



Australian Government
The Treasury

TSY/AU

Evaluation of the 2021 foreign investment reforms: consultation paper

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Consultation Process

Request for feedback and comments

In accordance with section 4 of the *Foreign Investment Reform (Protecting Australia's National Security) Act 2020*, the Treasury is conducting an evaluation of the operation of the foreign investment reforms, which commenced on 1 January 2021. The evaluation is required to be completed by 10 December 2021.

The Treasury invites interested stakeholders to make written submissions on the operation and performance of the reforms to inform this evaluation. While stakeholders are welcome to comment on any element of the reforms, or Australia's foreign investment framework more broadly, this paper outlines a number of key matters stakeholders may wish to comment on, in order to assist stakeholders in framing their submissions.

Please note the principles outlined in this paper are intended only to facilitate feedback, and do not represent the final views of the Government.

Closing date for submissions: 31 August 2021

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While submissions may be lodged electronically or by post, electronic lodgement is preferred. For accessibility reasons, please submit responses sent via email in a Word or RTF format. An additional PDF version may also be submitted.

All information (including name and address details) contained in submissions will be made available to the public on the Treasury website unless you indicate that you would like all or part of your submission to remain in confidence. Automatically generated confidentiality statements in emails do not suffice for this purpose. Respondents who would like part of their submission to remain in confidence should provide this information marked as such in a separate attachment.

Legal requirements, such as those imposed by the *Freedom of Information Act 1982*, may affect the confidentiality of your submission.

View our submission guidelines [here](#) for further information.

Evaluation of the foreign investment reforms

1. Introduction

Foreign investment is, and will continue to be, vital to Australia's economic growth and prosperity. By supplementing domestic savings, foreign investment facilitates a greater level of investment in the economy than would otherwise be possible.

Over recent years however, the risks from foreign investment to Australia's national interest, particularly our national security, have increased due to a confluence of developments including rapid technological change and changes in the international security environment.

On 1 January 2021, major reforms to Australia's foreign investment review framework came into effect to address these risks and improve the overall operation of the framework.

The reforms updated the framework in three broad ways: they addressed national security risks; strengthened the existing system, including in relation to compliance; and streamlined investment in non-sensitive businesses. The reforms also set up a framework to establish a register of foreign ownership of Australian assets. The reforms are supported by additional funding for the Treasury to upgrade its foreign investment case management system and uplift its capability as the regulator of foreign investment in Australia.

Significant stakeholder consultation was undertaken during 2020 to inform the development of these reforms. The Treasury's consultations reached over 2,000 stakeholders, including legal practitioners, foreign governments, institutional investors, business councils and peak bodies, relevant government agencies, and the broader community.

The reforms were enacted through the *Foreign Investment Reform (Protecting Australia's National Security) Act 2020* and the *Foreign Acquisitions and Takeovers Fees Imposition Amendment Act 2020*, along with supporting regulations: the *Foreign Investment Reform (Protecting Australia's National Security) Regulations 2020* and the *Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020* – herein together referred to as the 'Reform Acts'.

In accordance with section 4 of the *Foreign Investment Reform (Protecting Australia's National Security) Act 2020*, the Secretary to the Treasury is required to complete an evaluation of the operation of these reforms by 10 December 2021.

The evaluation is to consider the impact 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.

In accordance with the requirements of the Reform Acts to commence the evaluation by 10 January 2021, the Terms of Reference (ToR) were agreed on 8 January 2021.

In a statement posted on the Treasury website on 19 February 2021, the Treasury published the ToR but advised the ToR would be reconsidered mid-year to ensure they remain fit for purpose. The statement also announced the commencement of the stakeholder consultation process for the evaluation, yet noted that formal written submissions would be invited later in 2021 in recognition that the reforms had only just commenced and that any impacts may take some time to become more apparent.

The Treasury can advise that the ToR remain unchanged.

This paper now seeks formal written submissions from stakeholders to inform the Treasury's evaluation process. While stakeholders are welcome to comment on any element of the reforms or

the foreign investment review framework overall, the Treasury is particularly interested in hearing from stakeholders on the following matters.

