



Australian Government

The Treasury

Senate Standing Committee on Economics

**Inquiry into Foreign Investment Reform (Protecting
Australia's National Security) Bill 2020 and Foreign
Acquisitions and Takeovers Fees Imposition
Amendment Bill 2020**

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OVERVIEW

On 28 October 2020, the Government introduced to Parliament the Foreign Investment Reform (Protecting Australia's National Security) Bill 2020 and the Foreign Acquisitions and Takeovers Fees Imposition Amendment Bill 2020.

This package of bills will ensure that Australia's foreign investment review framework is equipped to keep pace with emerging risks and global developments, while continuing to welcome and be open to foreign investment.

The proposed foreign investment reform package addresses national security risks, strengthens compliance and enforcement powers, and streamlines certain approvals. The opportunity has also been taken to make technical amendments to ensure the framework is operating as intended, and to improve information capture and sharing.

The existing fee framework will be updated as part of the reform package, reflecting the significant increase in resourcing to support its implementation and the ongoing operation of the framework. Consistent with the Government's long-standing position that the cost of administering the foreign investment review framework should be borne by foreign investors, not Australian taxpayers, the increase in revenue resulting from the proposed fee framework will offset the full cost of the reform package.

In addition to the Explanatory Memoranda for the Bills, further information about, and background to, the reforms is available in a paper released on 5 June 2020 with the announcement of the reforms, available at the following link: <https://treasury.gov.au/publication/p2020-87595>.

The package of bills is accompanied by regulations that are subject to the passage of the bills. The regulations will complete the implementation of the reform package, for example by:

- Detailing the new fee framework.
- Setting out certain definitions that relate to the national security aspects of the reform package.
- Stipulating and adjusting exemptions.
- Making technical amendments.

THE FOREIGN INVESTMENT REFORMS

Rationale

Foreign investment is important for Australia's long term economic success, stability and prosperity. It creates jobs, improves productivity and connects Australian businesses to global markets. Foreign direct investment supports one in ten jobs in Australia and makes a significant contribution to the one in five jobs that are trade-related.

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. Security agencies are increasingly consulted as part of the foreign investment review process. For example, the Australian Security Intelligence Organisation (ASIO) undertook 275 foreign investment assessments in 2018-19 (up 12 per cent over the previous year).

Consistent with Australia's open and welcoming approach to foreign investment and to enable individual investments to proceed, the Foreign Investment Review Board (FIRB) is increasingly recommending conditions be attached to approvals on a case-by-case basis as the principal means to mitigate identified risks. As foreign investment is increasing in complexity, further resources are needed to ensure the integrity of our screening arrangements. Enhanced compliance and enforcement powers are required to align the framework with other business regulators and to ensure that credible monitoring and enforcement is maintained.

The Register of Foreign Ownership that will be introduced through the reform package will provide better visibility of foreign investment. Additionally, the 2020-21 Budget allocated \$86.3 million over four years to implement a new information and communications technology system to support more effective and efficient foreign investment application processing, case management and compliance activities.

Updates to the fee framework will ensure that the cost of administering the foreign investment review framework is borne by foreign investors, as well as making the fee framework simpler and fairer. While some investors will pay more, they will be the investors proposing to undertake the highest value investments. The reforms ensure that more of the costs of administering the framework are borne by larger investors and investors that currently pay a disproportionately smaller fee for their investment. In general, fees represent a small proportion of the costs associated with an investment, and this will continue to be the case. The maximum fee for a commercial transaction over \$50 million will not be higher than 0.03 per cent of the consideration. For agricultural land over \$2 million, it will not be higher than 0.66 per cent.

Australia is not alone in recognising and responding to increasing risks associated with foreign ownership. Many other countries—including the US, Canada, New Zealand, the UK, Japan, EU members, China and India—have recently updated their foreign investment rules. The prevalence of measures taken by countries to address national security risks posed by foreign investment is confirmed by reporting from the Organisation for Economic Security and Development.¹

Further detail on key aspects of the reforms

National security

The existing foreign investment framework has gaps in its capacity to address national security risks. This is because many private investments under \$275 million are not screened, and in some circumstances related to free trade agreements, only investments above \$1,192 million are screened. The majority of Australia's manufacturers and suppliers of military-related goods and services fall below both of these screening thresholds, limiting the Government's ability to scrutinise these transactions for national security risks.

The proposed national security test, under which investments meeting the definition of 'national security business' will be subject to a mandatory notification irrespective of their value, will provide a degree of certainty to investors about what types of investments need government approval pre-acquisition.

The mandatory notification requirement is complemented by the call-in power, which will allow investments not otherwise notified to be 'called in' for review if they raise national security concerns. The existence of the call-in power allows the national security business definition to be more targeted, because it provides the Treasurer with the ability to call-in acquisitions which may raise national security risks, but were not included in the definition of national security business and the new mandatory national security notification requirements. The call-in provides that national security risks can be addressed, which in turn allows the national security business definition to be focused on investments that are most likely to present national security risks.

Investors will have the option of voluntarily notifying acquisitions to obtain certainty and prevent the use of the call-in power with respect to the notified acquisition. Investors will also be able to apply to seek an exemption from the new screening arrangements (including the call-in), modelled on the existing exemption certificate pathway. To provide further clarity and certainty for investors, Treasury intends to provide guidance material on the definitions of 'national security business', 'national security land' and investments where the call-in power is most likely to be used and in relation to which investors should consider voluntarily notifying.

