



Australian Government
The Treasury

TSY/AU

Foreign investment reforms

June 2020



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Introduction

The Government welcomes foreign investment. It is important for Australia's long-term economic success, stability and prosperity. Based on the latest available data, foreign investment supports:

- employment (one in ten jobs are created by foreign businesses);
- the national economy (businesses supported by foreign investment contribute more than a quarter of Industry Value Added); and
- higher wages (foreign businesses pay wages that are on average \$20,000 a year higher)¹

However, risks to Australia's national interest, particularly national security, have increased as a result of a confluence of developments — including rapid technological change and changes in the international security environment.

Rising national security concerns have led many countries to review both their frameworks for screening inward investment and the way in which these frameworks are applied (see **Table 1** on page 3 for further details).

This paper outlines the most comprehensive reforms to Australia's foreign investment review framework in more than 20 years. The Government will shortly release exposure draft legislation for consultation on the reforms prior to its introduction into Parliament, and provide further guidance for investors on implementation.

These reforms include measures to strengthen the existing framework with: enhanced national security review of sensitive acquisitions; extra powers and resources to ensure foreign investors comply with the terms of their approval; and amendments to streamline investment in non-sensitive areas.

In particular, the national security reforms will enable the Government to better address emerging national security risks that arise from foreign ownership, such as powers to screen any direct² investment on national security grounds regardless of value. There are also measures to reduce the regulatory burden for certain investments that do not pose national security risks, and provide greater clarity on the scope and application of the *Foreign Acquisitions and Takeovers Act 1975* (FATA).

To ensure appropriate oversight during the coronavirus crisis, the Government announced on 29 March 2020 the temporary reduction to \$0 for the monetary screening thresholds for all foreign investments subject to the FATA.

The announcement of the reform package does not immediately affect the temporary measures, which will remain in place for the duration of the coronavirus crisis. The Government anticipates a smooth transition from the current temporary arrangements to the new system once legislated.

The Government's reforms will ensure the foreign investment review framework continues to balance:

- maintaining Australia as an attractive place for foreign investment, with a framework that promotes business certainty and delivers timely decisions;
- maintaining public confidence in the integrity of the framework, including compliance; and
- protecting Australia's national interest including national security.

1 ABS cat. no. 5494.0 — Economic Activity of Foreign Owned Businesses in Australia, 2014-15.

2 A direct interest in an entity or business is defined in section 16 of the *Foreign Acquisitions and Takeovers Regulation 2015*.

Background

Australia remains one of the world's most attractive destinations for foreign investment, with that attractiveness founded on a range of factors: our stable democracy; our strong rule of law; a highly-skilled and highly-educated workforce; our proximity to dynamic and fast-growing markets; our abundant natural resources and world-class industry capabilities; and a strong and well managed economy.

Australia's attractiveness as a destination for foreign investment is reflected in foreign direct investment (FDI) inflows, which in the three years to 2019 averaged 3.3 per cent of GDP — compared with 1.7 per cent of GDP for the OECD and 1.5 per cent of GDP for the G20 economies.³

In recent years, many countries have updated their foreign investment regimes to manage a range of new risks. This paper sets out Australia's reforms to respond to these shared challenges.

This package builds on reforms to the foreign investment review framework that the Government introduced in 2015. Those reforms modernised the FATA by: bringing all foreign investment into the legislative framework rather than relying on policy statements; strengthening the Government's oversight and enforcement of the residential real estate sector; providing greater scrutiny and transparency around agricultural investments; and introducing fees so that the cost of administering the foreign investment regime is borne by foreign investors and not Australian taxpayers.

Importantly, the reforms preserve the core principle underpinning Australia's foreign investment system: Australia welcomes foreign investment for the significant economic benefits it provides. The Government will continue to review individual investments on a case-by-case basis to ensure they are not contrary to the national interest. This is critical to both protecting Australia's national interest and maintaining the Australian public's confidence in the foreign investment regime.

Consistent with Australia's open, transparent and welcoming approach to foreign investment, the Foreign Investment Review Board (FIRB) considers ways to mitigate risks so individual investments can proceed. It is increasingly recommending conditions be attached to approvals on a case-by-case basis as the principal means of mitigation. Conditions provide a mechanism for foreign investment proposals to proceed while still safeguarding the national interest. The FIRB draws on advice from a range of agencies in performing this role.

The reforms outlined in this paper balance these considerations. The Government will introduce a new national security test to ensure that it can act to address national security concerns arising from individual investment proposals which would otherwise be below the screening thresholds when the temporary \$0 screening arrangements lapse. This measure, coupled with a more streamlined screening process for less sensitive foreign investments, will ensure Australia continues to successfully attract the levels of foreign investment which underpin our long-term economic prosperity without compromising national security.

The Government will also strengthen Treasury and the Australian Taxation Office's (ATO's) compliance monitoring and enforcement capacity. Australians rightly expect foreign investors to comply with the requirements of the FATA, along with any conditions imposed on their individual investments in Australia. Strengthening the Treasury and the ATO's ability to monitor, and enforce compliance with conditions will build confidence in the foreign investment framework, alongside ensuring that any investors who do not follow the rules are appropriately penalised.

3 OECD (2020), FDI flows.

Table 1: International developments in foreign investment screening

Prior to the coronavirus pandemic, several advanced and emerging economies had already introduced changes to their foreign investment screening rules which strengthened the existing powers of governments to scrutinise investment, particularly in sensitive sectors. Like Australia, when making these changes governments have overwhelmingly continued to emphasise the need to balance reform against the well recognised benefits of foreign investment.

OECD research has found that in the two years from 2017 to 2019, nine out of the world's largest ten economies have modified or introduced new, comprehensive policies to manage acquisition or ownership related risk to essential security interests in response to profound reassessments of risks and vulnerabilities.⁴

In July 2018, the **United Kingdom** outlined plans in a White Paper for a new national security power. The United Kingdom also lowered investment screening thresholds in high tech industries, including quantum computing.

In November 2019, **Japan** passed a bill placing restrictions on foreign investment on national security grounds, which include lowering the threshold in sensitive companies from 10 per cent to as little as 1 per cent. This follows August 2019 reforms which expanded by 20 the number of sensitive sectors for which pre acquisition notification is required.

In the **United States**, the Foreign Investment Risk Review Modernization Act 2018 commenced in November 2018, significantly expanding the government's powers to review investment in critical technologies, infrastructure and data. Under regulations that came into effect in February 2020, Australia is one of three countries to be declared an 'excepted foreign state', meaning Australian investors are exempt from certain notification and screening requirements.

In March 2019, **China** enacted the Foreign Investment Law, which has implications for foreign firms operating in China or looking to invest in China. The Law includes a provision to permit the review of foreign investment on national security grounds.

The **European Commission** introduced a new foreign investment screening framework, which commenced on 10 April 2019. The framework is intended to improve information sharing and cooperation between the individual screening rules of each member state. Several European Union members, including France and Germany, have recently strengthened their foreign investment rules.

In November 2019, the **New Zealand** government announced reforms to the Overseas Investment Act 2005 that enhance compliance powers, introduce a 'national interest test' (similar to Australia's) and introduce new powers to protect New Zealand's 'core interests', including national security. The latter includes mandatory notification requirements for sensitive transactions and a new power to enable the government to call in certain transactions that are not currently screened. Elements of these reforms, including the national interest test and call in power, were passed in May 2020 alongside a temporary notification requirement for all controlling investment in response to the coronavirus.

4 OECD, Joachim Phol, 2019, 'Acquisition- and ownership-related policies to safeguard essential security interests: New policies to manage new threats. (Research note on current and emerging trends'.