2. Implementation

Since the Reform Acts were passed by the Parliament on 9 December 2020, the Treasury has worked to bed down the reforms and support investors through the transition period. For example, the Treasury:

- updated the Foreign Investment Review Board (FIRB) website and Guidance Notes in late 2020, to provide supporting guidance on the new elements of the reforms (most notably, national security), introduce a more coherent structure, and improve useability (including reducing the total number of Guidance Notes from 53 to 15);
- published a Transitional Guidance Note to address investors' questions about the transition from the pre-reform system (including the temporary COVID-19 measures) to the post-reform system;
- further updated the Guidance Notes on 21 July 2021, in response to matters identified by the Treasury, the Australian Taxation Office (ATO) and stakeholders during the first six months of the reforms;
- implemented a near doubling in the budgeted number of permanent staff dedicated to the foreign investment framework from January 2020; and
- has continued to engage closely with its stakeholders, both domestic and international, including through face-to-face meetings, online briefings, and via phone and email.

The reforms commenced amid unusual economic circumstances due to the COVID-19 pandemic. In response to the economic disruption of the pandemic and the risk that the value of many Australian businesses could fall below the existing screening thresholds, in March 2020 the Government temporarily lowered all of the foreign investment monetary screening thresholds to zero dollars. This zero dollar threshold improved the Government's visibility of foreign investments made into Australia during this period by significantly increasing the number of foreign investment applications submitted for processing.

The extra caseload arising from zero dollar screening resulted in a stock of outstanding cases that transitioned into the new system on 1 January 2021, when the reforms commenced and the zero dollar thresholds were removed.

Consultation questions

To inform the evaluation, the Treasury is interested in hearing from stakeholders with regards to:

- 2.1** whether the updated FIRB website and Guidance Notes have aided investors' understanding of the new foreign investment framework and investors' obligations under the framework;
- 2.2** whether the Treasury's stakeholder engagement efforts have aided investors' understanding of the new foreign investment framework and investors' obligations under the framework; and
- 2.3** whether the *Transitional Guidance Note*, and the Treasury's implementation efforts during this period, assisted in navigating the adjustments on 1 January 2021.

3. Macroeconomic analysis

Foreign investment plays an important and beneficial role in the Australian economy. It helps drive economic growth, creates skilled jobs, improves access to overseas markets and enhances productivity.

The reforms to the foreign investment framework were therefore designed to ensure that Australia remains open to foreign investment and the economic benefits it provides, whilst also strengthening Australia's ability to ensure foreign investment is not contrary to the national interest, particularly national security.

The task of identifying the precise impact of the reforms is complicated by the specific global circumstances in which they were introduced. In particular, the COVID-19 pandemic continues to affect investment flows, economic activity and economic policy around the world. Further, many countries, including Australia, have updated their foreign investment screening regimes in recent years in response to a reassessment of the risks of foreign investment globally. When evaluating the impact of Australia's reforms, it is critical to take account of these circumstances.

Australia will continue to be an attractive destination for foreign investment given its growing and well-educated population, rich natural resource base, proximity to dynamic and fast-growing markets, strong rule of law and well-managed economy. However, feedback from stakeholders will provide insights into how the investment community viewed the reforms impact on this reputation.

Consultation questions

To inform the evaluation, the Treasury is interested in hearing from stakeholders with regards to:

- 3.1** what are investors' key considerations when choosing to invest in Australia, and where foreign investment screening fits among these considerations;
- 3.2** the impact that COVID-19 and the international investment environment has had, or is having, on foreign investment inflows into Australia; and
- 3.3** whether, or how, the reforms have affected Australia's attractiveness as a destination for foreign investment.

4. Reform analysis – national security

An important aspect of the reforms was the introduction of new national security powers, which include mandatory screening of sensitive investments, the ability to 'call in' other investments that raise national security concerns, and a last resort power to be used in exceptional circumstances to vary conditions or force divestment.

The national security changes introduced two new types of actions, notifiable national security actions (NNSA) and reviewable national security actions (RNSA), and new definitions such as national security business and national security land. The new *National Security Guidance Note*, first published in late 2020, explains these concepts and their intended operation in greater detail. A major objective of this new guidance was to help investors understand the types of investments that may pose national security concerns and may be called in, and which they should therefore consider voluntarily notifying.