The additional national security powers will also include the ability to conduct a last resort review, on national security grounds only, of foreign investment approvals issued after the commencement of the Bills, with the ability to impose new conditions, vary existing conditions, or as a last resort, force divestment where national security risks emerge. The last resort review will only be used in exceptional circumstances. It is subject to a range of safeguards, including merits review.

Compliance and enforcement

Conditions have been an important tool for mitigating risks to the national interest from foreign investment. In recent years, the use of conditions has become systemic. In 2018-19, 80 per cent of cases by value were subject to conditions—an increase from 35 per cent of cases four years ago. A decade ago, conditions were rarely imposed outside of residential and commercial land acquisitions.

The credibility of the ongoing and expanding use of conditions is dependent on having adequate resources and effective powers to ensure compliance and hold entities and individuals to account. Existing compliance powers are limited in comparison to other financial services, tax and competition regulators, and blunt in that action is largely reliant on the courts. Modernising the enforcement framework will allow for graduated and proportional responses to compliance issues, strengthening the overall effectiveness of the regime.

Key changes include:

Reformed FATA	Current FATA
Infringement notices will be available in relation to <u>all</u> investment, and adjustments will be made to make infringements more flexible.	Infringement notices only available in relation to residential real estate.
Penalties will be increased significantly up to maximums of (for civil penalties) 75% of the value of the investment/2.5 million penalty units	Current civil penalties are far lower: 250/1250 units for individuals/corporations.

(\$555 million) (whichever is greater) (comparable to penalties available to ASIC).	
Approvals can be revoked if a foreign person provides information in their application that is false or misleading in a material particular.	New power – no current equivalent.
Treasurer may issue directions or interim directions if he or she has reason to believe a foreign person is breaching or will breach the <i>Foreign Acquisitions and Takeovers Act 1975</i> (FATA).	New power – no current equivalent.
Treasury will obtain standard monitoring and investigation powers under the Regulatory Powers Act to support more effective compliance monitoring.	New powers – no current equivalent.
The Treasurer can accept enforceable undertakings in relation to compliance with the FATA.	New power – no current equivalent.

Streamlining

Recognising the need to ensure Australia continues to successfully attract foreign investment, as well as the need to focus the resources of the framework on the highest risk investments, the reform package will also reduce the regulatory burden on low-risk foreign investment. It will do so by:

- Exempting certain investments made by entities who are currently classified as 'Foreign Government Investors'. This exemption will 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.
- Exempting revenue streams in relation to mining and production tenements.
- Exempting acquisitions of interests in land acquired by private investors as a result of obtaining a right in an exploration tenement unless the land is national security land.

CONSULTATION AND RESPONSE

Consultation

Since the announcement of the reform package on 5 June 2020, Treasury has released a number of publications to help stakeholders navigate the details of the proposed Bills and the consultation

process. These included the above mentioned paper, an Implementation Roadmap, and two tranches of exposure draft legislation and regulations and associated explanatory memoranda.

Treasury also undertook an extensive consultation process in developing the reform package, engaging close to 1,000 stakeholders during each consultation period. The consultation period for tranche 1 of the reforms ran from 31 July to 31 August 2020, with 54 submissions received (40 non-confidential submissions have been published on the Treasury website). The consultation period for tranche 2 of the reforms ran from 18 September to 2 October 2020 with 43 submissions were received and 24 non-confidential submissions published. In addition, Treasury also held two public information sessions with over 120 subscribers.

Stakeholders were supportive of the rationale for reforms. Stakeholder feedback has been focused on investor certainty, transparency, the fee structure and efficient operation of the system.

Changes to the Bills between exposure and introduction

Treasury received 54 submissions on the exposure draft bills, which were carefully considered in the finalisation of the bills, resulting in adjustments in some instances. Other adjustments resulted from further development of the measures generally, and through the drafting process. Examples of changes include:

- Further safeguards were added to the use of the last resort power,¹ including a requirement for a material change in risk that triggers the use of the last resort power to have not been reasonably foreseeable at the time of the approval, and any misstatement made by the investor that triggered the last resort power to be directly related to the national security risk sought to be addressed through its use. These additional safeguards supplement the already significant safeguards attached to the last resort power, including merits review.
- Stakeholders raised issues of regulatory burden regarding share buy backs and other forms of capital reductions. In response, the final Bill² amended requirements for investors to notify in circumstances of passive increases so that notification is only required when they start to hold a certain level of interests (5 per cent, 10 per cent or 20 per cent depending on the acquisition type), while maintaining the Treasurer's powers over any further increases beyond those levels.
- Some stakeholders also commented that the registration obligations associated with the new Register of Foreign Ownership of Australian Assets may be onerous and increase compliance costs. In response, the final Bill consolidated overlapping registration obligations from existing registers (agricultural, residential and water) and extended the timeframe for registration of water rights to the end of the financial year.

ⁱ See, e.g. Twenty-third Report on G20 Investment Measures (29 June 2020), <http://www.oecd.org/daf/inv/investment-policy/23rd-Report-on-G20-Investment-Measures.pdf>.

¹ See new proposed section 79C of the Foreign Investment Reform (Protecting Australia's National Security) Bill 2020.

² The Foreign Investment Reform (Protecting Australia's National Security) Bill 2020.