Summary of Reforms

Protecting Australia's national security

1. The Government will introduce a new national security test which will:
 - a. enable the Treasurer to impose conditions or block any investment by a foreign person on national security grounds regardless of the value of investment;
 - b. require mandatory notification of any proposed investment by a foreign person in a sensitive national security business;
 - c. require mandatory notification where a business or entity owned by a foreign person starts to carry on the activities of a sensitive national security business;
 - d. allow any investment that would not ordinarily require notification to be 'called in' for screening on national security grounds;
 - e. allow investors to voluntarily notify to receive investor certainty from 'call in' for a particular investment or apply for an investor-specific exemption certificate; and
 - f. allow the Treasurer to impose conditions, vary existing conditions, or, as a last resort, require the divestment of any realised investment which was approved under the FATA where national security risks emerge.

Streamline less sensitive investments

2. The Government will exempt certain investments made by entities which are currently classified as 'Foreign Government Investors'. This exemption will be non-discriminatory and apply only where no foreign government investor has or could be perceived to have influence or control over the investment or operational decisions of the entity or any of its underlying assets.

Stronger penalties, compliance and enforcement powers

3. The Government will have standard monitoring and investigative powers (in line with those of other business regulators), including access to premises with consent or by warrant to gather information. This measure will improve regulators' capability to monitor investor compliance and/or investigate potential non-compliance.
4. The Government will have powers to give directions to investors in order to prevent or address suspected breaches of conditions or of the foreign investment laws.
5. The Government will increase civil and criminal penalties under the FATA to ensure these penalties act as an effective deterrent.
6. The Government will expand the infringement notices regime to cover all types of foreign investments and introduce a third tier to allow for a more graduated and proportional approach to enforcement.
7. The Government will have powers to remedy situations where foreign persons are given a no objection notification or an exemption certificate based on a foreign investment application that makes an incorrect statement, or omits an important piece of information.
8. The Government will have powers with respect to an investment that was originally made in breach of the FATA where the interest has subsequently been transferred to another foreign person by will or devolution by operation of law.

9. The Government will have the power to accept enforceable undertakings from foreign persons to manage non-compliance or to give weight to commitments a foreign person made at the time of applying for a no objection notification or an exemption certificate.
10. Foreign persons who have been issued a no objection notification for a proposed action or an exemption certificate will be required to notify the Government of certain events, including that the action has occurred or did not occur.

Integrity of the foreign investment review framework

11. The Government will clarify that foreign persons are required to seek further foreign investment approval for any increase in actual or proportional holdings above what has been previously approved, including as a result of creep acquisitions and proportional increases through share buybacks and selective capital reductions.
12. The Government will narrow the scope of the moneylending exemption so that it does not apply where foreign money lenders are obtaining interests in a sensitive national security business under a moneylending agreement.
13. The Government will require foreign persons to seek foreign investment approval for acquisitions of interests from the Commonwealth, state or territory governments or local government bodies to perform Government services or functions associated with privatisation programs that may raise national security risks.
14. The FATA will be amended so that the tracing rules can be similarly applied to unincorporated limited partnerships as they are to corporations and trusts, so that beneficial interests can be traced.
15. A foreign person, who is a parent or spouse of an Australian resident, will need to seek foreign investment approval prior to the purchase of Australian land where they provide money to their Australian family member for the purchase, other than by way of a gift.

More coordinated information gathering and sharing

16. The Government is considering a new Register of Foreign Ownership that will merge and expand the existing agricultural land, water and residential registers, in order to increase the Government's visibility of foreign investments made in Australia.
17. The Government will increase the scope of the information sharing provisions under the FATA and the *Tax Administration Act 1953* (the TAA) to allow greater sharing of foreign investment information across government agencies to simplify the administration of the foreign investment framework.
18. The Government will introduce new information sharing provisions to allow sharing of protected information with international counterparts where national security considerations are present.

A fairer and simpler framework for foreign investment fees

19. The foreign investment fees framework ensures that foreign investors, not Australian taxpayers, bear the costs of administering the foreign investment system. Consistent with this principle, fees will be reviewed to ensure they continue to cover the costs of administering the system. In doing so, the Government is committed to reforming the fees framework to make it fairer and simpler for investors.

A timely, consistent and reliable investor experience

20. The Government is committed to delivering a timely and efficient foreign investment regime which recognises commercial deadlines and does not unnecessarily impede the operation of foreign investors or markets. The Government will continue to work with stakeholders in identifying ways to streamline and enhance the investor experience.

Other amendments

21. The Government will introduce amendments to the foreign investment review framework to improve readability of existing provisions, rectify inconsistencies and unintended consequences, and address feedback from investors seeking greater certainty.

Protecting Australia's national security

The Government will strengthen the overall capacity of the foreign investment review framework to address existing and emerging national security risks arising from foreign ownership. It will do this by introducing a new national security test and ensuring foreign investors comply with Australia's rules.

Currently, foreign persons must seek government approval for investments above certain thresholds that are dependent on the sector and country of investor. While Foreign Government Investors (FGIs) already face a zero-dollar screening threshold, most private investments under \$275 million (or \$1,192 million for our Free Trade Agreement partners) are not screened.

The presence of monetary thresholds mean investments in some of our most sensitive sectors are not screened, even where an investment raises national security concerns. These sectors are particularly vulnerable as their specialised expertise often means they are comprised of a large number of new and/or smaller firms, with valuations that are frequently well below existing screening thresholds.

As noted in **Table 1**, Australia is not alone in recognising and responding to these national security challenges. Many other economies — including Canada, China, the EU, Japan, New Zealand, the UK and the US — have recently updated their foreign investment rules for similar reasons.

In addition, in the two years to 2019, nine out of the world's ten largest economies have modified or introduced new policies to manage foreign ownership-related risks to essential security interests in response to profound reassessment of risks and vulnerabilities.

To address risks arising from foreign ownership, a new national security test will be introduced for investments that raise national security concerns and which fall below existing monetary thresholds.

National security test for sensitive foreign investment

1. The Government will introduce a new national security test which will:
 - a) enable the Treasurer to impose conditions or block any investment by a foreign person on national security grounds regardless of the value of investment;
 - b) require mandatory notification of any proposed investment by a foreign person in a sensitive national security business;
 - c) require mandatory notification where a business or entity owned by a foreign person starts to carry on the activities of a sensitive national security business;
 - d) allow any investment that would not ordinarily require notification to be 'called in' for screening on national security grounds;
 - e) allow investors to voluntarily notify to receive investor certainty from 'call in' for a particular investment or apply for an investor specific exemption certificate; and
 - f) allow the Treasurer to impose conditions, vary existing conditions, or, as a last resort, require the divestment of any realised investment which was approved under the FATA, where national security risks emerge.

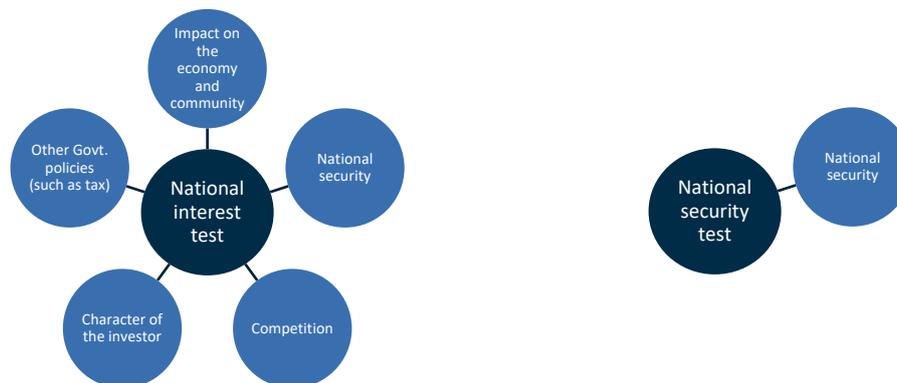
New national security test

The Government will introduce a new national security test for investments that raise national security concerns and which fall below existing monetary thresholds. Investments subject to the new national security test will be assessed in relation to factors that give rise to national security concerns. As context, the *Australian Security Intelligence Organisation Act 1979* defines security to mean protection from espionage, sabotage, politically motivated violence, attacks on Australia's defence system; acts of foreign interference; or the protection of Australia's territorial and border integrity from serious threats. These factors may be relevant for the Treasurer when considering whether a proposed investment gives rise to national security concerns.

