Australian Government

The Treasury

# Senate Standing Committee on Economics

## Inquiry into Foreign Investment Proposals

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# INTRODUCTION

The Treasury is pleased to contribute this submission to the Committee's inquiry into foreign investment proposals. As the lead agency responsible for the administration of the foreign investment framework, we hope that this submission constructively informs the Committee's deliberations.

As a small open economy, Australia has relied on foreign investment as an additional source of capital for much of its history. This submission provides an overview of Australia's current foreign investment framework, and the balance it strikes between facilitating investment and protecting Australia's national interest.

The submission outlines the flexible and consultative assessment process that Treasury undertakes in screening foreign investment proposals. It also discusses the role of the Foreign Investment Review Board (FIRB) in such assessments. While Treasury, and the FIRB, have a central role in the framework, ultimate responsibility for making decisions on foreign investment policy and investment proposals rests with the Treasurer.

As the investment environment has become more complex over recent years, the Government has increasingly attached legally enforceable conditions to investments. Conditions provide a mechanism to mitigate risks whilst still allowing proposed investments to proceed. Without the ability to impose such conditions, it is likely that a greater number of investment proposals would be prohibited. The submission provides further detail on the use of such conditions, and the processes and procedures that the Treasury administers to monitor and enforce investor compliance with them.

While the Treasurer can prohibit, or impose legally enforceable conditions on, foreign investment proposals, the foreign investment framework is only one part of the regulatory environment that operates to protect Australia's interests. Other Australian laws and regulators also play an important role in regulating the conduct of investors in Australia, including foreign investors. In many cases, risks to the national interest may be better addressed through these regulatory mechanisms than through the foreign investment framework.

To support the Committee in better understanding the recent trends and context of foreign investment in Australia, the submission also provides a range of relevant data.

Representatives of the Treasury would be happy to discuss the content of this submission further with the Committee, should it desire.

# THE FOREIGN INVESTMENT FRAMEWORK

## Benefits of foreign investment

Foreign investment is critical to the Australian economy. As a small open economy, Australia has relied on foreign investment as an additional source of capital for much of its history. By supplementing Australia's domestic savings, foreign investment facilitates greater economic investment in Australia than would otherwise be sustainable.

Foreign investment also promotes healthy competition among Australia's industries, encouraging greater innovation and productivity. It facilitates the transfer of international skills and knowledge to Australian businesses, and improves access to overseas markets. Without foreign investment, Australia's employment, income and economic growth would all be lower.

## Safeguarding the national interest

At the same time, successive governments have recognised that some proposed foreign investments may not be in Australia's national interest. It is for this reason that Australia has had a foreign investment screening framework in place since 1972.

- The legal framework is set out in the *Foreign Acquisitions and Takeovers Act 1975* and the *Foreign Acquisitions and Takeovers Regulation 2015* (herein together referred to as the FATA).
- The framework is also supported by information publicly available on the FIRB website, such as *Australia's Foreign Investment Policy* document and a range of supportive *Guidance Notes*.

## Striking a balance: the 'negative test'

Since its introduction, Australia's framework has operated as a 'negative test'. This means there is a presumption that foreign investment proposals are allowed to proceed unless found to be contrary to the national interest. In other words, the framework operates not by *approving* proposed foreign investments based on their expected benefits, and instead by *prohibiting* investments if they are considered to be contrary to Australia's national interest.

- Specifically, the FATA confers upon the Treasurer the power to decide on a case-by-case basis whether a proposed foreign investment would be contrary to Australia's national interest. If satisfied that a proposed investment would be contrary to the national interest, the Treasurer can prohibit the investment, or impose legally enforceable conditions on the investment to safeguard the national interest.

The framework therefore strikes a balance. It is designed to facilitate foreign investment, while still enabling the Government to protect the national interest where needed. If the Government fails to protect the national interest, it risks losing public support for foreign investment, and with it, the many benefits that foreign investment provides.

## The national interest

The national interest, and what would be contrary to the national interest, is not defined in the FATA. This gives the Treasurer the flexibility to consider any factors that may be relevant to a particular case.

This flexibility has been considered fundamental to ensuring community confidence in the framework as the national interest is difficult to define and can change over time.

- Notwithstanding this flexibility, there are a number of general factors that are typically considered when assessing a foreign investment proposal against the national interest. These include[1]:
  - The risk the proposed investment may pose to Australia's national security;
  - The impact the proposed investment may have on market competition;
  - The impact the proposed investment may have on Australia's broader economy and on the community;
  - The impact the proposed investment may have on Australia's tax revenues and other government policies, such as its environmental impact; and
  - The character of the investor.
- In particular situations, certain other factors will also generally be taken into account when considering relevant cases, including:
  - Where a proposal involves a foreign government investor, the Government will consider if the investment is commercial in nature or if the investor may be pursuing broader political or strategic objectives;
  - Where a proposal involves the acquisition of Australian agricultural land, the Government will consider whether Australian investors also had an equal opportunity to purchase that land; and
  - Where a proposal involves the acquisition of Australian residential land, the Government will consider whether that investment will increase Australia's housing stock.

The relative importance of these considerations can vary depending upon the nature of the investor and the target enterprise. For example, investments in larger enterprises – such as in terms of number of employees or market share – may raise more sensitivities than investments in smaller enterprises. However, investments in smaller enterprises with unique assets or in sensitive industries may also raise concerns.

