

Regulation impact statement — Foreign investment proposals

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Introduction

1.1 The Government welcomes foreign investment because it plays an important and beneficial role in the Australian economy. It has helped build Australia's economy and will continue to enhance the wellbeing of Australians by supporting economic growth and prosperity.

1.2 Foreign investment provides additional capital for economic growth, creates employment opportunities, improves consumer choice and promotes healthy competition, while increasing Australia's competitiveness in global markets. The Financial System Inquiry found that 'ongoing access to foreign funding has enabled Australia to sustain higher growth than it otherwise could'.¹

1.3 It can also help deliver improved competitiveness and productivity by introducing new technology; providing much needed infrastructure; allowing access to global supply chains and markets; and enhancing Australia's skills base.

1.4 Notwithstanding the benefits of foreign investment to the community, there is a need to review foreign investment proposals to ensure proposals are consistent with Australia's interests.

1.5 Consequently, the Government reviews foreign investment proposals against the national interest on a case-by-case basis. This flexible approach maximises investment flows, while protecting Australia's interests and providing assurance to the community.

1.6 The Government has already commenced the process of strengthening the foreign investment framework. On 11 February 2015 the Government announced:²

- (i) the screening threshold for foreign purchases of agricultural land has been lowered from \$252 million to a cumulative total of \$15 million. The new \$15 million screening threshold applies to the cumulative value of agricultural land owned by the foreign person, including the proposed purchase. The new threshold has applied since 1 March 2015; and
- (ii) a foreign ownership register of all land was established. From 1 July 2015 the Australian Taxation Office started collecting information on all foreign interests in agricultural land regardless of value.

1.7 In addition, compliance and enforcement activities for residential real estate began transferring from Treasury to the Australian Taxation Office from 4 May 2015.

Current screening arrangements

1.8 Australia's foreign investment review framework consists of the *Foreign Acquisitions and Takeovers Act 1975* (the Act), its associated Regulations, and Australia's Foreign Investment Policy (the Policy). The framework fits within Australia's overall approach towards foreign investment, ensuring significant foreign investments are considered in a timely, holistic and consistent manner while maintaining some flexibility to consider foreign investment proposals on a case-by-case basis. It is designed to maximise investment flows while serving to protect Australia's national interest.

1.9 The Act provides the legislative framework to review foreign investment proposals and provides the Treasurer with a range of powers, including the ability to order divestments of assets,

1 *Financial System Inquiry Final Report*, November 2014, page 2.

2 *Government tightens rules on foreign purchases of agricultural land*, 11 February 2015, the Hon Joe Hockey MP media release, <http://jbh.ministers.treasury.gov.au/media-release/005-2015/>.

block proposals, or apply conditions to proposals to ensure that they are not contrary to Australia's national interest.

- (i) The national interest test is a negative test — foreign investment proposals have to be contrary to the national interest to be prohibited.
- (ii) Three business proposals have been rejected since 2001: Shell's proposed acquisition of further shares in Woodside Petroleum; Singapore Exchange Limited's proposed acquisition of the Australian Securities Exchange; and Archer Daniels Midland's proposed acquisition of GrainCorp.

1.10 Under the Act a 'foreign person' includes all individuals who are not ordinarily resident in Australia. To be ordinarily resident in Australia a person has to have resided in Australia for 200 or more days in the preceding 12 months and be able to stay in Australia indefinitely.

- (i) This includes temporary residents, who hold a valid temporary visa permitting them to stay in Australia for a continuous period of more than 12 months (irrespective of how much time is remaining until that visa expires), or have submitted an application for permanent residency and hold a bridging visa which permits them to stay in Australia until their permanent residency application has been finalised.

1.11 A foreign person also includes:

- (i) a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest (15 per cent or more);
- (ii) a corporation in which two or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest (40 per cent or more);
- (iii) the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest (15 per cent or more); or
- (iv) the trustee of a trust estate in which two or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest (40 per cent or more).

1.12 The Policy provides guidance to foreign persons to assist their understanding of the review process. It also identifies a number of investment categories that need approval even if the Act does not apply. For example, requirements for foreign government investors to seek prior approval before making direct investments in Australia or the requirement on foreign persons to seek prior approval to make investments of 5 per cent or more in the media sector. These non-legislative requirements in the Policy are administered in the same way as those in the Act.

1.13 The Foreign Investment Review Board (FIRB), a non-statutory advisory body, is responsible for examining proposals and advising on the national interest implications of investment proposals. The Treasurer retains responsibility for making decisions.

1.14 Factors typically considered in assessing the national interest for business acquisitions include: national security, competition and other government policies such as taxation; the impact on the economy and the community; and the investor's character. Where a proposal involves a foreign government investor, the Government also considers the commerciality of the investment.

1.15 For agricultural investments there are additional factors that are typically considered when assessing foreign investment proposals against the national interest. These factors are set out in the Policy and include:³

- (i) The quality and availability of Australia's agricultural resources, including water;
- (ii) Land access and use;
- (iii) Agricultural production and productivity;
- (iv) Australia's capacity to remain a reliable supplier of agricultural production, both to the Australian community and our trading partners;
- (v) Biodiversity; and
- (vi) Employment and prosperity in Australia's local and regional communities.

1.16 In addition to approval or rejection of an application, the foreign investment rules allow for conditions to be placed on a sale where it is in the national interest to do so. An example of how national interest considerations have been applied is the Treasurer's foreign investment decision of 4 March 2015, concerning the proposal by JBS USA Holdings Inc. (JBS), through its wholly-owned subsidiary, JBS Smallgoods Hold Co Australia Pty Ltd, to acquire Australian Consolidated Food Holdings Pty Ltd (Primo). Conditions were attached to the approval which JBS agreed to maintain custom service killings of livestock provided at its processing plant in Scone, New South Wales⁴. This demonstrates a consideration of the impact of a foreign investment proposal beyond the existing tax, competition and environmental laws. Other examples of applications where conditions have been imposed can be found on the [FIRB website](#).

1.17 In relation to residential real estate, the foreign investment policy aims to ensure that any foreign investment increases Australia's housing stock. Consistent with this aim, different rules apply depending on whether the property being acquired will increase the housing stock or whether it is an established dwelling.

1.18 Generally, applications by foreign persons to purchase new dwellings are approved without conditions, on the basis that this type of investment increases Australia's housing stock.

1.19 In relation to established dwellings, temporary residents can only apply to purchase one established dwelling to use as a residence while they live in Australia. The purchase of an established dwelling is conditional on the foreign person selling the property within three months of leaving Australia.

1.20 Under the Act, it is a requirement that each proposed acquisition of real estate be individually notified and reviewed, unless specifically exempt. For example, property developers (Australian or foreign) can apply for an advanced-off-the-plan certificate to sell all new dwellings in a development of 100 or more dwellings to foreign persons, provided the development is marketed locally as well as overseas. Foreign persons purchasing dwellings in a certified development do not require separate approval.

- (i) Off the plan purchases by domestic and foreign residents are often important for developers to commence construction of new apartment complexes. These provide surety to developers of the financial sustainability of progressing with the development. These developments contribute to Australia's total housing stock.

3 [Australia's Foreign Investment Policy](#), 2015, page 9.

4 *Foreign Investment Decision*, 4 March 2015, the Hon Joe Hockey MP media release, <http://jibh.ministers.treasury.gov.au/media-release/014-2015/>.

1.21 Proposals to acquire an interest of 15 per cent or more in any business valued at over \$252 million (or \$1,094 million for Chilean, Japanese, Korean, New Zealand and United States non-government investors) generally must be notified to FIRB for examination. Prior to the implementation of a lower screening threshold (\$15 million cumulative) for rural land on 1 March 2015, 'rural land' acquisitions were also subject to this general business screening threshold.

1.22 All foreign government investors must get prior approval before making a direct investment in Australia, starting a new business or acquiring an interest in land, regardless of the value of investment.⁵

1.23 Further information on the foreign investment application processing arrangements can be found on the [FIRB website](#).

1.24 The foreign investment review framework is designed to strike an appropriate balance between maintaining community confidence in foreign investment, protecting the national interest and ensuring that Australia remains an attractive destination for foreign investment by providing certainty for investors.

- (i) While community stakeholders are not directly consulted on foreign investment applications because of the need to protect the commercial interests and privacy of applicants, the national interest test includes consideration of the impact on the economy and the community. The interests of employees, creditors and other stakeholders are considered as part of the assessment process. FIRB consults with other government departments and the states and territories to assist its consideration of these issues.
- (ii) In this way, where the framework applies to a particular foreign investment, it provides reassurance to the community that the Government is undertaking a balanced national interest assessment inclusive of its views.
- (iii) A system which does not reflect community expectations increases the risk that foreign investment could become subject to ad-hoc restrictions that negatively impact on investor confidence and Australia's ability to attract foreign capital.

1.25 While the framework has generally worked well since being introduced in the mid-1970s, heightened community sensitivity over certain types of foreign investment (in particular agriculture and residential real estate), and shifts in global investment patterns (most notably the increasing share of developing economies in global investment flows, with these economies less familiar with Australia's investment environment and the Australian community less accustomed to these investors) are all increasing community focus on the framework.

1.26 In 2012, the then Opposition released a Discussion Paper seeking public feedback on options to increase scrutiny and transparency around foreign investment in agriculture⁶. Following the discussion paper, the Coalition announced in the lead-up to the 2103 Federal Election that it would reduce the screening thresholds and publish a register of foreign ownership⁷.

1.27 Recognising increasing community concerns around residential real estate, in March 2014 the Government asked the House of Representatives Standing Committee on Economics to inquire into foreign investment in residential real estate. It tabled its report to Parliament in November 2014.

5 This includes an interest in rural land as well as prospecting, exploration, production or mining tenement.

6 [Foreign Investment in Australian Agricultural Land and Agribusiness](#), discussion paper

7 Tony Abbott, *Rooty Hill People's Forum*, 28 August 2013.

1.28 Following this report, the Government considered how to strengthen the foreign investment framework, including how to realign the framework with community expectations and the broader investment environment to ensure it continues to welcome foreign investment that is not contrary to Australia's national interest. This Regulation Impact Statement considered options in this regard.

1.29 On 25 February 2015, the Government released an Options Paper 'Strengthening Australia's Foreign Investment Framework' (Options Paper) which sought feedback from stakeholders on proposed changes to the foreign investment framework. There were 192 submissions received during the consultation process.

The problem

Maintaining the integrity of the foreign investment framework

1.30 Australia's foreign investment framework has generally worked well since it was introduced. The framework recognises the importance of foreign investment but incorporates a screening function to ensure that foreign investment proposals are screened on a case-by-case basis to protect Australia's national interest. The fundamental principles behind the foreign investment framework are sound and the framework has generally received the support of domestic and international stakeholders.⁸

1.31 However, heightened community sensitivity over certain types of foreign investment (in particular agriculture and residential real estate) and shifts in global investment patterns are placing stress on the ability of the framework to address community concerns.

1.32 Increasing community concerns in relation to agriculture have put pressure on the traditional approach of maintaining consistent thresholds for business investments across all sectors. While consistent thresholds portray Australia's non-discriminatory, non-preferential approach to business investment, they do not account for the relative significance of an investment in particular sectors where asset, business or land values are generally lower. For example, an investment of \$100 million in the mining industry may be small relative to the size of the industry, while a \$100 million investment in agriculture is more significant to industries in that sector.