For clarity, the existing national interest test will remain unchanged including the factors that typically underpin the assessment process such as the character of the investor, competition, impact on the economy and community, national security and other Government policies (including tax).

In order to avoid overlap between the two tests, wherever the broader national interest test would apply to a particular action, only that test will be used in an assessment. This is because national security is already a relevant factor that the Government considers as part of the national interest test.

Chart 1: Factors the Government will typically use to assess foreign investment proposals against when applying the existing national interest test and the new national security test



For most investors who undertake investments in non-sensitive areas, the introduction of the new national security test will not affect how they interact with the foreign investment review framework. If an investment was previously exempt from screening, it will remain exempt, unless the investment raises national security concerns and falls below existing monetary thresholds.

The new national security test will enable the Government to review any acquisition of a direct interest by a foreign person on national security grounds, regardless of the value of the investment. If satisfied that the investment would be contrary to Australia's national security, the Treasurer will have the power to mitigate national security concerns by imposing conditions or, if necessary, prohibit the proposed investment.

Enhanced national security protections will be given effect through the following five specific measures.

Mandatory pre-investment notification

Foreign persons acquiring a direct interest (generally at least 10 per cent, or in a position of control) in a 'sensitive national security business', or where a foreign person starts to carry on the activities of such a business, will need to notify and obtain foreign investment approval prior to making the acquisition. This will ensure foreign investments that raise national security concerns are screened irrespective of the value of the investment or the investor's nationality, or whether the acquirer is a private foreign investor or a foreign government investor.

Type of investment that will give rise to mandatory notification:

- Any proposed acquisition of a direct interest by a foreign person in a sensitive national security business; or
- Where a business or entity owned by a foreign person starts to carry on a sensitive national security business.

Definition of a sensitive national security business

The definition of a sensitive national security business for mandatory notification will be introduced in regulations. This is consistent with the current approach to defining sensitive businesses for Free Trade Agreement (FTA) purposes, and provides the Government with the flexibility to adapt the definition over time in response to a changing global environment.

The existing framework includes a definition of sensitive businesses for the purpose of monetary screening thresholds for the national interest test — that includes media, transport, and telecommunication businesses and businesses providing infrastructure to these businesses (section 22 of the *Foreign Acquisitions and Takeovers Regulation 2015 (FATR)*). Foreign investment by

private investors in these businesses is subject to the \$275 million threshold, even if the investor is otherwise eligible for the concessional FTA-partner screening threshold. Since foreign investment in a sensitive national security business will be subject to screening regardless of the value of the investment or the country of investor, the existing definition of sensitive business is considered too broad for the new mandatory notification requirements that specifically deal with national security risks.

Consultation on the new definition of a 'sensitive national security business' will explore concepts including, but not limited to:

- a businesses regulated under the *Security of Critical Infrastructure Act 2018* or the *Telecommunications Act 1997*;
- any business involved in the manufacture or supply of defence or national security-related goods, services and technologies, or any business that can create vulnerabilities in the security of Defence and national security supply chain, the Defence estate and/or other core Defence interests;
- any business or land situated in or proximate to Defence or national security installations; and
- any business that owns, stores, collects or maintains sensitive data relating to Australia's national security and/or defence.

Consultation on the definition of a sensitive national security business will take place alongside the release of exposure draft legislation.

'Call in' power

Any investment not otherwise notified under the existing national interest or new national security mandatory pre-investment notification processes will be able to be called in before, during or after the investment, on a case-by-case basis if the Treasurer considers the investment raises national security concerns.

Once called in, an investment will be reviewed under the national security test to determine if it raises national security concerns, consistent with the same process as those investors who notify on a mandatory basis.

The key concepts that are proposed to inform the definition of a sensitive national security business are deliberately narrow in recognition of the fact that, outside of those identified sensitive national security businesses, the majority of investments into Australia are not likely to raise national security concerns. However, national security concerns can and will arise in relation to particular investments outside those businesses over time. The 'call in' power will provide the Government with the ability to compel particular investors to submit an application for screening where such concerns arise, without imposing the regulatory burden of mandatory notification requirements over broad parts of the economy. The overwhelming majority of investment will not be called in for review.

To ensure investors have certainty, the use of this 'call in' power will be time-limited and public guidance will be issued on the type of investment where the 'call in' power could be used. This will provide investors with greater certainty and will further inform their decision whether to voluntarily notify.

Investor certainty: Voluntary notification

For greater regulatory certainty, investors will have the opportunity to voluntarily notify (on a per-investment basis), including pre-acquisition, to avoid the possibility of being called in for review on national security grounds.

Where a voluntary notification occurs for an investment that is not subject to mandatory notification, a time-limited period will commence in which the Treasurer will need to decide whether to exercise the ‘call in’ power and review the investment on national security grounds.

Investor certainty: Investor-specific exemption certificates

Investors will be able to apply for a time-limited investor-specific exemption certificate which enables them to make eligible acquisitions without case-by-case screening. Exemption certificates may range in length and value, and will be subject to conditions, including reporting conditions where necessary.

Investors will only be approved where they have been assessed as not posing a risk to national security, and once approved they would no longer face the time, cost and regulatory burden of separate applications.

Assessing exemption certificates on a case-by-case, non-discriminatory basis will provide Australia with the greatest flexibility to reduce investor burden while continuing to attract investment that is not contrary to Australia’s national security interests.

Last resort review power

The Government will introduce a national security last resort review power to reassess approved foreign investments where subsequent national security risks emerge. The last resort review power will allow the Treasurer to impose conditions, vary existing conditions, or, as a last resort, require the divestment of foreign interests in a business, entity or land.

The last resort review power will not be retrospective and will only be applicable to any future foreign investment that is reviewed under the FATA.

The purpose of the last resort review power is to address a gap in Australia’s approach to managing foreign involvement in sensitive sectors, where point-in-time approvals, including conditions to protect our national security, are made redundant due to rapid technological change, or where the nature of the security risks posed change subsequent to approval.

The last resort review power will enable the Treasurer to address national security risks only in relation to foreign investments approved under the FATA, either under the national interest test (which includes national security considerations) or under the new national security test for lower value transactions.

Where an investor has notified of an acquisition (action) — either voluntarily or mandatorily — or has been called in for review, the last resort review power will provide the Treasurer with the ability to subsequently assess and mitigate specific national security threats.

In order to provide certainty to foreign investors who pose no national security concerns, the last resort review power will only be available if and when the Treasurer has taken (or is deemed to have taken) a decision with respect to a particular action. Where an investment was not required to be screened and/or was not called in within the specified call in period, the action will not be subject to future action under the foreign investment review framework.

Providing no other regulatory mechanisms are available to satisfactorily address the national security risks (such as through the *Security of Critical Infrastructure Act 2018* and the *Telecommunications Act 1997*), the Treasurer will be able to impose new or vary existing conditions, or, as a last resort, require the divestment of foreign interests in a business, entity or title of land where subsequent to the original approval it can be substantiated that:

- the applicant made a material misstatement or omission to the Treasurer, and this misstatement or omission directly related to national security risks posed by the acquisition;

- the activities of the investor have changed substantially, posing national security risks which could not be reasonably foreseen at the time of approval;
- a material change occurs to the operating environment, which alters the nature of national security risks posed at the time of approval; and/or
- national security risks have emerged in relation to the acquirer, or the target, which could not be reasonably foreseen at the time of approval.

In recognition of the significant implications for investors, the need for investor certainty and the need for transparency, this power will be subject to significant safeguards including that the Treasurer be satisfied that:

- reasonable steps have been taken to negotiate in good faith with the foreign investor to achieve an outcome of eliminating or reducing the risk without action under the FATA;
- there are no other regulatory mechanisms outside the FATA that can be used to adequately address the identified risk; and
- action under the FATA is reasonably necessary for the purposes of eliminating or reducing the identified risk.