At a broad level, the national interest test recognises the importance of Australia's market-based system, where companies are responsive to shareholders and where investment and sales decisions are driven by market forces. The national interest consideration also expects investors to maintain the highest standards of corporate behavior and comply with all of Australia's laws. This includes, but is not limited to, Australia's anti-money laundering and counter-terrorism financing obligations.

While the foreign investment framework is flexible, and can take into account any potential concerns that an investment proposal may raise, it is only one part of Australia's regulatory environment that works to protect Australia's interests. Other laws (and regulators), such as competition and consumer

[1] These factors are described in greater detail in the document *Australia's Foreign Investment Policy*, available on the FIRB website.

protections, environmental protections, tax laws and law enforcement, also play an important role in regulating the conduct of foreign investors and their investments in Australia.

## A flexible, open, transparent and non-discriminatory approach

Australia's flexible approach to the national interest test allows us to protect Australia against a broader range of concerns than many other countries can under their comparable regimes. For example, in the United States, foreign investments are only prohibited on the basis of national security concerns. Australia's broader approach to the national interest test allows us to protect against any concern, including national security concerns, that may be present in a particular case.

Australia's foreign investment screening framework is open, transparent, and non-discriminatory. All investments that are subject to screening are screened in the same manner, regardless of which country they are from. While it is not always possible for Australians to invest abroad as foreigners can invest here, Australia's approach is not framed in the context of reciprocity, but in terms of Australia's national interest.

**Box 1: Brief history of foreign investment in Australia**

**1960s**

**FOREIGN LIMITS AND HIGH REGULATION**

At the beginning of the 20th century, most foreign investment came from the United Kingdom. After World War II, investment from the United States surged as multi-nationals invested in manufacturing and mining.

Prior to the 1970s, foreign investment into Australia was largely regulated through the foreign exchange control mechanism, although governments intervened in particular proposals.

**1970s**

**A FORMAL FOREIGN INVESTMENT SCREENING REGIME**

The trend of investment from the UK and the US continued.

In 1972, the first administrative system for vetting foreign takeover bids was established through the *Companies (Foreign Takeovers) Act 1972*. This included a national interest test.

Rules governing the ownership of residential real estate by foreign persons were tightened.

The foreign investment regime was progressively strengthened, culminating in the *Foreign Takeovers Act 1975*.

The FIRB was established in 1976 to provide advice on foreign investment proposals. The Government's position was clarified through policy documents which made clear that the regime was non-discriminatory.

**1980s**

### ECONOMY PROGRESSIVELY OPENED

Investment from Japan began to increase.

In the 1980s, Australia became more open to foreign investment. Notification and vetting thresholds were lifted and most local equity rules were removed. In the mid-1980s the Government invited foreign banks to establish operations in Australia.

In contrast to the liberalising of the regime in other sectors, in 1987 investment in established residential real estate was prevented unless the foreign person was a temporary resident.

In 1989, the Act was renamed the *Foreign Acquisitions and Takeovers Act 1975*.

**1990s**

### FURTHER OPENING OF THE ECONOMY

At the start of the 1990s, Japan was the leading source of foreign investment, largely concentrated in real estate and tourism.

In the 1990s the regime was liberalised further. This included changes to foreign equity thresholds, increased limits in the newspaper industry and the removal of the thresholds for developed commercial real estate.

In 1999, measures were announced aimed at rationalising regulation, reducing compliance costs and streamlining administrative procedures, mostly around residential real estate. From September 1999, a number of changes to facilitate investment between Australia and New Zealand took effect.

**2000s**

### MINING BOOM AND INTRODUCTION OF FTA THRESHOLDS

Chinese investment into Australia began to grow. Investment in the Australian mining sector peaked at the end of the decade.

In 2004, the Australia-United States Free Trade Agreement was signed, lifting screening thresholds for private US investors.

In 2009, the thresholds for private business investment were streamlined and indexation was introduced. The requirement for private investors to notify when establishing a new business in Australia was also removed.

**2010s**

### FURTHER FTAS AND REFORMS

Since 2010, Australia has also signed trade agreements with Canada, China, Chile, Hong Kong, Japan, New Zealand, Mexico, Peru, Singapore and South Korea, as well as countries involved in the Trans-Pacific Partnership, thereby raising screening thresholds for private investors from these countries.

In December 2015, significant reforms were introduced to modernise and strengthen the integrity of the framework, including: increased scrutiny of agricultural and residential investments; the introduction of application fees; and stricter and more flexible penalties.

The Government introduced an expectation that sales of agricultural land should offer Australian investors an equal opportunity to purchase that land.

# THE FOREIGN INVESTMENT FRAMEWORK ARCHITECTURE AND ADMINISTRATION

## Institutional responsibility

Consistent with the Treasurer's ministerial authority under the FATA, the Treasury is the lead agency for the administration of the foreign investment framework.

- The most significant change to this arrangement occurred in 2015, when the Australian Taxation Office (ATO) took on responsibility for administering investments into residential real estate. In April 2017, the ATO also took on responsibility for administering investments into non-sensitive commercial land and internal reorganisations. The transfer of these responsibilities from the Treasury to the ATO reflected the integral role that the ATO's advanced data matching capabilities play in screening these types of investments.