1.33 Increasing community concerns in relation to foreign investment in residential real estate have also been a focus in recent times, particularly in relation to compliance and enforcement of existing rules. In particular, concerns exist that there are foreign investors who are circumventing the framework and affecting housing affordability. Various media articles have quoted anecdotal cases of investors purchasing both new and existing properties.

Foreigners now buy almost one in six newly built homes sold in NSW, whether apartments or houses, according to the latest NAB quarterly property index, released on Thursday. Their slice of the new housing market in NSW has leapt from 11 per cent to 16 per cent in the three months since the bank's June quarter survey of the property industry, owners and investors.⁹

8 Domestically, the framework has received bipartisan political support and the conditional support of most business and community stakeholders (though some stakeholders question the need for screening of foreign investment). Internationally, investor concerns with the review framework have decreased substantially over the years, while international organisation concerns with screening have also moderated (though Australia still receives some criticism from organisations and countries that do not have screening mechanisms).

9 'Real estate in Sydney: the big foreign buy up', Rick Feneley, Domain.com.au, 12 October 2013, <http://news.domain.com.au/domain/real-estate-news/real-estate-in-sydney-the-big-foreign-buyup-20131011-2vdpd.html>, accessed 9 April 2015.

1.34 In addition to the findings of the House of Representatives Standing Committee on Economics that compliance of the residential real estate rules is lacking, the consultation process provided anecdotal evidence of people being prepared to breach the foreign investment rules in relation to real estate on the basis that the risks of being caught were low. This reinforces the view in the community that changes need to be made to how the rules are enforced.

1.35 Global investment patterns are also affecting the framework, with foreign direct investment outflows from developing and transition countries reaching record levels, both in terms of level and proportion (making up around 39 per cent of global flows in 2013, compared to only 12 per cent at the beginning of the 2000s).¹⁰ Australia is an increasing recipient of investment from developing countries, whose investors are less familiar with Australia's investment environment (such as Australia's broader rules and regulations, corporate governance standards and market based economy) and the Australian community is less accustomed to these investors.

Agricultural investment

1.36 Until 1 March 2015, non-government business proposals were only screened if they were over the relevant threshold (\$252 million for most countries). Agricultural investment proposals (both land and businesses) were assessed under the general business screening arrangements. This meant that there was only screening of a small number of exceptionally large agricultural transactions that were above the \$252 million threshold.

1.37 The majority of the submissions received in response to the 25 February Options paper were from individuals and many raised concerns around foreign ownership of Australia's agricultural assets. While major stakeholders (peak bodies, business representatives, law firms and investors) generally noted the positive role foreign investment has in the agricultural industry, some also acknowledged the need to ensure that the community is supportive of foreign investment.

1.38 It is important to note that investments in agriculture can differ from other businesses. Investments in other business sectors tend to be self-contained. In contrast, the make-up of Australian farming businesses means that a non-government investor may acquire a number of parcels of agricultural land either in one area or across the country to build up their business, with each individual acquisition not screened.

1.39 The 2010-11 Australian Bureau of Statistics (ABS) Agricultural Census found that the majority of farms are small, with around a third covering less than 50 hectares (36 per cent), and 36 per cent covering between 50 and 500 hectares. There were a small number (100) of farms that each occupied more than 500,000 hectares — more than twice the land area of the Australian Capital Territory.¹¹

1.40 A search of agricultural land for sale indicates that a farm of 850 hectares with significant water access in Queensland can be bought for around \$2.5 million, while the same money in Tasmania can buy a farm of 200 hectares. While over 4000 hectares can be purchased in New South Wales for around \$7 million. A property of \$2.5 million is 1 per cent of the former threshold.

10 [UNCTAD World Investment Report 2014](#), United Nations Conference on Trade and Development (accessed 8 April 2015), page. xv.

11 [ABS 4102.0 — Australian Social Trends](#), Australian Bureau of Statistics, December 2012, accessed 31 March 2015.

1.41 Farming businesses accounted for 53 per cent of land use in Australia, with agricultural activity being undertaken on 410 million hectares of Australia's total land mass of 769 million hectares.¹²

1.42 The available data suggests that the vast majority of agribusinesses and farmland is Australian owned, and that foreign ownership of agricultural businesses and land has remained broadly the same between 2010 and 2013.

1.43 The ABS Agricultural Land and Water Ownership Survey (ALWOS) found that as at 30 June 2013:

- (i) 87.5 per cent of agricultural land was entirely Australian owned (compared with 88.6 per cent in 2010);
- (ii) 98.9 per cent of agricultural businesses in Australia were entirely Australian owned (compared with 98.5 per cent at 31 December 2010); and
- (iii) 85.8 per cent of water entitlements for agricultural purposes were entirely Australian owned (compared with 90.8 per cent in 2010).

1.44 While there is Commonwealth, state and territory government regulation of certain individual elements of foreign investment proposals (such as environmental approvals, competition, tax implications etc.), the foreign investment review framework provides the opportunity for a broader assessment of national interest concerns. The national interest test reflects a case-by-case assessment of these factors in reaching a balanced judgement on whether an investment proposal is contrary to the national interest.

1.45 To address broader community concerns about the agricultural sector, in December 2013 the Australian Government commissioned a White Paper to boost Australia's agriculture productivity and profitability. It undertook extensive public consultation in 2014, and produced an Agricultural Competitiveness Green Paper for public consultation in October 2014 to inform the White Paper. One area that consulted on was that of foreign investment in agricultural land and agribusiness.

1.46 The Agricultural Competitiveness Green Paper identified that the source of community perceptions that agricultural land has increasingly been acquired by foreign investors in a manner that is damaging to Australia's interests appear to have arisen because "*poor information on the extent, location and origin of foreign investment in Australian agriculture has constrained public debate around the issue of foreign direct investment*".¹³

1.47 Further, the Senate Standing Committees on Rural and Regional Affairs and Transport 2013 report *Foreign Investment and the National Interest* found that community concerns about investment in the agricultural sector exist due to:

- Opaqueness regarding the level of foreign ownership in agricultural land;
 - While the ABS ALWOS provides a periodic (three yearly) estimate of agricultural land ownership derived from business self-reporting, in addition to five yearly Agricultural Census data, political and community stakeholders have raised concerns with the frequency of information collection and the sample-based methodology. While

12 [7101.0 — Ag Mag — The Agriculture Newsletter](#), Australian Bureau of Statistics, December 2012.

13 Agricultural Competitiveness Green Paper 2014, <https://agriculturalcompetitiveness.dpmc.gov.au/key-documents> accessed 23 March 2015, page 49.

statistically robust, the ABS's collections have not been sufficient to appease community concerns regarding foreign ownership.¹⁴

- The relative lack of scrutiny applying to acquisitions of agricultural land and agribusinesses
 - Concerns have been raised that the current screening threshold of \$248 million¹⁵ results in only a small number of agricultural acquisitions being screened.¹⁶

1.48 Specifically in relation to the ABS data, the Senate Standing Committees on Rural and Regional Affairs and Transport said it was concerned that the ABS 'included a large number of very small farming enterprises in the sample selection' and that this 'significantly undermines the credibility of the survey'. It said that 'having an estimated value of agribusiness between \$5000 and \$125,000 is too low as it captures over half of the businesses surveyed'. The Senate Standing Committees on Rural and Regional Affairs and Transport said that this was because 'very small businesses are likely to be of little or no interest to foreign investors'.¹⁷

- (i) It also said that 'The absence of information in the survey about the value of agricultural land under foreign ownership further undermines the usefulness of the survey for determining the level of foreign investment in Australian agriculture'.
- (ii) That 'the self-reporting aspect of foreign ownership in the questionnaire undermines the veracity of the survey results as it clearly relies on the goodwill of companies to report foreign ownership'.¹⁸
- (iii) Finally, the Senate Standing Committees on Rural and Regional Affairs and Transport said that the specific issues above 'seriously undermine the value of the ABS survey in informing public debate about the levels of foreign investment in Australian agriculture'.¹⁹

1.49 While improved data collection was not a key consultation issue in the Options Paper process, several key agricultural stakeholders reiterated their advocacy for the timely implementation of a foreign ownership register. Similarly, while the Options Paper focussed on definitional issues rather than the proposed agriculture screening thresholds, several submissions noted the need to increase scrutiny of agriculture investment (though some submissions cautioned against overreach into non-agriculture industries).

1.50 The overall theme from submissions received from individuals on the Options Paper was that the proposed reforms in the Options Paper were a step in the right direction to restore integrity in the framework but the reforms did not go far enough in preventing foreign investment in the agricultural sector. While institutional stakeholders recognise the benefits of foreign investment in agriculture, the negative views of individual stakeholders suggest that concerns with transparency and scrutiny around foreign ownership are translating into negative community attitudes towards foreign investment.²⁰ While there is limited evidence to support claims that foreign investment in

14 Foreign Investment and the National Interest, Senate Standing Committees on Rural and Regional Affairs and Transport, 26 June 2013, Chapter 3.

15 This was the threshold at the time of the 2013 Senate report.

16 Foreign Investment and the National Interest, Senate Standing Committees on Rural and Regional Affairs and Transport, 26 June 2013, Chapter 5.

17 Foreign Investment and the National Interest, Senate Standing Committees on Rural and Regional Affairs and Transport, 26 June 2013, page 31.

18 Foreign Investment and the National Interest, Senate Standing Committees on Rural and Regional Affairs and Transport, 26 June 2013, page 38.

19 Foreign Investment and the National Interest, Senate Standing Committees on Rural and Regional Affairs and Transport, 26 June 2013, page 39.

20 This is supported by Lowy Institute Polls in recent years that suggest the majority of people do not approve of foreign investment in agricultural land. Visit [The Lowy Institute Poll](#) website.

the agricultural sector is having a detrimental impact on the national interest, there is potential for negative community attitudes to have a negative impact on the general foreign investment environment and reduce Australia's ability to attract much needed foreign investment.

1.51 The community concerns about the lack of transparency appear to be focused on the need to improve transparency around the aggregate levels of foreign ownership of agricultural land and the lack of scrutiny around agricultural investments (although there may be members of the community who would like to see greater transparency at the individual transaction level).

Lack of data on foreign ownership

1.52 More broadly than agriculture, the absence of available information on what foreign persons have purchased and how much of Australian land is actually held by foreign persons is further undermining the integrity and public confidence of the foreign investment framework.

1.53 The FIRB publishes annual approvals of foreign investment by sector and by source. The data shows the flow of intended total investment. However, it is not possible to ascertain how much approved investment gets realised and over what time period.²¹

- (i) According to the ABS in the 2013-14 financial year there were 418,484 housing finance commitments (excluding refinancing of existing loans).²²
- (ii) In comparing the foreign investment proposals considered by FIRB with the ABS data, the level of foreign investment in the residential real estate sector represents around 6 per cent of this number. It is important to note though that as FIRB only collects approvals and not actual purchases of properties this number may be overstated.

1.54 The ABS also publishes aggregated data separately on net investment flows by country and by sector (separately — it is not possible to breakdown a particular country's investment by sector).²³ However, the ABS provides an overall picture of foreign investment rather than detailed information on individual investments or localised trends.

1.55 On 24 April 2010, the then Assistant Treasurer, the Hon Senator Nick Sherry MP, announced the reintroduction of the requirement for temporary residents to seek foreign investment approval prior to acquiring residential real estate in Australia.²⁴ The requirement for temporary residents to seek foreign investment approval to purchase residential real estate was removed in March 2009.²⁵

1.56 One of the reasons for reintroducing the requirement for temporary residents to seek foreign investment approval to acquire residential real estate was to address concerns at the time about the lack of transparency and available data around foreign investment activity in Australia's residential real estate sector.