Streamline less sensitive investments

2. The Government will exempt certain investments made by entities who are currently classified as 'Foreign Government Investors'. This exemption will be non discriminatory and apply only where no foreign government investor has or could be perceived to have influence or control over the investment or operational decisions of the entity or any of its underlying assets.

Some privately controlled and managed institutional investors are regularly screened under the 'Foreign Government Investor' (FGI) screening rules due to large investments by FGIs in their funds. Operational and strategic control over fund investments and fund investment decisions is generally undertaken entirely by the general partners of the funds (which are typically private, non-government entities). Receiving funding from foreign government-related sources is common amongst the largest institutional investors, and it is common for there to be sufficient barriers against foreign government influence to make them lower-risk or otherwise unlikely to raise national interest concerns.

The Government will no longer treat certain entities (that is, some investment funds) as FGIs under the broader national interest test where their FGI investors have no influence or control over the investment or operational decisions of the entity or any of its underlying assets. These entities will still be considered as 'foreign persons' for the purpose of foreign investment screening.

The measure is intended to streamline the handling of non-sensitive cases and reduce red tape for investors.

Current

The current definition of 'foreign government investor' under section 17 of the FATR is broad and includes foreign governments and their agencies. It also includes corporations, trustees of trusts and general partners of limited partnerships in which:

- foreign governments, their agencies (including other foreign government investors from the same country) hold an interest of at least 20 per cent; or
- multiple foreign government investors collectively hold an aggregate interest of at least 40 per cent.

If an investor is considered an FGI for the purpose of foreign investment laws, foreign investment approval is required for a range of actions which would not otherwise be required if the investor was a private investor.

Some institutional investors that are privately controlled may be caught within the FGI category under the FATA (and therefore subject to a \$0 screening threshold for certain types of investments), even where their FGI investors do not have any influence or control over the investment or operational decisions of the entity or any of its underlying assets. The experience of screening these proposals indicates they typically do not give rise to national interest concerns.

Reform

Certain entities (that is, some investment funds) will no longer be treated as FGIs under the broader national interest test where no FGI has management rights and all of their FGI investors have no influence or control over the investment or operational decisions of the entity or any of its underlying assets. This will be given effect in two ways:

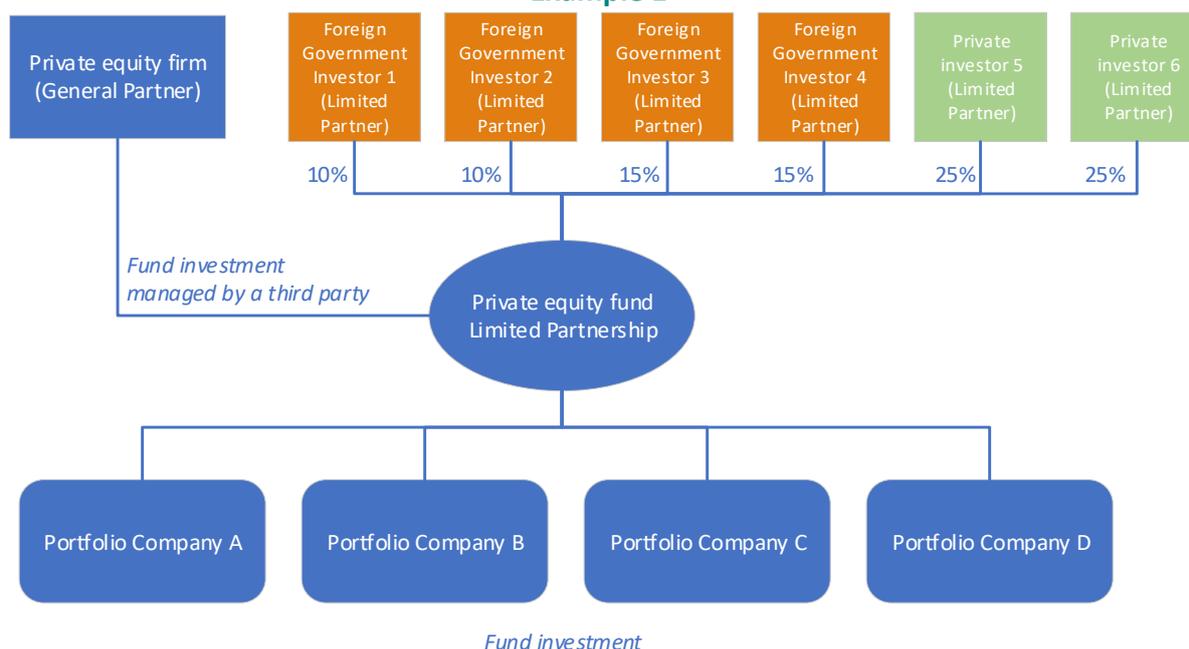
- Entities which have more than 40 per cent foreign government ownership in aggregate (without influence or control) but less than 20 per cent from any single foreign government will no longer be deemed FGIs under the FATR (see **Example 1** below).
- Entities which have a single foreign government with at least 20 per cent ownership (without influence or control) will still be deemed FGIs, however they will be able to apply for a broad exemption certificate on a case-by-case basis. These exemption certificates could be granted for a specified time period (such as 5 or 10 years, or up to the life of the entity), and could include conditions (see **Example 2** below).

These entities would still be subject to screening at the thresholds for private foreign investors (\$275 million, or \$1,192 million for FTA-partner countries) which apply when the temporary coronavirus-related measures are not in place. The new national security test will also apply where the investment raises national security concerns, regardless of the value of the investment (see Position 1).

Under **Example 2**, the limited partnership investment fund may apply for an exemption certificate and would have to demonstrate the absence of FGI influence or control. The fund will be required, at minimum, to show that their FGIs:

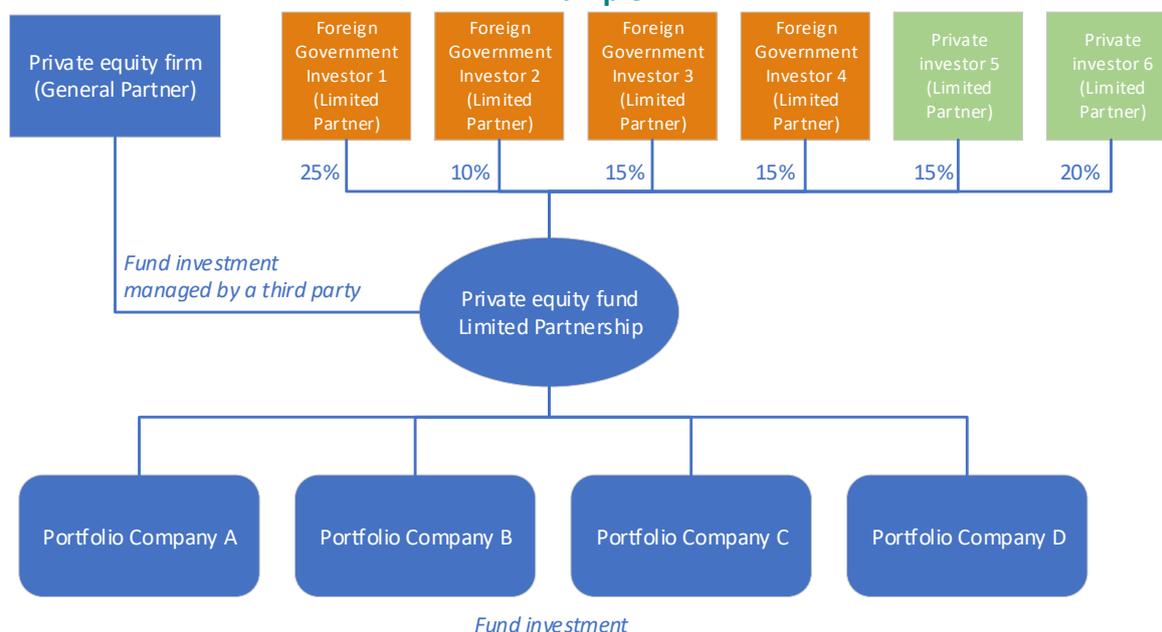
- do not have management rights in the investment;
- typically do not know which and when particular investments will be made (but may know the broad nature of the investment strategy); and
- do not have influence or control, directly or indirectly, and could not be perceived to have any influence or control over the investment entity or strategy (including decisions to increase holdings or divest holdings in a sector or industry) of the investment fund.