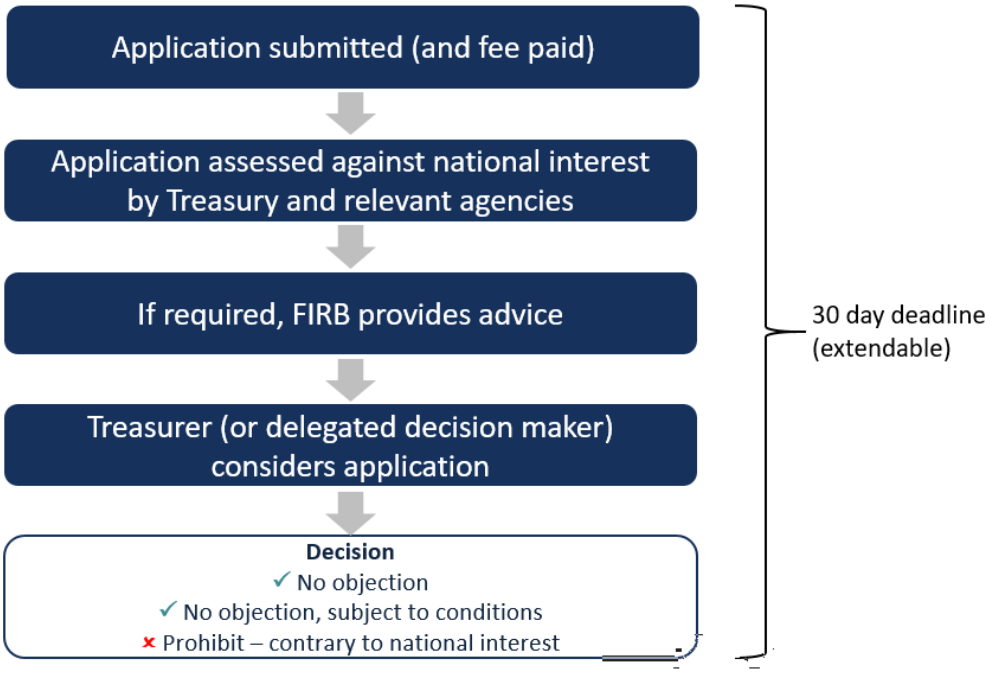
## Screening thresholds

Only investments above certain monetary and control thresholds are screened. The monetary threshold that applies for a particular investment will depend on a number of factors, including: the sector of the economy the investment is intended for; whether the investor is a foreign government or private investor; and whether or not the investor is from a country with a free trade agreement with Australia. Lower thresholds tend to apply for those investments considered most sensitive, such as investments into sensitive businesses and investments by foreign government investors. For investments into Australian entities, the proposed investment must also satisfy a minimum control threshold. This is generally met if the investor acquires an interest of at least 20 per cent or more in the entity (or 10 per cent or more if the investor is a foreign government investor).

## Screening process overview

The paragraphs below outline the screening process that Treasury undertakes in assessing relevant applications under its remit, including investments into agricultural land and sensitive businesses. A simplified illustration of this process is shown below in Figure 1.

**Figure 1: Simplified flow-chart of FIRB screening process**




Unless otherwise exempt, a foreign investor is required to submit an application via the FIRB online application portal prior to making their proposed investment. Applicants are also required to pay a processing fee to ensure that Australian taxpayers do not bear the cost of screening foreign investment proposals. The fee that applies for a particular investment depends on the size of the investment and the sector of the economy the investment is intended for.

- The fee framework is set out in the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* and the *Foreign Acquisitions and Takeovers Fees Imposition Regulation 2015*.

The examination of foreign investment proposals is rigorous. The Treasury – and, where appropriate, the FIRB (as a non-statutory body charged with advising the Treasurer on foreign investment proposals) – examine proposals to identify any sensitivities regarding the national interest, and determine whether these sensitivities can be mitigated or managed.

Once submitted, investment proposals are initially examined by Treasury. Where an application is particularly significant or sensitive, the FIRB may have direct and early involvement.

The preliminary assessment seeks to determine whether the application meets the notification requirements for a proposal under the FATA, whether the application contains sufficient detail, and that the correct application fee has been paid. Timing is also considered, including any deadlines that are commercially important to the investor.

The applicants, or their representatives, may be contacted to discuss their proposal at an early stage. This is particularly likely where a proposal is complex, information is inadequate, or the proposal raises potential national interest sensitivities.

## Consultation with other government agencies

A fundamental part of the screening process is consultation with other government departments and agencies. This ensures that the Treasurer receives whole-of-government advice on potential national interest issues. The Treasury and ATO have well-established and robust procedures to consult across

all levels of government. Depending on the nature of the application, Treasury may consult and share information with Australian and State & Territory government departments, Australian embassies and posts overseas, national security agencies, and authorities with responsibilities relevant to the proposal.