1.57 While the reintroduction of the requirement for temporary residents to seek foreign investment approval has provided transparency, in that investments in the residential real estate sector by temporary residents are now screened against the national interest, this change has not

21 Foreign investment in Australian Agriculture, Kali Sanyal, Parliamentary Library Research Paper, 18 February 2014, [www.aph.gov.au/About Parliament/Parliamentary Departments/Parliamentary Library/pubs/rp/rp1314/ForeignInvest](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1314/ForeignInvest), accessed 20 March 2015.

22 ABS Catalogue 5609.0 Housing Finance

23 ABS Catalogue 5302.0 and 5352.0.

24 Press release: *Government Tightens Foreign Investment Rules for Residential Housing*, The Hon Nick Sherry, Assistant Treasurer, 24 April 2010, <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2010/074.htm&pageID=&min=njsa&Year=&DocType=0>.

25 Foreign Acquisitions and Takeovers Legislation Amendment Regulations 2009 (No. 1), 27 March 2009.

facilitated data on the actual extent of foreign ownership in this sector. This is because the data presented in the FIRB Annual Report only reflects the number of foreign investment approvals and not all approvals translate into an actual purchase of property.

1.58 The House of Representatives Standing Committee on Economics reported that it:

... does not have confidence in the integrity of the current FIRB data on foreign investment in residential real estate. This lack of accurate and timely data represents a fundamental deficiency preventing proper understanding and analysis of the impact of foreign investment on the Australian real estate market.²⁶

1.59 The House of Representatives Standing Committee on Economics also found that a lack of reliable data has further eroded public confidence in the framework, and that to maintain and restore confidence significant improvements need to be made.²⁷

1.60 The lack of reliable data also impedes identification of the size and scope of the problem of identifying how much non-compliance exists with the foreign investment rules.

Residential real estate investment

1.61 Australia's foreign investment policy as it applies to residential real estate aims to increase Australia's housing stock. Foreign investment applications are considered in light of this overarching principle.

1.62 For foreign investment in residential real estate, the national interest test is prescriptive. Foreign persons will generally be granted approval to purchase new dwellings on the basis that such investment adds to Australia's housing stock. This includes purchases of dwellings off-the-plan, before construction commences. These types of purchases can considerably contribute to developers being able to commence construction.

1.63 For established dwellings, generally only temporary residents will be approved to purchase these properties. Only one established dwelling may be purchased by a temporary resident and it must be used as their place of residence in Australia. Foreign investment approval is normally given subject to conditions, including that the temporary resident sells the property within three months of it ceasing to be their primary residence. Established dwellings are unable to be used as rental properties or holiday homes.

1.64 Consistent with the policy objective of increasing the housing stock, more screening emphasis is generally placed on applications from temporary residents to purchase established residential property. These applicants are required to affirm their residency status, with this information validated against official sources. Investors are required to declare their property usage intentions, in line with the requirement that temporary residents must live in established properties they purchase and sell them when they depart Australia.

1.65 Until 4 May 2015, Treasury was responsible for compliance around the residential real estate rules. Compliance activities comprised a combination of pre-approval checking of applications, post-approval reviews, information resource building, consultation and investigation activities.

26 Report on Foreign Investment in Residential Real Estate, House of Representatives Standing Committee on Economics, 27 November 2014, page 64.

27 Report on Foreign Investment in Residential Real Estate, House of Representatives Standing Committee on Economics, 27 November 2014, page 36.

1.66 However, there were limited information sources available to Treasury that could be used to systematically identify non-compliant property acquisitions and it was difficult to prevent such transactions from proceeding. In this context, Treasury used a compliance framework that placed emphasis on information and education initiatives, supported where necessary by more active measures to encourage foreign investor compliance.

1.67 For example, a dedicated compliance hotline has operated since 2010. Information provided to the hotline was used to initiate follow-up investigations where appropriate. Relevant purchases identified in the media were also examined. Information sessions with real estate agents were conducted periodically in metropolitan centres.

1.68 Where conditions were imposed on approved purchases, the relevant properties were monitored to ensure the conditions are adhered to. Treasury made regular use of external data sources to support its compliance activities, such as the Department of Immigration and Border Protection's online visa record system, fee-based property ownership searches and statistical databases provided under licence by external agencies.

1.69 Treasury worked with applicants to resolve many compliance-related concerns and in examining proposals, the applicant's compliance with any conditions relating to past proposals was taken into account.

1.70 Currently, only divestment orders and criminal penalties apply for breaches of the Act. Criminal penalties are difficult to pursue due to the high burden of proof required. While existing measures were previously considered effective for managing screening and compliance for the comparatively low volume of residential real estate investments, the recent surge of residential real estate investment, coupled with strong housing market activity in major cities like Sydney and Melbourne, has led to community concerns with the integrity of the foreign investment rules. Other mechanisms such as civil pecuniary penalties would provide an extra enforcement tool and make it easier to pursue punishment for breaches of the framework.

1.71 The 2013-14 Annual Report FIRB approval data shows a significant increase in approvals for proposed purchases in the residential real estate sector. In 2013-14, FIRB approved 7,915 acquisitions of established dwellings compared with 5,091 in 2012-13. For new dwellings, in 2013-14, FIRB approved 11,338 new dwelling acquisitions compared to 4,499 in 2012-13. The significant increase in approvals for residential real estate is likely to be contributing to the increased community concern that exists about foreign investment in residential real estate. Approved proposed investment in real estate was \$74.6 billion in 2013-14, compared with \$51.9 billion in 2012-13. Further significant growth is expected for 2014-15.

Table 1.1: Investment in residential real estate by type of approval and number of proposals approved: 2010-11 to 2013-14²⁸

	2010-11		2011-12		2012-13		2013-14	
	No.	\$b	No.	\$b	No.	\$b	No.	\$b
Residential								
Developed								
- existing residential property	3,881	3.57	3,952	2.87	5,091	5.42	7,915	7.17
- annual programs	4	0.20	5	1.30	10	0.94	5	0.35
<i>Sub-total 'Developed'</i>	<u>3,885</u>	<u>3.77</u>	<u>3,957</u>	<u>4.18</u>	<u>5,101</u>	<u>6.36</u>	<u>7,920</u>	<u>7.51</u>
For development								
- vacant land	1,514	2.33	1,518	0.68	1,821	1.39	3,150	1.74
- new dwellings								
- individual purchases	3,911	2.46	4,022	2.54	4,499	2.91	11,338	7.72
- developer 'off-the-plan'	65	10.08	70	10.92	50	5.73	103	16.38
<i>Sub-total 'new dwellings'</i>	<u>3,976</u>	<u>12.54</u>	<u>4,092</u>	<u>13.46</u>	<u>4,549</u>	<u>8.64</u>	<u>14,591</u>	<u>25.85</u>
- redevelopment	171	0.45	191	0.50	189	0.36	534	0.79
- annual programs	10	1.83	10	0.89	8	0.41	9	0.57
<i>Sub-total 'For development'</i>	<u>5,671</u>	<u>17.15</u>	<u>5,811</u>	<u>15.52</u>	<u>6,567</u>	<u>10.80</u>	<u>15,134</u>	<u>27.20</u>
Total residential	9,556	20.92	9,768	19.70	11,668	17.16	23,054	34.72

Note: Totals may not add due to rounding

1.72 In March 2014, recognising increasing community concerns, the Government asked the House of Representatives Standing Committee on Economics to inquire into foreign investment in residential real estate. It tabled its report to Parliament in November 2014.

1.73 The House of Representatives Standing Committee on Economics report highlighted no enforcement activities regarding foreign investment in residential real estate through the courts occurred since 2006 and that only 17 divestment orders had been issued since 2003. It also noted that no data could be provided on voluntary divestments by foreign investors.

1.74 From submissions and testimonies to the House of Representatives Standing Committee on Economics it was clear that ongoing concerns about possible non-compliance undermine public confidence in the entire foreign investment framework, and its ability to track those that are bypassing the system.

- (i) Submissions to the Options Paper indicate a desire by the community to increase transparency about the aggregate levels of foreign ownership of residential real estate.
- (ii) Some submissions received (particularly from individuals) also reflected the view that Australia's national interest would be better served by preventing foreign investment in residential real estate altogether.

1.75 Given the beneficial role that foreign investment plays in the Australian economy, there is a need to ensure that the community has confidence in Australia's foreign investment framework to effectively screen investments to ensure they are in the national interest.

Modernisation

1.76 The complex legislation underpinning the foreign investment framework has changed little since it was introduced in 1975. Overall the framework (not its fundamental principles but how it technically captures foreign persons to be screened) is not well aligned with other regulatory regimes, such as Australia's takeovers regime. The Act also contains obsolete provisions, as well as provisions that do not promote investor certainty or consistency in the application of the review framework.

²⁸ Foreign Investment Review Board Annual Report 2013-14, May 2015, page 28.

1.77 The current penalty provisions were introduced in the late 1980s and have not been amended since then. The current penalty regime contains only criminal penalties, requiring a very high burden of proof before a case can be pursued.

1.78 The introduction of new and different thresholds through free trade agreements has also added complexity to the framework because different rules can apply depending on the origin of the investor.

- (i) Maintaining an effective foreign investment framework is crucial for Australia to be able to attract the high levels of foreign investment needed. The framework and its Act must continue to ensure:
- (ii) that the Treasurer has the necessary powers to protect Australia's national interests and maintain public confidence;
- (iii) regulatory costs for foreign investors are minimised; and
- (iv) to provide certainty about the consistency of the foreign investment and regulatory framework of Australia.

Summary

1.79 While Australia's foreign investment framework has generally worked well, the community is increasingly concerned that the framework is not sufficiently equipped to deal with changing global investment patterns that have resulted in a significant increase in the level of foreign investment into the Australian economy.

1.80 In addition, a lack of data on the levels of foreign ownership in the agricultural and residential real estate sectors has made it difficult to maintain community confidence in the foreign investment framework. It has also limited the ability of Government to identify how much non-compliance with the framework currently exists.

1.81 To ensure that Australia is able to continue to attract the high inflows of foreign investment that it requires, the community needs to be convinced that foreign investment is in the national interest and that foreign investors are complying with the rules.

- (i) A stronger level of compliance and enforcement as well as changes to the framework, are necessary to improve the integrity and community acceptance of the system.

The case for government action

1.82 Perceptions of unscrutinised foreign ownership of Australia's agricultural sector, and of a lack of compliance with foreign investment in residential real estate rules are affecting the integrity of the overall foreign investment framework.

1.83 Australia needs to continue to attract high levels of foreign investment. The Financial System Inquiry found that 'Australia is, and is likely to continue to be, a substantial net importer of capital'. It also found that Australia has 'significant endowments of natural resources that cannot be fully utilised without foreign investment'.²⁹

1.84 In order for Australia to continue to attract high levels of foreign investment, the foreign investment framework needs to maintain its integrity, collect and disseminate relevant data and have a solid legal framework to ensure that both investors and the community have confidence in it.

²⁹ *Financial System Inquiry Final Report*, November 2014, page 2.