Example 1



Notes: in this example, each single foreign government holds less than 20 per cent ownership in the Private equity fund Limited Partnership and when considered in aggregate, foreign governments hold more than 40 per cent foreign government ownership. This scenario will satisfy both limbs of the relevant test.

Example 2



Notes: in this example, not all single foreign governments hold less than 20 per cent ownership in the Private equity fund Limited Partnership, but when considered in aggregate, foreign governments hold more than 40 per cent foreign government ownership. This scenario will not satisfy both limbs of the relevant test. The limited partnership investment fund may apply for an exemption certificate and would need to demonstrate the absence of FGI influence or control.

Stronger penalties, compliance and enforcement powers

Ensuring foreign investors comply with Australia's rules is a priority for the Government.

Compliance activities are fundamental to the integrity of the foreign investment review framework. They provide assurance that foreign persons are meeting their obligations while minimising the regulatory burden and ensuring a level playing field for all investors.

The Government is supported by Treasury and the ATO, as Australia's foreign investment regulators, to ensure investor compliance with foreign investment legislation. Treasury is responsible for compliance and enforcement activities with respect to business, agricultural and commercial land foreign investment proposals. The ATO is responsible for compliance and enforcement activities with respect to residential real estate and the vacancy fee, and some commercial land proposals.

Treasury and the ATO adopt a risk-based approach to their compliance work and focus efforts on areas of risk to the national interest.

A credible compliance monitoring and enforcement capacity is essential to ensure the foreign investment review framework effectively addresses current and future risks, while continuing to attract foreign investment that strengthens our economy.

However, there is a need to expand Treasury's and the ATO's compliance monitoring and enforcement tools. Other than in relation to residential property investments, the Treasurer's enforcement powers are limited to seeking a civil penalty order or criminal prosecution. This is inhibiting the Government's ability to respond proportionally to issues of non-compliance. For example, court action has to be taken to enforce conditions, even if the breach of conditions was only minor. Additionally, the existing tools are out of step with those of comparable Australian market regulators.

The Government will deliver reforms to ensure that Treasury and the ATO have the resources, powers and penalties to effectively monitor, investigate and prosecute breaches of foreign investment laws. The reforms will enhance the FATA's compliance regime and brings it into closer alignment with overseas counterparts and domestic market regulators.

Obtain standard monitoring and investigative powers

3. The Government will have standard monitoring and investigative powers (in line with those of other business regulators), including access to premises with consent or by warrant to gather information. This measure will improve regulators' capability to monitor investor compliance and/or investigate potential non compliance.

Currently, the Treasury relies on the general information gathering power under section 133 of the FATA to monitor and investigate non-compliance, while the ATO utilises powers under the TAA.

While the information gathering powers under the FATA supports desk-top and paper-based auditing and compliance monitoring, it does not establish a specific framework for site or site-based inspections or investigations. At times the existing information gathering power is insufficient to draw compliance conclusions with respect to certain conditions (for example, conditions requiring the installation or removal of surveillance and communications equipment).

It is expected that the powers will be obtained by triggering the *Regulatory Powers (Standard Provisions) Act 2014*, which provides a standard suite of provisions in relation to monitoring and investigation powers. ATO officers working under the delegation of the Treasurer would continue to access powers under the TAA.

Obtain directions power

4. The Government will have powers to give directions to investors in order to prevent or address suspected breaches of conditions or of the foreign investment laws.

The absence of a directions power under the FATA leaves the Government without a tool to pursue early and effective action to remedy a breach of conditions. Relying on punitive action following a breach may place the national interest at greater risk than would be the case through more timely and targeted intervention.

The power to issue directions will give the Government flexibility on how best to address actual or likely non-compliance. The directions power would be triggered where the Government has a reason to suspect that an investor has, is, or will, engage in conduct that breaches a condition of their approval or breaches a foreign investment law. The requirement to have a 'reason to suspect' is an objective test based on the facts and circumstances of each case, and is consistent with the standard applied in other regulatory spheres such as in the *Australian Securities and Investment Commission Act 2001* and the *National Consumer Credit Protection Act 2009*.

Directions could be used to respond to a range of circumstances including to:

- comply with the FATA or the associated regulations;
- take action or refrain from a particular action required to prevent further or ongoing harm to the national interest; and/or
- take action or refrain from a particular action to remedy any breaches of the terms of an exemption certificate or no objection certificate.

An investor must comply with a direction. Failure to comply with a direction will expose the person to enforcement mechanisms.

Increase civil and criminal penalties

5. The Government will increase civil and criminal penalties under the FATA to ensure they act as an effective deterrent.

Current monetary penalties under the FATA are low compared to other business regulators, and do not act as an effective deterrent.

For example, with respect to non-residential real estate investments, the maximum civil penalties that may be applied by the courts to individuals on conviction for a breach of the FATA (such as failing to obtain prior approval, or comply with a condition of approval) is a fine of 250 penalty units (currently \$52,000) for individuals and 1,250 penalty units (currently \$262,500) for corporations. Criminal penalties are 750 penalty units and/or 3 years imprisonment for individuals, and 3,750 penalty units for corporations.

For organisations with the capacity to make investments generally greater than \$275 million, the current penalty scale does not provide a meaningful deterrent against non-compliance. This is especially so when compared to recent changes to the Australian Securities and Investments Commission's (ASIC) regime which allows ASIC to seek maximum penalties of \$1.05 million for individuals and up to \$525 million for corporations.

Changes to criminal penalty in relation to all types of investments (residential and non-residential)

Max criminal penalty	Individual			Corporation	
	Penalty units	\$	Prison term	Penalty units	\$
Current	750	157,500	3 years	3,750	787,500
Reform	15,000	3.15 million	10 years	150,000	31.5 million

Changes to civil penalty in relation to non-residential investments

Max civil penalty	Individual		Corporation	
	Penalty units	\$	Penalty units	\$
Current	250	52,500	1,250	262,500
Reform	The greater of 5,000 units or 75% of the value of the investment to a maximum monetary value of 2.5 million penalty units	1.05 million to 525 million	The greater of 50,000 units or 75% of the value of the investment to a maximum monetary value of 2.5 million penalty units	10.5 million to 525 million

Changes to civil penalty in relation to residential investments

Action	Maximum civil penalty	
	Current	Proposed
Foreign person acquires new property without approval Temporary resident acquires established property without approval See section 94 of the FATA	The greater of: <ul style="list-style-type: none"> 10 per cent of the consideration for the residential land acquisition; or 10 per cent of the market value of the interest in the property 	The greater of: <ul style="list-style-type: none"> 25 per cent of the consideration for the residential land acquisition; or 25 per cent of the market value of the interest in the property.

Expand the infringement notices regime

- The Government will expand the infringement notices regime to cover all types of foreign investments and introduce a third tier to allow for a more graduated and proportional approach to enforcement.

Currently, the FATA allows for less serious breaches of the foreign investment rules to be punishable by way of an infringement notice, but only in relation to residential real estate investments (see section 100). The lower level Tier 1 penalty applies if the person self-discloses the conduct which gives rise to the penalty, while the higher Tier 2 penalty applies in all other cases. The only existing mechanisms for penalising breaches of the FATA for all other sectors is to initiate court proceedings to impose civil or criminal penalties (a disposal order can be issued once a civil or criminal penalty is secured).