- Where a proposed investment transaction raises potential competition considerations (such as the investor and target being in the same industry), Treasury consults with the Australian Competition and Consumer Commission (ACCC). For each case referred to it, the ACCC makes an initial assessment about the likely competitive effects of the proposed transaction and determines whether or not a public review is warranted. The ACCC then provides input to Treasury, following either the initial assessment or public review. The ACCC's input informs Treasury's assessment of the case against the national interest.
    - Where relevant, Treasury may also engage directly with industry experts and existing competitors in a market to gain a better first-hand understanding of the likely market dynamics.
- Where a proposed investment transaction raises potential criminal risks, including the possibility of money laundering, Treasury engages with crime agencies such as the Australian Federal Police (AFP), the Australian Criminal Intelligence Commission (ACIC) and the Australian Transaction Reports and Analysis Centre (AUSTRAC), as well as the ATO. Factors that may lead Treasury to engage crime agencies include: transactions with excessively complex corporate structures involving multiple tax havens; concerns over the funding of the transaction; investments from low-transparency countries; and/or where there is a significant change in the target value over a short period of time. Crime agencies then undertake an assessment of the proposed transaction and the proposed investors, and provide advice to Treasury that forms part of our assessment on the national interest.
- Where a proposed investment transaction raises potential concerns about the integrity of Australia's market-based system, Treasury consults with any relevant agencies necessary. Depending on the particular facts of the case, we may consult with the ACCC, the Australian Securities and Investments Commission (ASIC) and crime agencies, as well as the Department of Foreign Affairs and Trade (DFAT) and our international posts. These agencies examine the relevant concerns, drawing on known intelligence where necessary, and provide advice to Treasury to inform our assessment of the national interest.
- Where a proposed investment transaction raises potential concerns for Australia's national security, Treasury consults with all relevant intelligence agencies and government departments, such as the Department of Defence and the Department of Home Affairs (DHA). Where the proposed investment also involves critical infrastructure (such as energy, water or communications assets), the Critical Infrastructure Centre (CIC) within DHA may coordinate a whole-of-government assessment of the potential national security risks. These agencies then provide advice to Treasury that informs our assessment on the national interest.
- On every investment proposal it screens, the Treasury consults with the ATO for advice on potential tax risks. This includes consideration of the financing arrangements related to the transaction. The Treasury also consults with the ATO on some agricultural proposals in order to better understand the concentration of foreign-held property in specific areas.

While these consultations can help the Treasury to identify potential concerns with an investment proposal, the foreign investment framework is not designed to be the sole regulator of these concerns.

It is infeasible for Treasury to monitor and enforce compliance by all foreign investors with all Australian laws to which an investor is subject. Other regulators, such as the ACCC, ASIC and AUSTRAC, can – and often are best placed to – take action under their own laws to protect Australia's national interest in relation to any existing or proposed foreign investment. In some cases, the FATA is used to mitigate risks from a foreign investment where it is not possible to address those risks through other regulatory mechanisms, or in support of those mechanisms. In addition, while the screening process is robust and provides assurance that risks are appropriately managed, it is not feasible to eliminate all risk from all proposals, even with the use of conditions.

## The Foreign Investment Review Board

Where a case is being considered by the Treasurer, the FIRB will provide advice to the Treasurer. The FIRB is a non-statutory advisory body that has supported the Treasurer and the Government in administering the FATA since the mid-1970s.

The FIRB currently consists of eight members with diverse commercial and government experience. Members are appointed by the Treasurer, often for periods of five years, and can be reappointed for repeat terms. Strong probity procedures are in place to ensure any potential conflicts of interest are managed appropriately. The Board is currently chaired by Mr David Irvine AO, a former Director-General of both the Australian Security Intelligence Organisation (ASIO) and the Australian Secret Intelligence Service (ASIS), and a former Ambassador to China.

The FIRB meets face-to-face monthly, weekly by telephone, and out-of-session via email. The Board's primary functions are to consider and provide advice to the Treasurer on proposed foreign investment applications and the Government's foreign investment policy more broadly. In addition, the members of the Board actively work to build greater public awareness and understanding of Australia's foreign investment framework through numerous public speeches and engagements. Members of the Board may also personally meet with investors and vendors. These engagements allow the Board to gain greater market intelligence to support its advice to the Treasurer, and enable investors to gain a better understanding of the foreign investment screening process.

The FIRB is supported by Treasury's Foreign Investment Division and the ATO. The head of Treasury's Foreign Investment Division is an Executive Member of the Board.

While the FIRB is a long-standing central element of Australia's foreign investment screening framework, its functions are advisory only. Responsibility for making decisions on foreign investment policy and investment proposals rests with the Treasurer.

Consistent with long-standing practice, the Treasurer has provided delegations to other Treasury portfolio ministers, as well as senior officers of the Treasury and the ATO, to make decisions on some applications. For example, senior officers of the Treasury can make decisions on some non-sensitive low-value applications for land, while senior officers of the ATO generally make all decisions relating to investments in residential real estate. The Treasurer remains the decision maker for the most sensitive cases.

## Decision making time limits

Recognising the need to provide certainty to investors in a timely manner, the FATA requires that the decision maker makes a decision on a case within 30 calendar days of the application processing fee having been paid. That decision then needs to be communicated to the applicant within a further 10 days. If a decision has not been made within this time, and the applicant has not been

informed, the decision maker's powers to prohibit or impose conditions on the transaction are extinguished.

Sometimes, however, it is not reasonable to make a decision on a case within 30 days, particularly where the investment involves complicated transactions or the acquisition of sensitive assets that require detailed examination. In such situations, the Treasurer can issue an interim order extending the statutory deadline by up to a further 90 days. Interim orders are registered on the Federal Register of Legislation. If the applicant does not wish for an interim order to be made, or considers that the existing timeframe is insufficient for assessing their case, they can voluntarily extend this timeframe. This ability – to extend the statutory timeframe to allow for a more thorough assessment of a case – is an important element in maintaining community confidence that the Government is thoroughly reviewing foreign investment proposals.

# CONFIDENTIALITY OF INFORMATION

The FATA includes strict confidentiality requirements. It specifies that information obtained under, in accordance with, or for the purpose of, the FATA is 'protected information'. Case applications, audit reports, letters or correspondence from applicants, as well as no objection notifications, conditions and advice to the Treasurer (or delegated decision maker), are likely to contain protected information.

Protected information may only be disclosed if authorised by one of the provisions set out in the FATA. Failure to uphold consistent and appropriate practices around confidentiality could result in significant legal and reputational risk to the Treasury, and civil and criminal penalties (including imprisonment for up to two years) may apply to individuals for unauthorised disclosure of protected information.