Of the 730 foreign investment applications we received from 1 January 2021 to 30 June 2021, around 60 were a result of the new national security rules – with these broadly split between NNSA and RNSA cases. These numbers are broadly consistent with the estimates provided in the Regulation Impact Statement for the reforms.

Consultation questions

To inform the evaluation, the Treasury is interested in hearing from stakeholders with regards to:

- 4.1 whether the national security screening requirements, and the concepts of NNSA, RNSA, and national security business and national security land, are well understood;
- 4.2 whether the framework for defining these concepts (i.e. across the legislation, regulations and official guidance notes) is appropriate and sufficient; and
- 4.3 what factors investors consider when deciding whether to voluntarily notify, including the effectiveness of the guidance on voluntary notification of RNSA in the *National Security Guidance Note*.

5. Reform analysis – compliance

Compliance activities are fundamental to the integrity of any regulatory framework, providing assurance that regulated entities are meeting their obligations.

The reforms introduced new compliance and enforcement powers, accompanied by additional resourcing and capability, that strengthened the Government's ability to prevent, identify and respond to instances of non-compliance with Australia's foreign investment laws. The reforms have brought the Treasury and ATO's compliance regime into closer alignment with overseas counterparts and domestic market regulators.

The Treasury and ATO adopt a risk-based compliance approach that aims to minimise the burden on those who are voluntarily compliant while ensuring that enforcement action is proportionate and undertaken only when necessary.

Consultation questions

To inform the evaluation, the Treasury is interested in hearing from stakeholders with regards to:

- 5.1 whether the new powers and increased enforcement penalties have resulted in a change in investors' attitudes and behaviours towards compliance; and
- 5.2 whether the new compliance obligations of investors are clear and adequately explained in the available guidance material.

6. Reform analysis – streamlining

Alongside measures to enable greater scrutiny of sensitive investments, the reforms also included changes to streamline less sensitive investments and reduce red tape. For example, the reforms included a measure that targets the treatment under the framework of certain investment funds with foreign government investors, as well as a measure to exempt certain acquisitions of royalty interests in respect of mining tenements.

Consultation questions

To inform the evaluation, the Treasury is interested in hearing from stakeholders with regards to:

- 6.1 whether the streamlining measures have reduced the regulatory burden on investment funds making investments into Australia;
- 6.2 the expected utility and impact of the new passive foreign government investor Exemption Certificate; and

- 6.3** other opportunities for streamlining the screening process to reduce regulatory burden while enabling appropriate scrutiny of risk.

7. Reform analysis – fees

The Government first introduced fees for foreign investment applications in late 2015. As part of the foreign investment reforms, the Government maintained its longstanding policy that foreign investors, not Australian taxpayers, should continue to bear the costs of administering the foreign investment regime. The revised fees framework was also intended to be fairer and simpler for investors.

Consultation questions

To inform the evaluation, the Treasury is interested in hearing from stakeholders with regards to:

- 7.1** whether the new fees framework affects investor decisions on investing into Australia;
- 7.2** whether the new fees framework affects when and how investors apply for foreign investment approval; and
- 7.3** whether there is a need for further guidance on the fees framework and, if so, what that guidance should address and in what format.

8. Other matters

In addition to the major reform elements discussed above, the reforms also introduced changes to various technical aspects of the foreign investment framework, including the treatment of passive increases in interests, the definition of an Australian media business, the change of control test, and the moneylending exemption.

Many aspects of Australia's foreign investment framework remain unchanged following the reforms. Australia continues to welcome foreign investment for the significant benefits it provides while ensuring that investments are not contrary to the national interest. The foreign investment framework remains non-discriminatory and applications continue to be assessed on a case-by-case basis. The Treasury seeks feedback from stakeholders as to their views on the operation and effectiveness of other elements in the foreign investment framework.

Consultation questions

To inform the evaluation, the Treasury is interested in hearing from stakeholders with regards to:

- 8.1** whether any other elements of the reforms, which are not already discussed at a consultation question above, have had a significant impact on stakeholders and, if so, what those impacts are; and
- 8.2** whether any other elements of the foreign investment framework, which are not already discussed at a consultation question above, have a significant impact on stakeholders and, if so, what those impacts are and how they could be addressed.