The Government will expand the infringement notices regime to cover all types of breaches relating to foreign investments and enable proportionate, and graduated, action in response to investor non-compliance. A third tier will also be introduced for non-compliance in relation to high-value acquisitions (for example, above \$5 million). This would enable the ATO and Treasury to respond to a range of compliance issues, and ensure more credible deterrence for low to mid-range non-compliance. This means infringement notices will attach to civil penalty provisions that relate to business investments (for example, contravening a condition imposed to ensure that the action taken would not be contrary to the national interest).

Current — Two tiers infringement notices regime and apply to breaches in residential real estate only.

Tiers	Individual		Corporation	
	OFFICIAL			
1				
2				

Reforms — Three tiers infringement notices regime and apply to breaches with respect to all types of breaches, not just in residential real estate.

Tiers	Individual		Corporation	
	Penalty units	\$	Penalty units	\$
1	12	2,520	60	12,600
2	60	12,600	300	63,000
3	300	63,000	1,500	315,000

Obtain adequate powers to remedy incorrect statements

7. The Government will have powers to remedy situations where foreign persons are given a no objection notification or an exemption certificate based on a foreign investment application that makes an incorrect statement, or omits an important piece of information.

Currently, short of the anti-avoidance rules under section 78 of the FATA, no other specific provisions exist that allow for an adequate remedy in situations where a person makes an incorrect statement, or omits an important piece of information, when notifying the Government of their proposed investment.

If the Government relies on the information that is provided in the notification, and that information is false or misleading, an unsatisfactory outcome could result. The Government may not be able to order the investor to dispose of their interest in the relevant asset, because the foreign person has received a no objection notification or exemption certificate in relation to that interest (see section 70 of the FATA).

Criminal remedies could be sought if a person provides false and misleading information to a Commonwealth employee during the administration of the FATA. The FATA will be amended to provide the Government with additional powers to remedy situations where foreign persons are given a no objection notification or exemption certificate based on an application that makes an incorrect statement, or omits an important piece of information, when notifying the Government of their proposed investment and that statement or omission was material to the no objection notification or exemption certificate being given. This amendment is necessary as criminal remedies could not undo the harm to the national interest arising from the grant of a no objection notification that was based on incorrect information.

The amendments will include the following key changes:

- First, establish a civil penalty and an associated infringement. While the *Criminal Code Act 1995* provides for punishment of a person who makes a false or misleading statement to a Commonwealth official, it does not respond effectively to the threat to Australia's national interest that such a statement may cause. Establishing a civil penalty and an infringement ability in such circumstances would enable a more nuanced response to such breaches.
- Second, an incorrect statement would trigger the Treasurer's powers in Part 3 of the FATA to remedy an unsatisfactory outcome that is a result of a foreign person providing incorrect information while seeking approval, including disposal powers in the most serious cases.

Strengthen the Government's powers with respect to interests transferred by will or devolution by operation of law

8. The Government will have powers with respect to an investment that was originally made in breach of the FATA where the interest has subsequently been transferred to another foreign person by will or devolution by operation of law.

Currently, section 29 of the FATR provides a broad exemption with respect to interests acquired by will or devolution by operation of law. The exemption applies even when the original acquisition was not notified to the Government in breach of the FATA.

For example, a property held in breach of the FATA which is later transferred by will or devolution by operation of law to another foreign person, could become 'legitimised' by virtue of section 29 of the FATR. Consequently, a foreign person may hold an asset that they would not otherwise be permitted to acquire under the national interest test, leaving the Government with no ability take appropriate action on property held contrary to the national interest.

The Government will introduce amendments to require foreign persons to notify of an acquisition made by will or devolution by operation of law in circumstances where no requisite approval was given prior to the relevant interest being transferred by will or devolution by operation of law. Additionally, the Government will have the power to impose conditions and disposal order power to safeguard the national interest in these circumstances.

Obtain the power to accept enforceable undertakings

9. The Government will have the power to accept enforceable undertakings from foreign persons to manage non compliance or to give weight to commitments a foreign person made at the time of applying for a no objection notification or an exemption certificate.

Undertakings will be a complementary mechanism to the proposed directions power described above.

Enforceable undertakings are a credible and flexible part of an effective deterrence regime, because they provide a mechanism to prevent actions which could place the national interest at risk, and restore investor compliance without recourse to the courts.

Enforceable undertakings would be available for use in the following circumstances:

- where an investor faces a realistic prospect of litigation for a civil penalty order for breach of condition, and offers the undertaking as a lower cost, more flexible and more certain alternative; or
- where, at the time an investment is proposed, an investor offers to undertake certain things which have the effect of reducing national interest risks and make it more likely that the proposal (subject to any applicable conditions) would not be contrary to the national interest, so enabling the decision maker to accept it. It is anticipated that the framework for accepting and enforcing undertakings that is set out in the *Regulatory Powers (Standard Provisions) Act 2014* will be used to enact this power.

Require notification that an action has been taken

10. Foreign persons who have been issued a no objection notification for a proposed action or an exemption certificate will be required to notify the Government of certain events, including that the action has occurred or did not occur.

Presently, following a no objection notification, there is often a lack of visibility whether the proposed action actually occurs and when. This makes it difficult to enforce conditions that only take effect upon the action occurring, because Treasury is not aware when these conditions take effect.

A requirement to notify when the transaction takes place is included in conditions relatively often, but a uniform and legislated requirement will place a stronger obligation on investors and will be simpler to administer.

An applicant who has been issued a no objection notification for a proposed action will be required to notify, within a specified number of days, that: the action has occurred; the action did not occur within the life of the no objection notification; or the applicant become aware of a termination event in relation to conditions that have been imposed.

Integrity of the foreign investment review framework

The Government is committed to improving the integrity of the framework by making foreign investor obligations clearer, ensuring the foreign investment review framework continues to be fit for purpose and meet community expectations.

Improve the integrity of the approval process

11. The Government will clarify that foreign persons are required to seek further foreign investment approval for any increase in actual or proportional holdings above what has been previously approved, including as a result of creep acquisitions and proportional increases through share buybacks and selective capital reductions.

Not all increases in shareholdings of an Australian business require foreign investment approval. Certain investors may be able to increase their holdings above 20 per cent in target companies incrementally over time, and unless the acquisitions result in a change in control, the Government may be unable to impose conditions or prohibit these further acquisitions under the FATA even where the investment raises national interest concerns.

Additionally, the effects of selective capital reductions or share buyback programs present a potential gap in the Government's ability to address national interest risks with respect to previously approved foreign investors increasing their percentage, including changes in control above 20 per cent. This amendment will clarify that increases in interests in entities above 20 per cent as a result of share buybacks or selective capital reductions will require approval under the FATA.

Narrow the scope of the moneylending exemption

12. The Government will narrow the scope of the moneylending exemption so that it does not apply where foreign money lenders are obtaining interests in a sensitive national security business under a moneylending agreement.

Section 27 of the FATR exempts for all purposes, the acquisition of an interest in securities, assets, a trust, Australian land or a tenement if the interest is held solely by way of security for the purposes of a moneylending agreement. The scope of this moneylending exemption will be narrowed so that foreign persons will need approval before acquiring an interest in securities, assets, a trust, Australian land or a tenement in a sensitive national security business (as newly defined under the national security measures), where the interest will be held solely by way of security for the purpose a moneylending agreement.

Oversight of Commonwealth, state, territory and local Government asset sales

13. The Government will require foreign persons to seek foreign investment approval for acquisitions of interests from the Commonwealth, state or territory governments, or local government bodies to perform Government services or functions associated with privatisation programs that may raise national security risks.

Currently, section 31 of the FATR exempts certain acquisitions from Australian governments from the FATA, except for acquisitions by foreign government investors or acquisitions of specified infrastructure from Australian governments (or 'Australian businesses' holding interests in such infrastructure).