The FATA permits disclosures of protected information only in certain circumstances, including: for the purposes of law enforcement (section 123); to disclose de-identified data on an aggregated basis for reporting on the administration of the FATA (section 124); if the information is in the public domain (section 125); if consent is given (section 126); to a court or tribunal (section 127); and to a Minister administering one of a number of Acts listed in section 122 (for example, the *Migration Act 1958*, the *Australian Securities and Investments Commission Act 2001*, the *Australian Security Intelligence Organisation Act 1979*, and various tax laws).

In addition, section 121 allows a person to disclose information obtained under the FATA to the following people (provided that the disclosure is made in performing the person's functions or duties, or exercising the person's powers, under the FATA):

- a Minister, officer or employee of the Commonwealth, a State, the Australian Capital Territory or the Northern Territory;
- an officer or employee of a Commonwealth, State or Territory body; or
- a person appointed by the Commonwealth for the purposes of the FATA.

It is section 121 that Treasury routinely uses to disclose protected information to consult partners in both the Australian and State & Territory governments. It does so to obtain advice on potential risks to the national interest which may be posed by a proposed investment, and on any conditions which could be applied to mitigate those risks. In such circumstances, the information disclosed retains its character as protected information in the hands of the recipient.

In addition to the restrictions on disclosure imposed by the FATA, information acquired in the course of administering the foreign investment framework is also subject to normal constraints, such as those imposed under the *Privacy Act 1988* as well as commercial-in-confidence obligations. In many instances, disclosure of the fact of an application under the FATA, or the details contained in an application, could disrupt normal operations of the investment markets.

Investors can choose to self-disclose the fact of an application, or information contained in an application. An example of such disclosure would be an announcement to the Australian Securities Exchange.

# CONDITIONS AND COMPLIANCE

## Role of conditions in compliance activities

Conditions are an important tool used to mitigate risks to the national interest from foreign investment. Under the FATA, a condition may only be imposed if the decision maker considers the condition is required to ensure the investment is not contrary to Australia's national interest.

Conditions have become an increasingly important tool for the Government to manage the growing risks associated with foreign ownership. In recent years, risks to the national interest, particularly national security, have risen as a result of a confluence of developments, including: the rapid pace of technology change; the convergence of civil and military applications; and changes in the international security environment. Conditions provide a mechanism for the Government to mitigate these risks without having to prohibit an investment from going ahead.

As a result, the rate at which conditions have been imposed on foreign investment cases has increased markedly over recent years. In 2017-18, 75 per cent of cases by value had conditions attached to them, compared to 35 per cent in 2015-16 (see Table 1).

**Table 1: Rate of conditions imposed on proposed investments[2]**

| | 2014-15 | 2015-16 | 2016-17 | 2017-18 |
|---|---|---|---|---|
| No. of applications allowed to proceed, without conditions | 21,355 | 26,954 | 8,607 | 6,301 |
| No. of applications allowed to proceed, with conditions | 16,598 | 14,491 | 5,750 | 4,844 |
| Value of applications allowed to proceed, without conditions ($billion) | 125.7 | 97.0 | 53.8 | 40.1 |
| Value of applications allowed to proceed, with conditions ($billion) | 66.2 | 150.8 | 143.9 | 123.0 |

Source: FIRB data
Note: The value of applications allowed to proceed does not include corporate reorganisations or new businesses, as these are attributed a $0 value.

[2] As of 2017-18, all applications for residential real estate that have been allowed to proceed have included a condition to register on the *Residential Land Register*. Where this is the only condition imposed, it is counted in the table as being allowed to proceed without conditions.

As well as being imposed more often, conditions have evolved over time in terms of their nature. Some examples are depicted in Table 2.

**Table 2: Nature of some of the conditions imposed on investors**

| Established conditions | Evolving conditions |
|---|---|
| **Reporting conditions to maintain visibility of business activity** | Data security conditions to ensure a change of ownership does not create an unmanaged risk of unauthorised access to personal, government, or sensitive operational data |
| **Tax conditions that require additional reporting where financing or capital arrangements create a risk of tax revenue losses** | Requirements for compliance audits where more visibility is needed |
| **Management and control conditions such as prohibiting the acquirer from seeking a board seat** | Options for rectification once non-compliance is identified (such as remedial action plans) |

## Increased focus on compliance

The increased use of conditions over recent years has required a greater focus on compliance. In September 2017, the Treasury implemented an enhanced *Foreign Investment Compliance Framework* which broadly covers the following areas:

- Compliance assurance – including audits and compliance reviews, as well as compliance monitoring.
- Enforcement – developing the capacity to undertake enforcement activities.
- Stakeholder engagement – educating foreign investors and their advisers on compliance obligations.
- Market intelligence – using data and information to better understand and address non-compliance.

The framework is reflected in a *Compliance Framework Policy Statement*, available on the FIRB website. Treasury's foreign investment compliance function is maturing and developing, and additional resources have been devoted to compliance since the *Foreign Investment Compliance Framework* was put in place.

## Compliance activities

Treasury's assurance activities include ongoing monitoring of compliance. For example, some investors with particularly sensitive, large-scale or complex investments are required to report on their compliance with conditions imposed on them as part of their no objections notification. Since October 2019, this practice has been extended to all investors that receive a conditional no objection decision. The nature and intensity of these reporting requirements varies depending on the assessed

risk being addressed. These reports provide Treasury with information about the level of compliance and how compliance activities could be targeted in the future.