1.85 Foreign investment in the agricultural sector has long made an important contribution in supporting economic growth, jobs and prosperity and can assist in expanding Australia's production capacity. In residential real estate, Australia's foreign investment framework has aimed to channel investment into new housing, assisting in increasing the supply of housing and supporting broader economic activity. It is important to maintain the Australian community's confidence in the foreign investment framework's ability to appropriately screen and assess foreign investment proposals against the national interest. This includes having a system that is easily understandable by both the community and investors.

1.86 Without comprehensive information about the extent of foreign ownership of agricultural land and limited scrutiny of investment proposals by privately-owned foreign investors, it is difficult to placate community concerns and for there to be an informed public debate on these matters. There is a risk that, if not addressed, these concerns will continue to undermine community confidence in the benefits of foreign investment.

1.87 This, in turn, may undermine broad community support for, and openness to, foreign investment, potentially creating pressure for increased restrictions on foreign investment and reducing Australia's attractiveness to foreign investors.

1.88 The House of Representatives Standing Committee on Economics Report acknowledged that there are concerns in parts of the community that policies allowing foreign investment in residential real estate are not benefitting Australians because they make housing less affordable.³⁰ There is also community concern that foreign investors are by-passing the framework.

1.89 The House of Representatives Standing Committee on Economics found that better information about foreign investment in residential real estate would go a substantial way to addressing these community concerns:

Better processes and better data collection within the Treasury and FIRB in the future will enable better reporting and engender greater confidence among policymakers, and the public at large, that this system is beneficial and is working effectively.³¹

1.90 Government action can improve the integrity of the system by ensuring that there are suitable resources to undertake compliance and enforcement activities and clarifying what is and is not required to be screened in order to support both community and investor confidence in the framework.

1.91 Improved data collection, aggregated dissemination of data and data matching will improve transparency about the foreign investment framework. This will help increase understanding in the community of the framework and support informed debate about the role of foreign investment in Australia's economy. Capturing and matching of data is within government control.

1.92 Modernising the Act is the responsibility of Government. The Act is somewhat outdated in community and business expectations of Australian legislation. Updating the Act to make it easier for stakeholders to navigate, providing greater certainty to investors and removing cases from the framework which do not raise national interest concerns would help to modernise the framework and reduce unnecessary regulation on business.

30 Report on Foreign Investment in Residential Real Estate, House of Representatives Standing Committee on Economics, 27 November 2014, page 84.

31 Report on Foreign Investment in Residential Real Estate, House of Representatives Standing Committee on Economics, 27 November 2014, page 37.

1.93 The framework must continue to ensure that the Treasurer has the necessary powers to protect Australia's national interests and maintain public confidence in the foreign investment regime, while minimising regulatory costs and disincentives for foreign investors.

Policy options³²

Options already in place

1.94 A number of the proposed options considered by Government have already commenced. These are summarised below.

Reduce the screening threshold for agricultural land from \$252 million to \$15 million cumulative

1.95 On 11 February 2015, the Government announced that it would lower the screening threshold for agricultural land to a \$15 million cumulative threshold from 1 March 2015. This was consistent with its election commitments.³³

1.96 To give early effect to implementation of the lower threshold, the Government relied on the existing definition of 'rural land' as an interim definition of 'agricultural land' pending further consultation on an appropriate definition. Details on the outcomes of this consultation are outlined in paragraphs 1.116 and 1.117.

1.97 Prior to the formal consideration of implementation options, the Government clearly articulated its policy that it would implement the lower agricultural land threshold changes to the extent possible given existing free trade agreement commitments.

1.98 Australia's commitments in trade agreements bind if and how far Australia can lower the foreign investment screening threshold. In particular, in relation to agricultural investments, whether the lower screening threshold could apply to a foreign investor will depend on whether Australia has a trade agreement with that country and what that agreement provides for. Different thresholds will apply depending on what country an investor is from.

1.99 Consistent with Australia's free trade agreement commitments the cumulative \$15 million threshold applies to all private investors except those from the United States, New Zealand, Chile, Singapore, Thailand, Japan, Korea and China. Foreign government investors would continue to be screened at the \$0 threshold for investments in agricultural land.

- (i) United States, New Zealand and Chilean investors would require prior approval to acquire an interest in agricultural land valued above \$1,094 million;
- (ii) Singaporean and Thai investors would require prior approval if acquiring a substantial interest in a primary production business valued above \$50 million; and
- (iii) Japanese, Korean and Chinese investors would require prior approval to acquire an interest in agricultural land valued above \$15 million.

1.100 This Regulation Impact Statement does not consider implementation options that would require the renegotiation of free trade agreement commitments.

32 At the time of publication of the RIS, the Government has already started to implement aspects of the reform package (such as the lower \$15 million cumulative screening threshold for agricultural land from 1 March 2015, the agricultural land foreign ownership register from 1 July 2015 and the transferral of compliance and enforcement activities around residential real estate to the ATO from 4 May 2015).

33 Government tightens rules on foreign purchases of agricultural land, 11 February 2015, the Hon Joe Hockey MP media release, <http://jbh.ministers.treasury.gov.au/media-release/005-2015/>.

Undertake a stocktake of agricultural land and introduce a foreign ownership register of all land

1.101 There is no definitive data source showing how much Australian land is owned by foreigners. Treasury only collects data on approvals of applications submitted to it, which are published in the FIRB Annual Report. It does not track whether an approval translated into an acquisition or a subsequent disposal of a property.

1.102 On 1 July 2015, the Government introduced a foreign ownership register of land, leveraging existing state and territory land titles collections. The register is administered by the ATO. When fully operational, the register will capture all land transfers to and from foreign persons, regardless of whether the land is agricultural, commercial or residential.

1.103 States and territories already require a significant amount of data as part of the transfer of property process that can be used to form the basis of the national register. These include the lot number, name of purchaser, address and contract date.

1.104 The Government is currently negotiating with states and territories to leverage from their existing state and territory land title collects to establish the all land register. In the interim, the Government has established a foreign ownership register which collects existing and new acquisitions of agricultural land by foreign persons. The register commenced on 1 July 2015.³⁴

1.105 The ATO is undertaking a stocktake of foreign persons with existing holdings of agricultural land. Foreign persons are required to notify the ATO of existing interests of agricultural land before 31 December 2015. Foreign persons are required to notify new acquisitions of interests in agricultural land within 30 days to the ATO.

1.106 The ATO will collect information such as the location and size of property and size of interest acquired on new foreign investment in agricultural land to develop a national register. Aggregate data will be made available to the public from the first half of 2016.

1.107 The register collecting data on the foreign ownership of agricultural land directly from investors will remain in place until land title data from the states and territories can be provided to the ATO. From 1 July 2016 it is expected that the register would include information on all land types with data to be supplied from the states and territories. There is no proposal to conduct a stocktake of existing foreign ownership of other types of land.

ATO to undertake screening and compliance

1.108 The role of screening residential real estate applications and undertaking compliance and enforcement of the foreign investment framework began transferring from Treasury to the ATO on 4 May 2015.

1.109 A new, dedicated compliance and enforcement area is being established within the ATO, which already tracks compliance of a range of property transactions. This new unit will undertake compliance, investigation and enforcement activities by utilising specialist, experienced staff to systemically detect breaches of conditions on foreign purchases of residential real estate and enforce compliance through the imposition of penalties.

34 Further information is available at <http://jbh.ministers.treasury.gov.au/media-release/066-2015/> and www.ato.gov.au/general/Foreign-investment-in-Australia/agricultural-land-register/.

Options under consideration

Option 1: No change

1.110 This option would see the existing foreign investment framework (including the measures which have already commenced) being maintained. The focus on the upfront approval process would form the basis of enforcement and compliance. This would mean a continued limited capacity to detect foreign persons who avoid the foreign investment approval process.

1.111 This option would also mean that there would continue to be no application fees for foreign investment proposals. There would not be any additional revenue to fund increased compliance and enforcement activities.

1.112 The current criminal penalty framework would remain available for pursuing breaches of non-compliance.

Option 2: Agricultural land definition changes

Option 2A: Definition based on 'rural land'

1.113 The term 'agricultural land' is not currently used in the foreign investment framework. Currently the Act categorises Australian land as being either 'urban land' or 'rural land'. 'Rural land' is defined as 'land used wholly and exclusively for carrying on a business of primary production'.

1.114 Option 2A would define 'agricultural land' as 'rural land' for the purposes of the new threshold, utilising the long-standing and well understood definition under Australia's foreign investment framework.

Option 2: Definition reflecting commonly understood concept

1.115 This option proposes defining agricultural land with reference to exclusive ongoing use as a primary production business does not capture land used for multiple purposes or land that is suitable but not currently used for agriculture.

1.116 Option 2B therefore proposes defining agricultural land as 'land used, or that could reasonably be used, for a primary production business' (primary production business is defined under the *Income Tax Assessment Act 1997*).

Option 3: Introducing a screening threshold for agribusiness

1.117 Currently, foreign investment approval is required to acquire an interest of 15 per cent or more in any business valued at over \$252 million (including agribusinesses). There is currently no definition of 'agribusiness' in the Commonwealth statute.

1.118 To deliver on its election commitment, the Government has announced its intention to introduce a new \$55 million screening threshold for non-government investments in agribusiness, subject to consultation on an appropriate definition of 'agribusiness'.³⁵ All proposed direct investments by foreign government investors, including in agriculture, would continue to be reviewed regardless of value.

35 Government to strengthen Australia's foreign investment framework, 25 February 2015, joint media release the Hon Tony Abbott MP and the Hon Joe Hockey MP, <http://jbh.ministers.treasury.gov.au/media-release/008-2015/>.

1.119 This option considers three alternatives for implementing the commitment, including one option that would retain the status quo (\$252 million) for agribusinesses that are not captured by the definition of agricultural land and two options for introducing a separate \$55 million threshold with different definitions of agribusiness.

1.120 Prior to the formal consideration of implementation options, the Government clearly articulated its policy that implementation of a lower agribusiness threshold would be to the extent possible given existing free trade agreement commitments. This Regulation Impact Statement therefore does not consider implementation options that would require the renegotiation of free trade agreement commitments.

1.121 United States, New Zealand and Chilean investors will continue to only require approval if acquiring a substantial interest in an agribusiness valued above \$1,094 million. The proposed agribusiness threshold would apply to all other countries.

Option 3A: Retain the status quo for 'agribusinesses' beyond the farm gate

1.122 Option 3A would retain the existing general business threshold (\$252 million or \$1,094 million for certain free trade agreement partners) for the screening of agribusinesses that are not otherwise screened as 'agricultural land'.

1.123 This reflects that both the current and prospective definitions of 'agricultural land' (options 2A and 2B refer), for which a \$15 million cumulative screening threshold would apply, are based on land used for operating a primary production business. As a result, agribusinesses within the farm gate (directly involved in a business of primary production) would already be captured by the \$15 million cumulative threshold, substantially reducing the need for a separate \$55 million 'agribusiness threshold'.

1.124 For ease of comparison, Option 3A would be similar in scope to defining agribusiness with reference to the sectors captured by Division A of the Australian and New Zealand Standard Industrial Classification (ANZSIC) Codes.

Option 3B: \$55 million threshold with a definition based on ANZSIC codes

1.125 Option 3B would introduce a \$55 million threshold for agribusiness that captures primary production businesses and certain first stage downstream manufacturing businesses (including meat, poultry, seafood, dairy, fruit and vegetable processing and sugar, grain and oil and fat manufacturing) via reference to the ANZSIC Codes.