However, where a foreign person seeks to acquire a service, function or asset from a government entity, and where the government entity, in that context, is not conducting a business (in the legal sense), this may not be considered to involve the acquisition of an interest in an existing 'Australian business' for the purposes of the FATA. Therefore, the acquisition may not be subject to foreign investment review, even where the investment raises national security concerns. This is because the ordinary and traditional functions of government may not be considered to be an act of 'carrying on a business' with the primary aim of making or gaining profits.

Amendments will be made to ensure the Government has the opportunity to review and determine that proposed investments of this type are not contrary to national security.

Amendments will also be made to align the scope of the exemption under section 31 of the FATR with the new national security test, so that acquisitions of an interest in a 'sensitive national security business' from Australian governments are also subject to the FATA.

Extend the tracing rules to apply to limited partnerships

14. The FATA will be amended so that the tracing rules can be similarly applied to unincorporated limited partnerships as they are to corporations and trusts, so that beneficial interests can be traced.

To consider whether a foreign person requires approval for a proposed acquisition of an interest in securities, assets or trusts, it is necessary to determine what interests are held in the relevant entities. One way that an interest is established is by tracing interests through corporations and trusts.

The effect of the tracing rules under section 19 of the FATA is that a person is taken to hold the interests in securities in companies or trusts which are lower in the corporate structure where certain requirements are met.

The current tracing provisions only apply to interests in trusts and companies; they cannot be applied to those limited partnerships which are not incorporated. This means that the Government can impose conditions on the higher entity in an organisational structure where the higher entity holds an interest in the lower entity; however, conditions may not be able to be imposed if there is an unincorporated limited partnership sitting between the two entities.

Presently, this limits the Government's ability to effectively address national interest and security risks, particularly where limited partnerships are used as a vehicle for investment in critical infrastructure and other sensitive sectors.

The tracing rules will be extended to apply to unincorporated limited partnerships. This will enable the Government to impose conditions on the higher entities in the organisational structure where required to manage national interest risks. Following the amendment, foreign investment laws may capture significant actions that occur offshore involving the higher entities in the organisation structure through the application of the tracing provisions to the lower entities.

Prevent the use of family structures to subvert the operation of the FATA

15. A foreign person, who is a parent or spouse of an Australian resident, will need to seek foreign investment approval prior to the purchase of Australian land where they provide money to their Australian family member for the purpose, other than by way of a gift.

There is a risk that a foreign person could avoid foreign investment screening when purchasing Australian land and other assets by providing the funds to a family member (such as a spouse or a child) to purchase the asset.

Generally, a trust or equitable interest arises on behalf of a person providing the funds for a purchase of property. Where persons involved in this type of transaction are related, the 'presumption of advancement' (a common law principle) assumes the person who gave the money to the other person intended for that person to acquire the property unfettered. Foreign ownership would not be recognised unless the presumption of advancement could be rebutted, for example by showing that when the property is later sold, the proceeds of the property sale were dispersed back to the foreign person who originally provided the funds to purchase the property. It is at this later stage that it becomes clear the property was actually held on trust by the family member, which is evidence that would have rebutted the presumption of advancement. However, by this time, the property has been sold and funds dispersed, leaving little recourse against the foreign person who avoided scrutiny. These actions may lead to land banking by foreign persons.

To address this issue, the operation of the presumption of advancement will be excluded from the FATA. Amendments will be introduced to clarify that, where a foreign person provides money to their family members to purchase Australian land (irrespective of whether their relationship triggers the presumption of advancement), the foreign person would be acquiring an interest in the property at the time of the purchase, and as such, may require prior approval. Exceptions will apply where it can be shown the money was a genuine gift.

More coordinated information gathering and sharing

The Government recognises the need to protect commercially sensitive information, but also supports a coordinated approach to screening foreign investment applications and protecting the national interest and security. This means relevant government agencies need the flexibility to share information and respond quickly on consultation requests, thereby enabling faster processing of applications and greater consistency of decision making.

The Government's ability to identify and assess national interest and national security risks in foreign investment hinges on the quality, accuracy and currency of foreign investment data. However, the availability and accessibility of such data can at times be limited.

Data relating to foreign investment is spread out across the government, making it challenging to identify investor trends. Currently the ATO administers the agricultural land, water entitlements and residential land registers, the Australian Communications and Media Authority (ACMA) administers the media assets foreign ownership register, and some information on foreign ownership is collected under the critical infrastructure assets register administered by the Critical Infrastructure Centre (CIC). The differing regulators and legislation underpinning these registers have the potential to lead to unintended consequences of organisational and legal barriers to information sharing.

The Government will introduce reforms to ensure, subject to appropriate safeguards and in line with other legislative requirements, greater sharing of foreign investment information (for example, information held on ATO registers) across government agencies and with international counterparts where national security considerations are present.

A new Register of Foreign Ownership

16. The Government is considering a new Register of Foreign Ownership that will merge and expand the existing agricultural land, water and residential registers, in order to increase the Government's visibility of foreign investments made in Australia.

The new Register of Foreign Ownership (the Register) will provide greater visibility of foreign investment in Australia and support information sharing across government. The Register will be administered by the ATO.

Information gathered on the register will, subject to appropriate safeguards, be sharable across government in line with the proposed changes to the foreign investment information sharing provisions. The Register will not be searchable by the public due to commercial sensitivities and privacy considerations.

The Register will initially amalgamate existing registers, and subject to consultation, require at a minimum foreign persons to register: interests they acquire in Australian land; water entitlements and contractual water rights; and business acquisitions that require foreign investment approval including anything covered by the new national security test.

As the ATO already administers the existing agricultural land, residential land and water entitlements registers, these registers (in addition to any new registration obligations arising from this proposal) will be merged and consolidated to avoid duplication. This will allow for a better user experience, and will assist the Government to identify trends and any systemic issues. It may also support compliance activities more broadly, including managing investors' exit from the regulatory environment when approved investments are sold down or divested.

The Register will be a post-acquisition recording system, recording actual foreign direct investments, rather than proposed acquisitions. The register will also require investors to notify of divestments, disposals of assets, and any changes in their foreign entity status. Investors will be required to register within a specified period following an action.

For most investors, the registration requirement will not impose an additional burden over an existing obligation. For example, foreign persons currently have to register when acquiring or disposing of interests in agricultural land, residential land, water or media assets, or if they are a responsible entity or a direct interest holder of a specified critical infrastructure asset.

Where possible, Treasury and the ATO will leverage the capabilities from the [Modernising Business Registers program](#) to assist in the development of the Register. This may include ensuring the interoperability of the new Register with other government registry services, minimising regulatory reporting burdens where possible.

Greater sharing of foreign investment information

17. The Government will increase the scope of the information sharing provisions under the FATA and the TAA to allow greater sharing of foreign investment information across government agencies to simplify the administration of the foreign investment framework.
18. The Government will introduce new information sharing provisions to allow the sharing of protected information with international counterparts where national security considerations are present.

Legislative amendments will be made to facilitate, subject to appropriate safeguards, more streamlined sharing of foreign investment information to other state and federal agencies (including those with related domestic responsibilities with an interest in conditions imposed).

Legislative amendments will also be made to enable the ATO to communicate protected information (as defined under the *Tax Administration Act 1953*) directly to the FIRB (rather than through the Treasury as the current law requires) for the purpose of advising the Government on foreign investment issues.

New information sharing provisions will be introduced, subject to appropriate safeguards, to enable sharing of protected information with international counterparts in limited circumstances where national security considerations are present.

The Government recognises that much of the information required to assess an application will be commercially sensitive or of a private or confidential nature. Accordingly, these initiatives will be implemented consistently with Australian privacy and confidentiality laws to ensure adequate protection of such information.