In 2017, the Treasury introduced an annual rolling audit program, which uses a risk-based approach to select audit targets. This approach considers issues such as the nature of conditions imposed on an investment proposal, the impact of non-compliance on the national interest and indicators of potential non-compliance. During the 2018-19 audit program, Treasury completed nine compliance audits that together considered seventeen different foreign investment transactions.

Treasury also reviews instances of potential non-compliance as part of its compliance assurance activities. Reviews commonly target potential non-compliance with the obligation to notify an investment, and are often triggered by information received from members of the public regarding suspected breaches of the FATA by investors. Between July 2019 and January 2020, Treasury received 15 reports of potential non-compliance. Eight of those were assessed as not requiring follow-up compliance action, including two that were referred to other Government agencies or areas of Treasury for monitoring. The remaining seven reports are still undergoing initial assessment, of which three have been subject to some compliance action by Treasury.

## Enforcement

The FATA contains powers to enforce the foreign investment rules, including criminal and civil penalties for non-compliance. Penalties may be applied for breaches of the FATA, including where a foreign person fails to notify relevant investments that fall within screening thresholds, or breaches a condition imposed on an investment. Penalties under the FATA are designed to deter non-compliance, support the integrity of the framework, and safeguard the national interest. In general, Treasury will seek to work with foreign investors to achieve compliance (as opposed to taking enforcement action) in cases where: non-compliance is inadvertent and self-reported by the foreign investor; the breach is administrative; and the investor is willing to remediate the breach as quickly as possible. Treasury's focus continues to be on encouraging and assisting investors to comply. A detailed list of the penalties and the enforcement options available under the FATA is set out in Table 3.

Enforcement action will be recommended to the Treasurer in accordance with the enforcement principles above, and where:

- legal advice supports this course of action;
- action is not more appropriately undertaken by another regulator or law enforcement agency; and
- all other reasonable avenues have been pursued, including working with the foreign investor to remedy the breach (unless the breach is egregious or deliberate).

**Table 3: Enforcement options**

| | |
|---|---|
| **Non-legislative approaches** | Where possible, Treasury will use non-legislative approaches to work with a foreign investor to achieve compliance in cases where non-compliance is inadvertent, self-reported by the investor, the breach is administrative, and the investor is willing to remediate the breach as quickly as possible. |

| | |
|---|---|
| | This may include formal correspondence with investors on compliance findings, seeking agreed remediation actions, and education and counselling on obligations. |
| **Remediation action plan**<br><br>*Through conditions imposed under section 74* | In certain circumstances, conditions imposed on an investor under section 74 require an investor to submit a remediation action plan if found non-compliant with their conditions. Such plans must typically satisfy the Commonwealth that the actions proposed are appropriate to return the investor to compliance (depending on the wording of the condition). |
| **Information gathering**<br><br>*Section 133* | The Treasurer may require an investor to provide information relating to matters that are relevant to the exercise by the Treasurer of his or her powers under the FATA. Section 133(7) provides that a person is not excused from providing information that might incriminate him or her. The ATO has equivalent powers through the *Tax Administration Act 1953*. |
| **Infringement notices**<br><br>*Section 100* | An infringement notice can be issued for breaches of residential real estate requirements. |
| **Civil penalties**<br><br>*Sections 93 and 102(2)* | Penalties: 250 Penalty Units ($210 a unit as at 1 July 2017) or $52,500 and up to five times this for a body corporate.<br><br>Process: The Treasurer may apply to a relevant court for an order that a person, who is alleged to have contravened a civil penalty provision, pay the Commonwealth a pecuniary penalty. Note: different civil penalties apply for breaches of residential land conditions (section 96). Officers of corporations may have civil liability extended to them.<br><br>Note: different civil penalties apply for breaches of residential land conditions (sections 94-98) and there are means to recover part of capital gains as a civil penalty. There are also provisions allowing for recovery of civil penalties through charges (sections 104-111). Officers of corporations may have civil liability extended to them. |
| **Criminal penalties**<br><br>*Sections 87 and 102(1)* | Penalties: 3 Years imprisonment and/or 750 Penalty Units ($210 a unit as at 1 July 2017) or $157,000 and up to five times this for a body corporate.<br><br>Process: The Treasurer may refer a matter to the Commonwealth Director of Public Prosecutions (CDPP). If the CDPP decides to pursue the matter (based on public interest considerations), and person is found guilty by the court of committing a criminal offence under the FATA, penalties may be imposed by the courts. Officers of corporations may have criminal liability extended to them. |
| **Powers of courts to enforce** | Where an investor has committed an offence, or contravened a civil penalty provision, the Federal Court of Australia, the Federal Circuit Court of |

| | |
|---|---|
| **Treasurer's orders**<br><br>*Section 132* | Australia or the Supreme Court of a State or Territory may make any order it sees fit, if the contravention was of a condition, to achieve the purpose for which the condition was imposed by the Treasurer. Such orders can be made even when the conviction or civil penalty has not yet been recorded/made. |
| **Disposal order**<br><br>*Section 69* | The Treasurer may make a disposal order in relation to a significant action for which a no objection notification has been issued if the result of the action is contrary to the national interest. A disposal order can also be made in relation to an approved investment after an investor has been convicted of an offence or a civil penalty order has been issued for contravening conditions (see above). |
| **Anti-avoidance**<br><br>*Section 78* | Where an investor seeks to avoid the FATA, anti-avoidance provisions apply which can enliven the Treasurer's power to order disposal. |

### Gatekeeper role

As mentioned above, the foreign investment framework is only one part of the regulatory environment that operates to protect Australia's national interests in relation to investment, including foreign investment. While the foreign investment framework plays an important role in helping protect Australia's interests, its functions and powers are generally limited to the upfront assessment process and any conditions that may be imposed. Otherwise, once established, foreign investors are generally treated the same as domestic investors under Australia's laws, in accordance with our international commitments.