Option 3C: \$55 million threshold with a definition based on predominant income derived from primary production business

1.126 Option 3C would also introduce a \$55 million threshold for agribusiness that captures certain downstream businesses beyond the farm gate.

1.127 However, this option provides an alternative approach, based on suggestions by stakeholders, which would define agribusiness beyond the farm gate on the basis of business income and relatedness to primary production.

Agribusiness would be defined as 'a business whose income predominantly derives from the production, processing or transformation of commodities produced by primary production businesses.'

Option 4: Introduction of application fees

1.128 Currently, no fees apply to foreign investment applications. Under this option, the Government would seek to charge a fee on all foreign investment applications to fund screening, compliance and enforcement activities and improved data collection on foreign investment.

- (i) Fees would apply to both residential real estate applications and all business foreign investment proposals.

1.129 The proposed fees are listed in the table below. Foreign investors would be required to pay the application fee before their foreign investment application is processed. The 30 day statutory time period for assessing the application would begin after payment is received.

1.130 For auctions, the eligible foreign person would seek approval to purchase one established property in a specified area. An approval would then be valid for 6 months, but only for purchases within the area for which they have sought approval. The fee will only be charged once in this instance. This is consistent with the rules that currently apply to the purchase of residential real estate as it will only allow one property to be purchased. This will remove the need for foreign investors to lodge multiple applications to bid in various auctions in an area.

Table 2: Proposed fee schedule for foreign investment applications

Sector	Type of investment	Application fees from 1 December 2015 (indexed by CPI on 1 July)
Residential ³⁶	Residential properties valued at \$1 million or less	\$5,000
	Residential properties valued at greater than \$1 million	\$10,000 then \$10,000 incremental fee increase per additional \$1 million in property value
	Advanced off-the-plan certificates	\$25,000 upfront, with a six monthly reconciliation of properties sold to foreign persons based on rates above
Business	Commercial real estate	\$25,000
	Business acquisitions in non-sensitive sectors	\$25,000
	New business proposals	\$10,000
	Any other interest in urban land (except residential real estate)	\$10,000
	Business acquisitions in sensitive sectors ³⁷	\$25,000
	Business acquisitions where the value of the transaction is greater than \$1 billion.	\$100,000 (based on the value of the transaction)
	Internal re-organisations	\$10,000

³⁶ In instances where a foreign investor is seeking multiple approvals to bid at auctions, a 6 months general approval period will be given to them to participate in an auction to purchase one property. This would alleviate the need for bidders to pay multiple application fees.

³⁷ The prescribed sensitive sectors are: media; telecommunications; transport; defence and military related industries; and the extraction of uranium or plutonium or the operation of nuclear facilities.

Sector	Type of investment	Application fees from 1 December 2015 (indexed by CPI on 1 July)
Agriculture	Rural land valued at \$1 million or less	\$5,000
	Rural land valued at greater than \$1 million	\$10,000 incremental fee per \$1 million in rural land value, capped at \$100,000
	Investments in agribusinesses	\$25,000 or \$100,000 for agribusiness acquisitions where the value of the transaction is greater than \$1 billion
Annual program	Annual programs for land interests	\$25,000 or \$100,000 where proposed investment is greater than \$1 billion

Option 5: Penalties and enforcement

1.131 Currently, only divestment orders and criminal penalties apply for breaches of foreign investment rules under to the Act. The maximum penalty that can be applied by a Court to individuals on conviction of a breach (such as failing to obtain approval or comply with a condition of approval) is a fine of up to 500 penalty units (\$90,000), imprisonment of two years or both. In the case of a corporation, a multiplier of five applies to the maximum fine for an individual.

1.132 Enforcing breaches under the current criminal penalty framework requires a high burden of proof and may involve lengthy court proceedings. There is currently no civil penalty regime for breaches of the Act.

1.133 This option considers introducing a civil pecuniary penalties regime, supported by an infringement notice regime. Divestment orders would still be available, but in addition the Government would have the option to pursue either criminal penalties or civil penalties through the courts. This option also considers increasing the level of the current criminal penalties but not changing the offences to which they apply.

- (i) These penalties are proposed to provide an additional compliance and enforcement tool for the investment framework, enhancing the Government's ability detect and deal with breaches.

1.134 Foreign investors who breach the Act would be subject to civil pecuniary penalties. Civil pecuniary penalties would be introduced for those breaches in the Act to which criminal penalties already apply. Introducing civil pecuniary penalties would make it faster and simpler for court action to be undertaken as the burden of proof is the balance of probabilities, lower than the standard for criminal offences.

1.135 The civil penalties would be supported by an infringement notice regime that would apply to more minor breaches and provide an additional tool to enforce the Act.

1.136 Currently, the Criminal Code makes it an offence where a person knowingly assists another person to commit a criminal offence. Similarly, the *Regulatory Powers (Standard Provisions) Act 2014* makes it a breach where a person knowingly assists another person to breach a civil penalty provision. Under this option, it is also proposed that the Act make it clear that the Criminal Code offence and Regulatory Powers breach applies to third parties that knowingly assist foreign investors to breach the rules.

Table 3: Proposed new penalty arrangements

Breach of current rule	Proposed new penalties
<p>Foreign person acquires new property without approval (approval would normally have been granted)</p> <p>Temporary resident acquires established property without approval (approval would normally have been granted)</p>	<p>There is currently no civil pecuniary penalty or infringement notice regime under the Act for these breaches.</p> <p>Increased criminal penalty</p> <p>Maximum criminal penalty of</p> <ul style="list-style-type: none"> • Individual — 750 penalty units (\$135,000) or 3 years imprisonment. • Company — 3,750 penalty units (\$675,000). <p>Civil penalty</p> <p>Maximum civil penalty is the greater of the following:</p> <ul style="list-style-type: none"> • 10 per cent of purchase price in addition to the relevant application fee; or • 10 per cent of market value of the property in addition to the relevant application fee. <p>Tier 1 Infringement notice — Voluntary complied by coming forward</p> <ul style="list-style-type: none"> • Individual — 12 penalty units (\$2,160) plus the relevant application fee. • Company — 60 penalty units (\$10,800) plus the relevant application fee. <p>Tier 2 Infringement notice — Identified through compliance activities</p> <ul style="list-style-type: none"> • Individual — 60 penalty units (\$10,800) plus the relevant application fee. • Company — 300 penalty units (\$54,000) plus the relevant application fee. <p>Either an infringement notice or civil penalty would be sought but not both.</p>
<p>Non-resident acquires established property or temporary resident acquires more than one established property (not normally approved)</p> <p>Temporary resident fails to sell established property when it ceases to be their principal residence (breach of conditional approval)</p> <p>Temporary resident rents out an established property (breach of conditional approval)</p> <p>Failure to begin construction within 24 months without seeking extension (breach of conditional approval of vacant land/redevelopment applications)</p>	<p>There is currently no civil pecuniary penalty under the Act for these breaches.</p> <p>Increased criminal penalty</p> <p>Maximum criminal penalty of:</p> <ul style="list-style-type: none"> • Individual — 750 penalty units (\$135,000) or 3 years imprisonment. • Company — 3,750 penalty units (\$675,000). <p>Civil penalty</p> <p>Maximum civil penalty is the greater of the following:</p> <ul style="list-style-type: none"> • the capital gain made on divestment of the property; • 25 per cent of purchase price; or • 25 per cent of market value of the property.

Breach of current rule	Proposed new penalties
<p>Developer fails to market apartments in Australia (breach of advanced-off-the-plan certificate)</p>	<p>There is currently no civil pecuniary penalty or criminal penalty under the Act for this breach.</p> <p>Criminal penalty Maximum criminal penalty of:</p> <ul style="list-style-type: none"> • Individual — 750 penalty units (\$135,000) or 3 years imprisonment. • Company — 3,750 penalty units (\$675,000). <p>Civil penalty Maximum civil penalty of:</p> <ul style="list-style-type: none"> • Individual — 250 penalty units (\$45,000) • Company — 1,250 penalty units (\$225,000)
<p>Property developer fails to comply with reporting conditions associated with approval (breach of advanced-off-the-plan certificate)</p> <p>Foreign person fails to comply with reporting condition which requires them to notify of actual purchase and sale of established properties (a new rule)</p>	<p>There is currently no civil pecuniary penalty or infringement notice regime under the Act for these breaches.</p> <p>Civil penalty Maximum civil penalty of:</p> <ul style="list-style-type: none"> • Individual — 250 penalty units (\$45,000) • Company — 1,250 penalty units (\$225,000) <p>Tier 1 Infringement notice — Voluntary complied by coming forward</p> <ul style="list-style-type: none"> • Individual — 12 penalty units (\$2,160) plus the relevant application fee. • Company — 60 penalty units (\$10,800) plus the relevant application fee. <p>Tier 2 Infringement notice — Identified through compliance activities</p> <ul style="list-style-type: none"> • Individual — 60 penalty units (\$10,800) plus the relevant application fee. • Company — 300 penalty units (\$54,000) plus the relevant application fee. <p>Either an infringement notice or civil penalty would be sought but not both.</p>
<p>Third party assists foreign investor to breach rules</p>	<p>There is currently no civil pecuniary penalty under the Act for knowingly assisting breaches of the Act.</p> <p>Civil penalty Knowingly assisting another person to contravene a civil penalty provision is a breach of the <i>Regulatory Powers (Standard Provisions) Act 2014</i>. The maximum civil penalty is the same as the primary breach.</p> <p>Criminal penalty Knowingly assisting another person to commit a criminal offence is an offence under section 11.2 of the Criminal Code (maximum penalty is the same as the primary offence).</p>

Table 4: Penalties for breaches of rules which apply to the business and agriculture sectors

Breach of current rule	Proposed new penalties
<p>Foreign person makes an acquisition without approval (approval would normally have been granted)</p>	<p>Increased criminal penalty Maximum criminal penalty of</p> <ul style="list-style-type: none"> • Individual — 750 penalty units (\$135,000) or 3 years imprisonment. • Company — 3,750 penalty units (\$675,000). <p>Civil penalty Maximum civil penalty of:</p> <ul style="list-style-type: none"> • Individual — 250 penalty units (\$45,000) • Company — 1,250 penalty units (\$225,000)
<p>Foreign person fails to comply with a condition of approval</p>	<p>Increased criminal penalty Maximum criminal penalty of</p> <ul style="list-style-type: none"> • Individual — 750 penalty units (\$135,000) or 3 years imprisonment. • Company — 3,750 penalty units (\$675,000). <p>Civil penalty Maximum civil penalty of:</p> <ul style="list-style-type: none"> • Individual — 250 penalty units (\$45,000) • Company — 1,250 penalty units (\$225,000)

Option 6: Information campaign

1.137 This option considers the Government conducting a targeted communication campaign to inform the community about the benefits of foreign investment and to outline how the foreign investment framework screens proposed investments to protect Australia’s national interest.

Option 7: Increased and improved ABS survey of agricultural land

1.138 This option proposes that the ABS be tasked to conduct a census of the land and water holdings of all foreign owners every two years. This option would seek to address the concerns about the lack of data about the level of foreign investment in Australian agricultural land and businesses.

1.139 A biennial ABS census of all foreign-owned land and water holdings would operate similarly to the existing ALWOS census surveys, but would take place every two years.

1.140 The ABS has existing procedures for the handling and protection of private and commercially sensitive information, and established mechanisms for maximising compliance and data integrity.