A fairer and simpler framework for foreign investment fees

19. The foreign investment fees framework ensures that foreign investors, not Australian taxpayers, bear the costs of administering the foreign investment system. Consistent with this principle, fees will be reviewed to ensure they continue to cover the costs of administering the system. In doing so, the Government is committed to reforming the fees framework to make it fairer and simpler for foreign investors.

The Government maintains that the cost of administering the foreign investment review framework should be borne by foreign investors not Australian taxpayers.

On this basis, the fee schedule will be updated to reflect the enlarged roles and responsibilities of foreign investment activities across government, including aspects related to national security. It will also take into account the growing complexity of cases, as well as the administrative cost of the review process over recent years.

At present, fees are generally payable by a foreign person who makes an application under the FATA, with applications only considered once the correct fee has been paid.

Application fees vary based on the type and size of an acquisition. Generally for business proposals, fees range from \$2,000 to \$105,200. Land fees vary depending on the type of land being acquired and the price for the acquisition of the interest.

The updated fee schedule will primarily focus on delivering a structure that is fairer and simpler. In particular, the update will reduce the complexity of the framework to minimise the compliance and administrative costs for foreign investors in establishing and paying the applicable fee.

With the introduction of investor-specific exemption certificates, the fee schedule for exemption certificates more broadly will be adjusted to reflect the varied duration and value of exemption certificates.

A timely, consistent and reliable investor experience

20. The Government is committed to delivering a timely and efficient foreign investment regime which recognises commercial deadlines and does not unnecessarily impede the operation of foreign investors or markets. The Government will continue to work with stakeholders in identifying ways to streamline and enhance the investor experience.

The Government provides a range of services and programs to support foreign investors and business operating in Australia in recognition of the important role they play in supporting Australia's prosperity. Ensuring a more seamless interaction between these activities and the foreign investment review framework can improve the operation of businesses, markets and the economy.

In 2014 the Government introduced the Regulator Performance Framework (RPF), establishing a common set of performance measures that will allow for the comprehensive assessment of regulator performance and their engagement with stakeholders. Australia's foreign investment regulators (Treasury and the ATO) report annually on performance against the RPF and in 2018-19 were found to have met the required key performance indicators. However, stakeholders identified a number of issues which Australia's foreign investment regulators will prioritise over the coming reporting periods. These include:

- reviewing Treasury's business processes and implementing more systematic arrangements to case processing;
- improving processes for applying conditions;
- enhancing avenues for formal and informal engagement, including stakeholder feedback, and increasing survey response rates; and
- continuing to build cross agency understanding of national interest risks in key sectors of the economy.

Treasury will address these concerns over the coming reporting period. The Government is also committed to ensuring Australia's foreign investment regulators have appropriate systems and resources to effectively balance commercial deadlines against the robust review of applications the Australian community expect. This objective needs to be balanced with an efficient, and timely foreign investment review process which provides commercial certainty for investors. Data for 2018-19 indicates that the median application processing time for Treasury was 45 days. This outcome generally reflects sensitive or significant applications which require in-depth analysis and the need to be informed by expert input from consultation partners.

Under current processes, extension to the 30-day statutory deadline is only available through a voluntary request from the applicant for an extension or through an interim order by the Government. In light of the expiration of powers to prohibit or impose conditions if a decision is not made by the statutory deadline, it is important that where additional time is needed to assess the application that such additional time is allocated.

For this reason, the Government will introduce a new measure to extend the statutory decision period in certain circumstances, particularly when considering a complex and sensitive case. The Government will have a new power to extend, or further extend, the statutory timeframe by up to 90 days so that the Treasurer can determine whether the relevant action being considered is

contrary to the national interest, including to provide sufficient time to consult with a Commonwealth, State or Territory body.

This measure will enable the Government to extend the statutory timeframe of an application by providing a reason to the applicant, but without the need to issue an interim order or seek consent from the applicant. This power is limited so that the total period by which the Treasurer can extend the consideration period is 90 days, though this total may be reached by way of multiple extensions.

This measure will complement the other existing mechanisms to extend the statutory period. It is intended to increase the efficiency associated with the processing of cases, accommodate the time required by consultation partners, decision makers and the Government to consider and process complex and sensitive cases as well as provide greater clarity on the application process to the applicant in such cases.

Other technical amendments

21. The Government will introduce amendments to the foreign investment review framework to improve the readability of existing provisions, rectify inconsistencies and unintended consequences, and address feedback from investors seeking greater certainty.

Amendments	Rationale
Address anomalies with the treatment of sub-divided or amalgamated land	<p>The process of amalgamation or subdivision of land results in the cancellation of the old title and the creation of a new title in respect of the land, and so a new interest in land is created and acquired by the new or existing landholder(s). This could give rise to a significant and/or notifiable action if one of the landholders is a foreign person and the relevant threshold is met.</p> <p>Following the amendment, Australian land owned by a foreign person that is subject to a subdivision or amalgamation will not require further foreign investment approval following the creation of a new title where the same foreign person making the ‘acquisition’ held an interest in the relevant title that was subdivided (or titles that were amalgamated) immediately before the subdivision or amalgamation occurred.</p> <p>Where relevant, conditions attached to acquisition of the original parcel of land will continue to be in force, for both private and foreign government investors, after the subdivision or amalgamation.</p>
Exempt certain revenue streams of mining and production tenements	<p>Acquisitions of revenue streams in relation to mining and production tenements will be exempted from the FATA where the revenue stream does not entail rights to occupy the land or have direct control or influence over the land.</p> <p>Stakeholders have raised issues regarding acquisitions of mining royalty streams being captured by the FATA and imposing unnecessary regulatory burden. The definition of interest in land includes interests in revenue streams that do not offer any rights to occupy the land or have direct control or influence over the land.</p> <p>Following the amendment, a foreign person, who had already received approval to acquire a mining and production tenement, would not need to seek further approval if they wanted to on-sell their interest and receive a revenue stream as consideration. Any revenue streams that offer occupancy, control or influence over the land would still be subject to the FATA.</p>
Exempt exploration tenements acquired by private investors, regardless of the right to occupy	<p>In general, acquisitions of exploration tenements by private investors are already exempt from screening under the FATA. However, some tenements in some states and territories (e.g. Northern Territory and offshore exploration tenements), are not exempt, as they provide the investor a right to occupy the underlying land which is also another type of land such as vacant commercial land (and are therefore a notifiable action).</p> <p>Following this amendment, exploration tenements acquired by private foreign investors will be exempted from the FATA. The exemption may not extend to certain investments, such as acquisitions that are subject to the new national security test, and exploration tenements acquired by FGIs — these will continue to be subject to the FATA.</p>
Update the definition of ‘Australian media business’	<p>‘Australian media business’ is currently defined under section 5 of the FATR as an Australian business of publishing daily newspapers, or broadcasting television or radio, in Australia (including on websites from which all or part of those newspapers or broadcasts may be accessed). This definition excludes Australian businesses that publish content through websites and/or web applications only.</p>
Provide flexibility to impose a lesser penalty for infringement	<p>A key limitation of the current infringement notices regime is the lack of flexibility to move down the infringement tier structure. This is because of the strict manner in which the definitions of the infringement tier structures are put in place under subsection 101(1)(c) of the FATA. As such, the FATA does not provide the flexibility to adjust the infringement penalty to a more appropriate amount, such as in circumstances where the investor shows a willingness to comply.</p> <p>This amendment will enable the Government to consider lesser value penalties than what is stated on an issued infringement notice (i.e. reductions to the other tier amounts set in legislation) where there are significant mitigating circumstances concerning the conduct of the person.</p>
Other amendments	<p>Minor technical amendments to improve investor clarity on certain legislative provisions.</p>

Abbreviations

Acronym	Meaning
ATO	Australian Taxation Office
FATA	<i>Foreign Acquisitions and Takeovers Act 1975</i>
FATR	<i>Foreign Acquisitions and Takeovers Regulation 2015</i>
FGI	Foreign Government Investor
FIRB	Foreign Investment Review Board
TAA	<i>Tax Administration Act 1953</i>