# FOREIGN INVESTMENT DATA

### Applications of proposed investment

As noted above, unless exempt, a foreign investor is required to submit an application to the Government prior to making their proposed investment in Australia. Once the investor is informed that the decision maker does not object to their proposed transaction (either with or without conditions), the investor will generally have 12 months to undertake that transaction. However, the investor is not obliged to proceed with the transaction, should they choose not to do so. As such, the FIRB's visibility of foreign investment data in Australia is largely limited to proposed investments that meet the notification requirements of the FATA (and not actual investments that are made)[3].

While over recent years there has been significant variability in the total number of applications considered under the framework, this is almost exclusively the result of a decline in applications for residential real estate since 2015-16 (see Table 4). This decline is likely the result of a combination of

[3] Further information and data on the applications considered each year is available in the respective *FIRB Annual Reports*, available on the FIRB website.

factors, including: the introduction of application fees in December 2015[4]; capital controls imposed by overseas authorities; the imposition of additional state government surcharges on foreign owners of residential land; and Australian market conditions, including tighter lending standards by Australian banks.

On the other hand, the number of applications outside of residential real estate (such as investments into Australian businesses or agricultural land) has remained relatively stable over recent years.

Prohibitions of proposed foreign investments are very rare – with only a handful in recent years – especially compared to the number of applications allowed to proceed.

**Table 4: Number of applications considered under the framework**[5]

| | 2014-15 | 2015-16 | 2016-17 | 2017-18 |
|---|---|---|---|---|
| Allowed to proceed, non-residential real estate | 1,112 | 1,304 | 1,159 | 1,109 |
| Allowed to proceed, residential real estate | 36,841 | 40,141 | 13,198 | 10,036 |
| Total applications allowed to proceed | 37,953 | 41,445 | 14,357 | 11,145 |
| Prohibited | 0 | 5 | 3 | 2 |
| Declined (a) | | | | 3 |
| Total applications decided | 37,953 | 41,450 | 14,360 | 11,150 |
| Withdrawn (b) | 799 | 1,319 | 770 | 644 |
| Exempt (c) | 180 | 244 | 60 | 61 |
| Total applications considered | 38,932 | 43,013 | 15,190 | 11,855 |

Source: FIRB data

(a) Declined refers to applications for Exemption Certificates (EC) where that EC was not granted. This, however, does not prohibit the investor from separately applying for each acquisition that would have been covered by the EC.

(b) Some applications are withdrawn by the investor prior to a decision being made.

(c) Some applications are found to be exempt from the notification requirements of the FATA.

Real estate (comprising both residential and commercial real estate) has been the main target sector for foreign investment in Australia in recent years. Since 2014-15, it has attracted around 45 per cent of the proposed value of investment that has been allowed to proceed (although this share has decreased since the 2015 reforms and subsequent decline in residential applications). Other popular sectors for investment in recent years include the services sector (22 per cent of proposed investment) and the manufacturing sector (15 per cent).

## Sources of investment

Historically, Australia has experienced successive waves of investment from various countries and regions. At the beginning of the 20th century, most foreign investment came from the United Kingdom. After WWII, investment surged from the United States. In recent decades, there has been an increase in investment from Asia – first, from Japan in the 1980s, and now, increasingly from emerging economies such as China.

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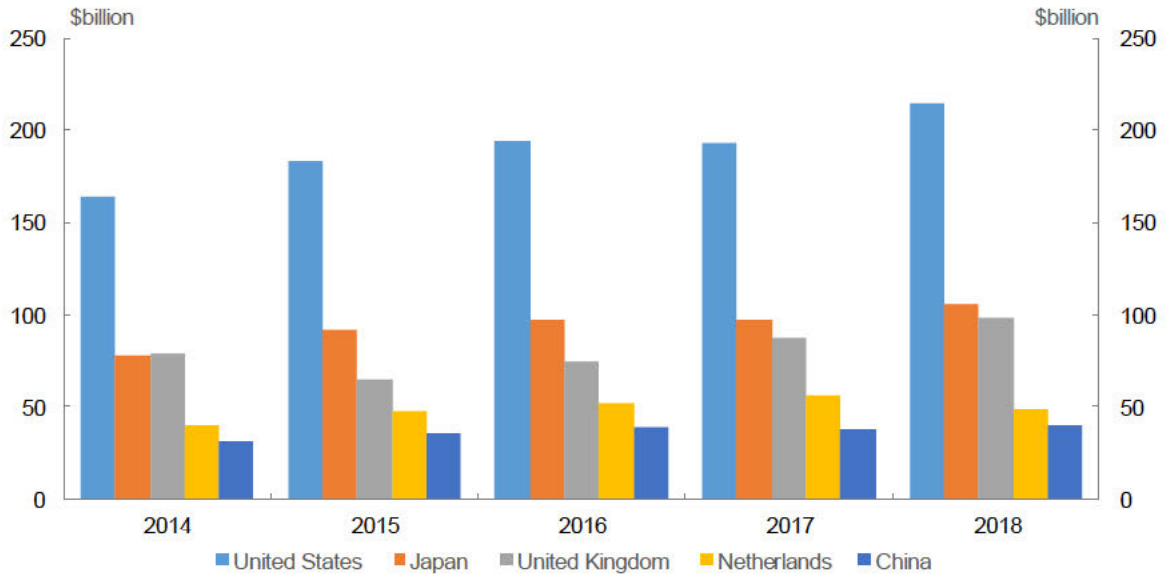
4 Prior to the introduction of application fees, foreign investors often made several applications when considering multiple properties, even though they might have ended up only purchasing a single property. Investors now have an incentive to apply only when they have a high certainty of purchasing a property. Exemption Certificates have also been introduced that allow foreign investors to apply only once, and be able to purchase a property in a specified state or territory, without having to separately apply for each property they are interested in.