1.141 The results would be published in accordance with the *Census and Statistics Act 1905*.

Option 8: Modernising and simplifying the foreign investment framework

1.142 While some amendments have been made over time to respond to particular developments and priorities, the Act has not undergone a major update since it was introduced in the 1970s.

1.143 Further, the rules underpinning the framework are overly complex and do not promote investor certainty. There are also asymmetrical screening outcomes depending on the nature of the target or how the transaction is structured.

1.144 The Government proposes a number of changes to the screening framework's legislation and associated regulations to modernise and simplify the system and remove less sensitive transactions that are unlikely to raise national interest concerns. There would also be drafting changes to simplify the current Act and better reflect administrative practices.

1.145 The proposed changes would reduce compliance costs for both investors and the Government. The measures are also consistent with the Government's deregulation commitment and commitment to create an investment environment that is open for business. They would largely offset the increased regulatory burden that would arise from lowering the screening thresholds for agricultural investments, introducing a stocktake requirement for agricultural land register and introducing application fees.

1.146 The proposed options are set out in the Options Paper on Modernising Australia's foreign investment framework³⁸ (Modernisation Paper) and include:

- (i) incorporating the additional Policy only requirements into the legislative framework;
- (ii) addressing legal risks to the framework by legislating to allow applicants to voluntarily agree to extend the screening period, allow the Treasurer to impose conditions if foreign investors fail to notify, and issue exemption certificates with legally enforceable conditions; and
- (iii) amending the legislation so that it equally applies irrespective of the transaction structuring.

1.147 Other options include:

- (i) increasing the control threshold for a single foreign person from 15 to 20 per cent;
- (ii) allowing entities with their primary listing on an Australian securities exchange to disregard non substantial holdings when applying the foreign person definition (i.e. holdings below the 5 per cent market disclosure trigger); and
- (iii) abolishing the special screening requirements for heritage listed commercial developed property.

1.148 The Modernisation package was put forward in the Modernisation Paper which went out for public consultation between 18 May 2015 and 29 May 2015. As a result of submissions received in the consultation process, a revised package was agreed by the Government and is available on the [FIRB website](http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2015/Modernising-Australias-foreign-investment-framework). The package will be implemented through the *Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015* and its associated Regulations.

³⁸ *Modernising Australia's foreign investment framework*, www.treasury.gov.au/ConsultationsandReviews/Consultations/2015/Modernising-Australias-foreign-investment-framework.

Cost benefit analysis of each option/impact analysis

Options with no regulatory impacts

1.149 The following cost benefit analysis examines the proposed changes to the foreign investment framework. Treasury's assessment is that the impact of application fees, increased penalties and enhanced compliance and enforcement will not significantly reduce Australia's attractiveness as a desirable destination for foreign investment as investment decisions are based on a broad range of factors.

Options already in place

ATO to undertake screening and compliance

1.150 The role of screening residential real estate applications and of compliance and enforcement of the foreign investment framework began moving to the ATO on 4 May 2015. Previously the Foreign Investment and Trade Policy Division in Treasury was responsible for screening all residential real estate applications, as well as all compliance and enforcement activities concerning the foreign investment framework.

1.151 The House of Representatives Standing Committee on Economics found that the Foreign Investment and Trade Policy Division was under-resourced to undertake its compliance and enforcement activities. The Government proposed in its Options Paper that the compliance and enforcement functions be moved to the ATO, by establishing a new, dedicated compliance and enforcement area. The ATO already undertakes a significant number of compliance and enforcement activities as part of administering the tax system. While this is a new function, the ATO has staff with specialist skills and experience, as well as systems, to more effectively undertake such activities.

1.152 Submissions to the Options Paper generally supported improved compliance and enforcement of the rules. However, stakeholders noted the need for caution in striking the right balance between increased compliance and not deterring foreign investment.

1.153 As the ATO has taken over activities which already existed (or should have been undertaken to ensure compliance with the rules) there is no regulatory impact as a result of the move to the ATO. Consequently, no regulatory impact analysis has been done on this option.

Options under consideration

Option 1: No change

1.154 Leaving the foreign investment screening framework as it stands is unlikely to address broader concerns about its integrity in protecting Australia's national interest and the ability of all investors to be able to easily understand it.

1.155 In relation to foreign investment in residential real estate, option 1 is unlikely to address concerns that the framework is not being enforced and may therefore cause public confidence in the framework to deteriorate further. In relation to foreign investment in agriculture, leaving the framework as it is would not address concerns about the reliability of data on the level of foreign investment in agriculture or that investments are being appropriately screened to ensure they are in Australia's national interest. This may ultimately undermine confidence in the framework, leading to calls for foreign investment restrictions (as opposed to a screening based system) which would be detrimental to the economy.

1.156 Further, under Option 1, no application fees would be introduced for foreign investment proposals. Consequently, there would be no additional revenue to support increased compliance and enforcement activities, or improvements in IT systems to capture additional data to identify non-compliance.

1.157 Consequently, under Option 1, there would be no changes to current arrangements, and hence no additional regulatory impact.

Option 5: Penalties and enforcement

1.158 This option proposes introducing a civil penalty regime, supported by an infringement notice regime, as part of the regulatory framework for foreign investment. Currently, only divestment orders and criminal penalties apply for breaches of the Act. Divestment orders would still be available, but in addition the Government would have the option to pursue either criminal penalties or civil penalties through the courts.

1.159 The House of Representatives Standing Committee on Economics report recommended that the Government introduce a civil penalty regime for breaches of the foreign investment framework as it applies to residential real estate.

- (i) At hearings for the House of Representatives Standing Committee on Economics some stakeholders expressed the view that the current penalty regime could be extended to third parties who have intentionally broken the law.

1.160 The Options Paper recommended the introduction of civil penalties and infringement notices for residential real estate, agriculture, business and commercial real estate applications. It also sought feedback on whether the existing criminal penalties should be increased.

1.161 Submissions generally support the proposed civil penalty regime for residential real estate applications and the magnitude of the proposed penalties more broadly. Third parties such as conveyancers and real estate agents are opposed to being made subject to the proposed requirements and penalties for their enabling of non-compliance.

- (i) Some stakeholders supported the proposed civil penalties being set at the rate of 10 per cent. The Law Council considered that the existing framework may need to be updated; however, any introduction of a new penalty regime should not occur without further assessment. The Law Council considered the proposed penalty rate of 25 per cent of the property value was high. The Housing Industry Association supported the framework proposed in the Options Paper, but for any new offences, it stated that it is opposed to strict liability provisions which do not require intent.

1.162 There were mixed views from stakeholders on whether civil penalties and infringement notices should apply to agriculture, business and commercial applications.

- (i) The Law Council did not support the application of civil penalties or infringement notices to agriculture, business and commercial real estate applications as they consider there is no evidence of widespread non-compliance. However, others supported the expanded penalty regime noting that those who comply have nothing to be concerned about.

1.163 In general, it is the size and gravity of a penalty that acts as a deterrent effect. To date the penalties available have only been criminal, and there have been very few successful prosecutions. A civil penalty has a lower burden of proof in order to take a matter before a court. The proposed penalties also mean that not only will someone who breaches the rules be more likely to be taken to court, the potential financial penalty that the judge could impose would be greater. It is considered

that higher penalties, in conjunction with ATO enforcement of the rules, will act as a significant deterrent to those investors considering breaching the rules, and thereby result in better compliance with the framework.

1.164 This option would simply introduce a civil penalty regime to supplement the increased existing criminal penalties for breaches of the framework and would not impact people who are already compliant with the framework. Accordingly, there is no regulatory impact from this option.

Option 6: Information campaign

1.165 This option considers the Government conducting a targeted communication campaign to inform the community about the benefits of foreign investment and to outline how the foreign investment framework screens proposed investment to protect Australia's national interest.

1.166 An information campaign could inform the community about the benefits of foreign investment for the Australian economy. However, an information campaign is unlikely to address the community concerns with the current foreign investment framework. An information campaign is also unlikely to meet community expectations due to the lack of data available on the extent of foreign ownership or address concerns that foreign investors are circumventing the foreign investment framework, particularly in relation to residential real estate.

1.167 As the community would simply receive information and not be required to do anything to receive the information, there is no regulatory impact from this option.

Option 7: Increased and improved ABS survey of agricultural land

1.168 This option would propose that the ABS be tasked to conduct a census of the land and water holdings of all foreign owners every two years. This option would seek to address the concerns about the lack of data available around the level of foreign investment in Australian agricultural land and businesses.

1.169 Having the ABS conduct a census of land and water holdings of foreign owners would largely replace the need for a land register but is unlikely to provide as comprehensive a picture as the land register. This is because a biennial survey would only provide data every two years whereas a register will be updated each time a property is bought or sold. There are also limited options available to ensure that investors comply and accurately answer the survey questions, whereas penalties would be available to those who do not comply with the register requirements.

1.170 If the additional questions formed part of an existing collection process, they would be negligible in terms of adding any time to the survey. Consequently, there is no regulatory impact from this option.

1.171 However, the ABS has already released two ALWOSs. While they indicated that the level of foreign ownership is small, these surveys have not reduced community concern around foreign investment because they are not perceived to be comprehensive.

Options with regulatory impacts

Options already in place

Agricultural land threshold changes

1.172 As noted above in paragraph 1.96, the Government chose to reduce the screening threshold for agricultural land from \$252 million to \$15 million (cumulative) from 1 March 2015.

1.173 The lower threshold provides for more screening of proposed investments in agricultural land, introducing a new compliance cost on non-government foreign investors seeking to purchase agricultural land in Australia. This is because the threshold for acquisitions of most agricultural land acquisitions was \$252 million (those not currently captured as 'urban land', for which all investments are screened from dollar zero). Consequently, previously unscreened acquisitions (everything between the current and proposed thresholds) are now captured.

1.174 Reducing the screening threshold has resulted in more applications being screened. This increases the possibility that a case could be deemed to be against the national interest or have conditions imposed. However, past history demonstrates that very few investment proposals are prohibited or subject to conditions. The screening arrangements ensure that Australia gains from the benefits of foreign investment by allowing the investment to proceed in most cases (as opposed to a system that imposes outright restrictions on the level of foreign investment which may prevent valuable investments) while ensuring that community concerns can be taken into consideration.

1.175 It is too early to conclude whether lowering the screening threshold has had an impact on investment activity. However, any impact is likely to be marginal. While it has been argued that the new threshold increases the overall complexity of the framework, with the introduction of different thresholds for different business activities (agriculture) and different countries (with thresholds varying on the basis of free trade agreement commitments), most investors acquiring more than \$15 million of agricultural land will be sophisticated investors who will typically engage professional advice (including from medium to large law firms), regardless of whether foreign investment approval is required.

1.176 The drivers for the potential increase in the regulatory burden as a result of implementing either of the proposed options include increases in compliance costs for foreign investors (costs incurred in applying for foreign investment approval) and administration costs (costs incurred by Treasury in providing the FIRB secretariat and the Government in administering the screening regime).

1.177 Potential compliance costs include professional advisory costs (such as legal and valuation costs) and the opportunity cost of time the investor spends in complying, including in relation to the statutory period for considering proposals caught by the Act, the use of interim orders to extend the statutory period and possibly further time where necessary for proposals considered under the Policy or otherwise withdrawn and resubmitted. There is also, potentially, a delay cost on the seller.

1.178 The likely compliance costs are somewhat reduced by extending exemptions which currently apply under the foreign investment screening framework to agricultural land (as proposed under Option 8). For example, extending annual program arrangements to agricultural land transactions would help minimise compliance costs for foreign investors that regularly acquire small interests in agricultural land (for example, acquiring easements for pipelines).