5 Excluding exempt applications, to be counted as an application considered, the relevant application fee must have been paid, or waived. Data does not include applications for variations. Data on declined applications is not separately available for years before 2017-18.

That said, Chinese investment into Australia has slowed substantially in recent years. For instance, the value of foreign investment proposals allowed to proceed from China was $23.7 billion in 2017-18, down from $47.3 billion in 2015-16. This change reflects a global slowdown in Chinese outbound investment that has been driven largely by developments within China, including greater regulatory scrutiny of outbound capital flows and tighter lending conditions.

Despite high investment flows over the past decade, China still holds a relatively small share of the total foreign direct investment (FDI) stock in Australia. As Figure 2 shows, the largest holders of foreign direct investment in Australia remain our traditional trading partners in the United States, Japan and the United Kingdom.

**Figure 2: Stock of FDI in Australia, top five countries (as at 31 December)**




Source: Australian Bureau of Statistics, 5352.0
Note: China excludes SARs and Taiwan

## Actual investment registers

To improve the transparency around actual foreign investments being made in Australia, the Government has, over the past few years, introduced a number of ownership registers to record actual investments into Australian residential land, agricultural land and water entitlements[6]. Where an investor proceeds to acquire an interest in one of these forms of land, they are required to register their interest on the relevant register, usually within 30 days of acquiring that interest.

As shown in Figure 3 below, as at 30 June 2018, around 13 per cent of Australia's agricultural land, and 10 per cent of Australia's water entitlements, had a level of foreign ownership[7].

- The framework for the agricultural land and water entitlement registers is set out in the *Register of Foreign Ownership of Water or Agricultural Land Act 2015*.

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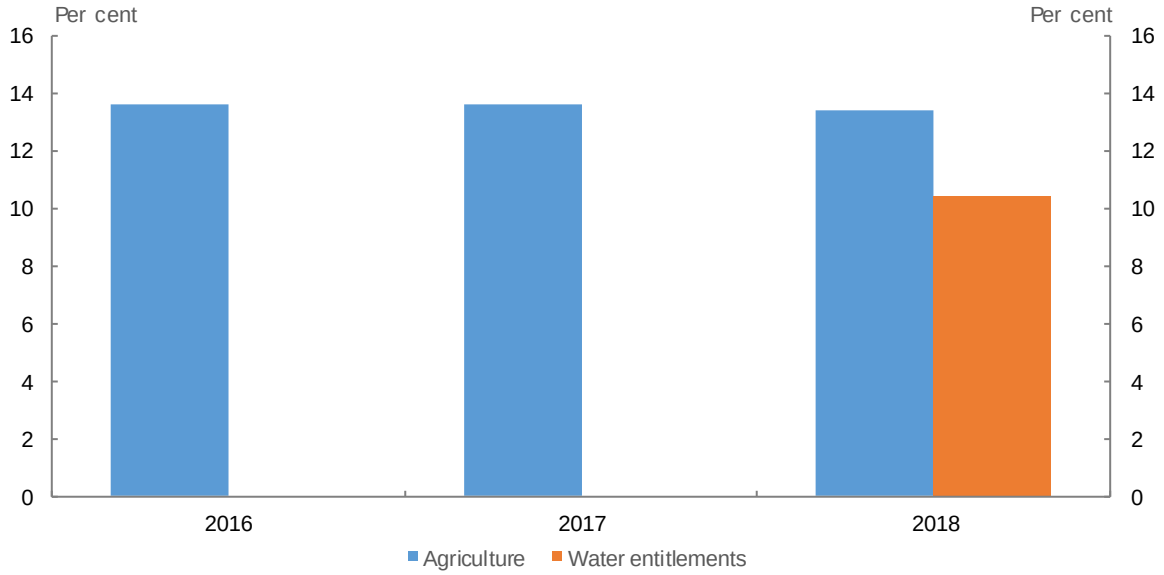
6 Responsibility for managing the registers rests with the ATO.

7 Further information and data on the level of foreign ownership in Australian agricultural land and water entitlements is available in the respective *Register of Foreign Ownership* publications, available on the FIRB website.

**Figure 3: Foreign ownership of Australian land (as at 30 June)[8]**




Source: ATO foreign ownership registers

The countries with the highest level of ownership of Australian agricultural land are the United Kingdom (owning 2.6 per cent), China (2.3 per cent) and the United States (0.7 per cent). Around 80 per cent of all foreign held agricultural land is held on a leasehold basis, rather than being outright owned.

The countries with the highest level of ownership of Australian water entitlements are China and the United States (both holding 1.9 per cent of the total water entitlement), followed by the United Kingdom (1.1 per cent). The greatest usages of foreign held water are for agriculture and mining, with over 81 per cent of foreign held water held within Australian incorporated entities.

The first register of residential real estate transactions is yet to be released.

[8] The first report of the agricultural land register was for 30 June 2016, and the first report for the water entitlements register was for 30 June 2018.