1.179 Community stakeholders are expected to benefit from the additional scrutiny and transparency around foreign investment in agricultural land, addressing increasing concerns that this investment is contrary to Australia's national interest. To the extent that additional screening increases community confidence in foreign investment, investors may benefit from an improved investment environment.

- (i) However, it is possible that even with increased transparency some sections of the community that have general concerns with foreign investment will not find this reform addresses their concerns.

- (ii) Equally, those that are strongly supportive of foreign investment may view this reform as restricting and discouraging foreign investment.

1.180 An analysis of the potential compliance costs from a \$15 million threshold is provided at [Attachment A](#). Assuming the average compliance cost per proposal is \$10,000 per business per application (as a result of professional advisory fees), this is unlikely to represent a significant cost for a foreign investor in deciding whether to proceed with an agricultural land investment.

- (i) Analysis was done on the average application cost with a range between \$1,000 and \$22,000 depending on the complexity of the case.
- (ii) As agricultural land applications could vary in complexity but are likely to be of average complexity, a median number of \$10,000 was chosen.

1.181 The number of new business applications that would be caught by the reduced \$15 million threshold, is estimated to be 120 per annum.³⁹ Assuming the average \$10,000 compliance cost per proposal, this results in an estimated total compliance cost of \$1.2 million per year.

1.182 The chosen definition of agricultural land may also impact on the number of additional cases screened.

Undertake a stocktake of agricultural land and introduce a foreign ownership register of all land

1.183 A register of foreign holdings of agricultural land began operating on 1 July 2015 while systems are put in place with states and territories to capture foreign ownership of all land.

1.184 The register will be populated by a stocktake of foreign holdings of agricultural land and notifications of new acquisitions of agricultural land.

1.185 Foreign persons are required to advise the ATO: of any new interests that they acquire in agricultural land; if a foreign person holds or ceases to hold an interest in that land; if a holder becomes a foreign person; and if a foreign person ceases to be a foreign person for the purposes of the Act.

1.186 The creation of a national register will assist in addressing the concerns expressed by the community, the House of Representatives Standing Committee on Economics and the Agricultural Competitiveness Green Paper that there is no definitive data set on how much Australian land is in foreign hands. The absence of this data limits the ability of the Government to undertake compliance and enforcement activities.

1.187 The Options Paper sought views on the creation of a national foreign ownership of land register to address these concerns. Submissions presented a range of views, but in general there was broad support for the creation of a land register.

1.188 Most submissions supported, in-principle, the creation of a non-public database for the purpose of administering, monitoring and ensuring compliance of foreign investment in residential real estate. The submissions were also supportive of using existing data sources, such as state and territory land title office data.

- (i) One stakeholder suggested that an agricultural land register should be implemented as a one step process through the state and territory land titles offices, with transitional

39 Since 1 March 2015, the screening threshold for foreign purchases of agricultural land has been \$15 million cumulative. As a result of this lower threshold, around an additional 30 cases have been caught. This figure was extrapolated to reach the 120 estimate.

provisions to require notification to the titles offices of foreign ownership of existing landholdings.

- (ii) The Business Council of Australia supported the proposal to establish an agricultural land register, with information being drawn from existing processes and databases, and not imposing an additional cost on business.
- (iii) The Law Institute of Victoria also supported using existing state and territory data, and that relevant land forms should be amended to require declarations of residency. It suggested that any purchaser of a property should be required to personally sign a declaration of residency.

1.189 Submissions from the community highlighted concerns about whether foreign investment is being appropriately screened. This is consistent with the findings of the House of Representatives Standing Committee on Economics report that FIRB has not been undertaking a sufficient level of compliance, as would be expected.

1.190 Without a stocktake of foreign ownership and ongoing data collection, the Government risks further undermining community confidence in the framework.

- (i) It is possible that even in publishing aggregated data this may not address entrenched views of a portion of the community that does not support foreign investment in any form. This section of the community may want to see greater transparency at the individual transaction level. The reduction in the thresholds for agricultural land and agribusiness will provide some reassurance to the community that proposals are being appropriately considered as to whether they are against the national interest.

1.191 In working with the states and territories to leverage their existing processes and data the Government is seeking to ensure it does not create any duplication.

1.192 Once systems are established, the data collected through the process would then be transferred to the ATO to populate the national register. The ATO would then be responsible for publishing aggregated data on foreign ownership of land in Australia.

1.193 As noted in paragraphs 1.33 and 1.34 there are significant community concerns around investment in Australian agricultural as well as more broadly. The stocktake that is proposed under this option would address these concerns, particularly as part of populating a national register. In its submission to the Options Paper the National Farmers Federation said that a foreign ownership register of agricultural land is an important step in responding to community concerns around investment in Australian agriculture.

1.194 Similarly, the Chamber of Commerce and Industry Western Australia in its submission supported a register of foreign ownership of agricultural land as part of informing the debate on foreign investment and providing useful data.

1.195 A stocktake of existing foreign ownership holdings of agricultural land would result in a minor regulatory impact for affected persons and entities. According to the ABS ALWOS there are an estimated 350 businesses in Australia that currently own agricultural land. It is estimated that these entities may spend an additional two hours reporting to the ATO on their current holdings of

agricultural land. The total compliance cost is estimated at \$131 each,⁴⁰ with the total compliance cost for all estimated 350 entities being \$46,470 for the year in which they are required to notify.

1.196 Overall, this option is broader than the Government's original election commitment to establish a register of foreign ownership of agricultural land.

1.197 The House of Representatives Standing Committee on Economics recommended:

... the Government, in conjunction with States and Territories, establish a national register of land title transfers that records the citizenship and residency status of all purchasers of Australian real estate. This information should be accessible by relevant agencies from a single database.⁴¹

1.198 The House of Representatives Standing Committee on Economics found that this title transfer data would contribute to compliance and the enforcement of the existing rules.

1.199 This option seeks to address community concerns about the reliability of data on foreign investment in residential real estate, and increase the data available on foreign ownership of agricultural land. The national register of foreign ownership of all land titles would provide a clearer and more comprehensive picture of foreign ownership of all Australian land.

Options under consideration

Option 2A and 2B: Introduce a clearer definition of agricultural land

1.200 Stakeholders that made submissions to the Options Paper supported the Government introducing a clearer definition that better captures 'productive' agricultural land. While few stakeholders provided specific suggestions regarding the proposed definition, some suggested changes to (rather than the complete removal of) the 'wholly and exclusively' aspect of current 'rural land' definition, while others noted that the definition should focus on reasonable potential agricultural land use rather than past activity. The options considered in this Regulation Impact Statement were developed in recognition of this feedback.

- (i) It is acknowledged that there will be a transition as foreign investors that regularly deal with the framework seek to understand the change.

1.201 A clearer definition that better captures agricultural land that is used for productive purposes rather than the broader rural land definition will better target land used or that could reasonably be used for primary production purposes.

1.202 The choice of agricultural land definition would affect the regulatory impact of any threshold implementation. A definition based on 'rural land' (option 2A) unambiguously increases screening of agricultural land investments that are exempt under the \$252 million threshold which applied until 1 March 2015. Agricultural land investments that are 'rural land' are therefore more likely to be screened, whereas agricultural land investments that currently meet the definition of 'urban land' (that is, land that is not wholly and exclusively used for a business of primary production) would continue to be screened from dollar zero.

40 This estimate is based on the additional time spent reporting on current ownership of agricultural land and the associated labour costs.

41 Report on Foreign Investment in Residential Real Estate, House of Representatives Standing Committee on Economics, 27 November 2014, page xviii.

1.203 It is not possible from available data to differentiate the impact of Options 2A and 2B. The estimates at Attachment A are based on the ABS definition of agricultural land, which is limited to businesses owning or operating land, or water entitlements used for agricultural activity. This includes businesses that conducted agriculture as a primary or secondary activity as well businesses that owned land or water entitlements but were not active in agricultural production, and excludes the processing and downstream transformation of agricultural goods (manufacturing). In this regard, the ABS data is a reasonable approximation but captures a broader concept of agricultural land than either Option 2A or 2B.

Option 3: Introducing a lower screening threshold for agribusiness

1.204 Options 3B and 3C would provide for more screening of proposed foreign investment in agribusiness, introducing new compliance costs on non-government foreign investors seeking to purchase agribusinesses. Option 3A would retain the status quo with respect to screening of agribusiness beyond the farm gate.

1.205 Options 3B and 3C would be expected to involve similar additional cases screened and therefore similar compliance costs. Option 3B is limited to fewer sectors but may capture some businesses whose income is not predominantly derived from primary production businesses, whereas option 3C is not limited by sector but by income.

1.206 The additional proposed investments captured by foreign investment screening would be subject to the Treasurer's powers to approve, reject or impose conditions upon to ensure the proposed investment is not contrary to Australia's national interest. While proposals are rarely rejected and conditions are infrequently imposed, the Treasurer would continue to have this discretion.

1.207 Reducing the screening threshold will result in more applications being screened than now. This increases the possibility that a case could be deemed to be against the national interest. However, past history demonstrates that very few investment proposals are prohibited. The screening arrangements also allow for conditions to be attached to an approval to ensure that Australia gains from the benefits of foreign investment while ensuring that community concerns can be examined or taken into consideration.

1.208 Stakeholders consulted on the Options Paper were divided on the potential scope of an agribusiness definition. For example, some submissions supported a narrow definition of agribusiness (within the 'farm gate'), whereas others supported a broader definition (beyond the 'farm gate').

1.209 Where stakeholders supported a definition that goes beyond the 'farm gate', they expressed concern that the ANZSIC Codes do not provide a sufficient mechanism for capturing businesses with significant links to primary production. While the Codes adequately capture certain value chain activities that could be considered agribusinesses, they do not subcategorise certain subsectors (such as manufacturing, wholesaling and transport) as agriculture related.

1.210 The consistent concern raised was that in the absence of further defining 'agribusiness' within particular sectors to ensure consistency and specificity across the Codes, a Codes-based definition would capture too many businesses not traditionally considered as agribusinesses.

1.211 Alternative approaches to the ANZSIC codes suggested by stakeholders sought to capture businesses that have significant control over or input into the agricultural value chain. One confidential submission suggested defining agribusiness as a chain of industries directly involved in the production, transportation or provision of agricultural commodities. The options considered in

this Regulation Impact Statement were developed in recognition of this feedback, noting that using the agricultural value chain provides a viable alternative to a sector based definition.

1.212 The introduction of a \$55 million screening threshold would (on balance) increase the overall complexity of the framework, with the introduction of different thresholds for different business activities (agribusiness, including vis-à-vis primary production businesses within the farm gate) and investments from different countries (with thresholds varying on the basis of free trade agreement commitments). While this may lead to costs to investors in having to identify if the target investment requires foreign investment approval, most investors acquiring more than \$15 million of agricultural land will be sophisticated investors who will typically engage professional advice (including from medium to large law firms), regardless of whether foreign investment approval is required.

1.213 The Business Council of Australia in its submission said there should be no new threshold for agribusiness 'because it increases costs, brings uncertainty and leads to a chilling effect on investment'.

1.214 However, as noted in paragraphs 1.8 and 1.9 Australia's foreign investment framework is very open to foreign investment, and applications are only rejected if they are found to be contrary to the national interest. Since 2001, only three foreign investment proposals have been rejected.

1.215 The drivers for the potential increase in the regulatory burden as a result of implementing Options 3B or 3C include increases in compliance costs for foreign investors (costs incurred in applying for foreign investment approval) and administration costs (costs incurred by Treasury in providing the FIRB secretariat and the Government in administering the screening regime).

1.216 Potential compliance costs include professional advisory costs (such as legal and valuation costs) and the opportunity cost of time the investor spends in complying (including in relation to the statutory period for considering proposals caught by the Act, the use of interim orders to extend the statutory period and possibly further time where necessary for proposals considered under the Policy or otherwise withdrawn and resubmitted). There is also, potentially, a delay cost on the seller.

1.217 Conversely, increasing scrutiny of foreign investment in agribusinesses may improve community and government understanding of investment flows into the agricultural sector. Community stakeholders are expected to benefit from the additional scrutiny and transparency around foreign investment in agricultural land, addressing increasing concerns that investment is contrary to Australia's national interest. To the extent that additional screening increases community confidence in foreign investment, investors may benefit from an improved investment environment.

1.218 Analysis of the potential compliance costs from a lower screening threshold for agribusiness is provided at [Attachment A](#). It estimates that the regulatory impact per agribusiness application to be \$10,000. As most agribusinesses tend to be larger if they are of interest to a foreign investor we have assumed all applications are from businesses.

- (i) The cost of \$10,000 per application was chosen for the same reasons in paragraph 1.181, as agribusiness applications are considered to be of medium complexity.

1.219 The number of anticipated additional agribusiness applications Treasury would receive each year is five.

- (i) This was derived from the total number of ASX listed and non-listed public and proprietary Australian-owned agricultural businesses with market value between \$55 million and \$252 million as at 1 December 2014 equalling 380 companies. It is estimated that

10 per cent of these companies would be sold each year, with 20 per cent of those sold to a foreign entity.

1.220 Accordingly, the total compliance cost of introducing a \$55 million threshold for screening of agribusiness is estimated at \$50,000 per year.

1.221 It is not possible from available data to differentiate the impact between Options 3B and 3C. The above estimates are based on a sectoral based analysis of ASX data, which is most similar to the ANZSIC Codes approach under option 3B but far from perfectly comparable. The definition would necessarily exclude businesses captured under option 3C that predominantly source their income from primary production business commodities but are otherwise classified in non-agriculture related sectors (e.g. transport, wholesale etc.).

Option 4: Introduction of application fees

1.222 Currently, no fees are imposed as part of the foreign investment application process. This option considers introducing application fees on foreign investment proposals.

1.223 The House of Representatives Standing Committee on Economics report recommended that the Government apply an administrative fee to the current screening for all foreign purchases of residential real estate to fund compliance and enforcement activities. It noted that level of the fee should be such that it does not significantly deter future foreign investment in property. It also found that a fee regime would not only provide valuable new resources for compliance activities but also contribute greatly to data collection on completed purchases of properties by foreign investors.⁴²

1.224 The Options Paper suggested a fee be imposed on all foreign investment applications — both for residential real estate or land proposals and business applications.

1.225 The majority of stakeholders accepted that introducing fees is necessary to fund additional compliance and enforcement measures and desirable that foreign investors should pay their fair share of the costs. However, they argue that fees should reflect a reasonable approximation of costs rather than be used to raise revenue, with the proposed fees on business applications attracting the most concern for appearing excessive. There were also some specific concerns regarding the proposed treatment of multiple applications for an individual investment and uncapped fees for certain investment types, which were seeking to avoid the potential for duplicate and disproportionate fees.

1.226 Submissions made by individuals generally indicated that the application fees should be higher than what was proposed in the Options Paper. For residential real estate applications, a number of submissions suggested a different level of fee be applied between established and new property, due to the lower perceived consequence of non-compliance in new property, and therefore the lower cost of resourcing compliance and enforcement activities for new properties.

1.227 A fee distinguishing between established and new residential property would provide a clear message to foreign investors that the Government's foreign investment policy as it applies to residential real estate is focused at increasing the housing supply. However, it would place a disproportionate regulatory burden on temporary residents who are often encouraged to participate in the Australian economy (for example, student visas) over investors.

⁴² *Report on Foreign Investment in Residential Real Estate*, House of Representatives Standing Committee on Economics, 27 November 2014, page 37.

1.228 For instances where a foreign investor is seeking multiple approvals (for example, a foreign person bidding at multiple auctions to buy property), it is proposed that a general approval would be given to the foreign investor to participate in auctions to purchase one property within a specified area for a period of six months. This would alleviate the need for individual foreign investors to pay multiple application fees.

1.229 This is appropriate where a foreign person is in the unique competitive environment of an auction. Sales of residential real estate by a negotiation or 'for sale' arrangement are typically subject to the purchaser receiving approval under the Act should it be required. It would be expected that such arrangements would continue.

1.230 In the case of business applications, submissions to the Options Paper from businesses and peak bodies were generally unsupportive of an application fee. Those who acknowledged the need for fees indicated that they should be consistent with cost recovery.

1.231 The Business Council of Australia opposed the proposed fees stating that they would deter investment.

1.232 The National Farmers' Federation said that they considered the proposed fees to be too high and would act as a deterrent on foreign investment, and that any fees should be consistent with the Government's Cost Recovery Guidelines.

1.233 Some stakeholders raised concerns around the proposal to introduce an upfront fee on advanced off the plan certificates and the potential for this cost to be passed on to domestic purchasers.

1.234 This option proposes, as set out in Table 2, that for developers seeking an advanced off-the-plan certificate they would pay an upfront application fee of \$25,000 to cover the cost of administration.

- (i) An advanced off-the-plan certificate would be provided on condition the developer reports on six monthly basis from the date of the certificate and makes a payment based on the number of properties purchased by foreign persons in the preceding six month period. Payment would then be based on the sale price of individual dwellings.
- (ii) This should alleviate the concerns of stakeholders that fees would be passed on to domestic purchasers that do not need foreign investment approval.

1.235 CPA Australia said that the application fees should balance the cost of funding new compliance and enforcement activities while preserving Australia's reputation as a desirable investment destination.

1.236 The modelling and analysis that has been done internationally has found that there is a varying impact of taxes on decisions of companies to invest in particular country, and that while taxation matters, it is not the most important factor.

1.237 The Australian Productivity Commission said in 2013 that:

Taxation matters for FDI, but it is not the most important factor. There is a complex interaction between the impact of tax exemptions, tax planning strategies or other sources of competitive advantage, such as efficient tax administration and low

compliance costs, as well as other regulatory arrangements or location advantages of investment in a particular country.⁴³

1.238 The OECD in 2007 in relation to the impact of taxation on foreign direct investment decisions also said:

... one might expect that the sensitivity of FDI to taxation would vary and depend on host country conditions and policies (including the level of corporate tax rates), types of industries/business activities covered, the time period examined, and other factors.⁴⁴

1.239 The academic literature indicates that charges or taxes, such as fees, can reach a point where they will weigh more in a foreign investment decision than they might otherwise for a comparable investment in a comparable jurisdiction.

1.240 As the proposed fees are greater than the costs of administering the system, they could be viewed as potentially reducing Australia's attractiveness as an investment destination. However, the decision to invest in a particular country is based on a wide range of factors. Treasury's assessment based on these findings is that an application fee of less than 1 per cent of the value of the investment is unlikely to be considered high enough to result in a material behavioural impact on foreign investment decisions.

1.241 Applicants would be required to pay the fee before their foreign investment application is processed, avoiding the need for debt recovery mechanisms. The Act would need to be amended so that the 30 day statutory time period to assess an application commences only after payment has been received.

- (i) This proposal also includes legislating for the Treasurer to have the power to waive the fee, where it is considered to be in the national interest.
- (ii) This would likely only be exercised in rare situations. For instance, to ensure that only one application fee is paid in situations where substantively the same proposal is submitted a second time.

1.242 Regulatory costs from this option result from the additional time taken on the current application form to process the payment of the fee and to understand why the fee is being charged.

1.243 For individuals it is expected that this would add no more than 10 minutes to the current FIRB process. Accordingly, the estimated annual regulatory cost for individuals is \$108,539.

- (i) This is based on 20,405⁴⁵ applications to Treasury each year, with an expected annual growth rate of 3 per cent.

1.244 For entities it is estimated they will spend about an additional 20 minutes per application in processing the fee. This time above the individuals is attributed to them possibly requiring feedback from FIRB on what the appropriate level the fee should be, as it will be dependent on the type of investment proposal. It is estimated that around 500 entities per annum will be required to pay the fee to the ATO. The total regulatory cost is therefore estimated for entities is \$8,181 per annum.

1.245 The total regulatory cost for this option is therefore estimated to be \$116,720 per annum.

43 The use and abuse of indicators on foreign ownership restrictions and taxation to assess the investment climate, Australian Productivity Commission 2013 (from [Seminar and Policy Dialogue on Enhancing the Investment Environment in APEC and ASEAN economies](#)), accessed 8 April 2015.

44 Tax Effects on Foreign Direct Investment — No. 17: Recent Evidence and Policy Analysis, OCED, 2007, www.oecd.org/ctp/tax-policy/39866155.pdf, accessed 8 April 2015.

45 The number of applications received from individuals in 2013-14.

1.246 The revenue from application fees would be used to improve service delivery to foreign investors and would help to offset the direct and indirect costs of managing the foreign investment regime. This includes the enhanced compliance and enforcement regime for the foreign investment in residential real estate and the establishment of a national register. The ATO will be funded to conduct more detailed audits and ensure proper compliance with the law.

- (i) Improved IT infrastructure and support for compliance and enforcement activities would allow for better capture of data and data matching by the ATO. The ATO would also be able to match land title data from the states and territories, taxpayer information, foreign investment approvals data and immigration movements to detect possible breaches.

Option 8: Modernising and simplifying the foreign investment framework

1.247 The details of this option as set out in the Modernisation Paper available at www.treasury.gov.au/ConsultationsandReviews/Consultations/2015/Modernising-Australias-foreign-investment-framework, seek to modernise and simplify the overall foreign investment framework.

1.248 Australia's foreign investment screening framework is designed to maintain a balance between welcoming much needed investment, protecting the national interest, and ensuring public confidence around foreign investment continues.

1.249 While the basic principles governing the framework are sound, the complex legislation underpinning the foreign investment framework has changed little since it was introduced in 1975. It does not promote investor certainty and has not been amended to take into account major changes in other corporate regulatory frameworks. This adds to complexity and the regulatory burden on all stakeholders.

1.250 Rewriting the Act will ensure that the drafting is up to date and as clear and simple as possible. This will make it easier for investors and stakeholders to understand and navigate the rules and consequently apply for approval.

1.251 Ensuring that the Act is brought into line with current regulatory frameworks, and to reflect current administrative practices and regulatory concepts, as well as for modern business and corporate finance practices, will improve foreign investor understanding about how the foreign investment framework fits within Australia's overall regulatory framework.

1.252 For those investors and professionals that are already very familiar with the current framework there would be a transition cost as they come to grips with the changes to the framework and the updated Act.

1.253 Modernising and simplifying the current framework would increase the efficiency of the system without impacting its national interest objectives. The legislative amendments needed to implement the proposed changes to the foreign investment framework provide an opportunity for this modernisation.

1.254 For some of the detailed changes the regulatory impact in terms of the number of cases removed cannot be easily quantified. Consequently, a conservative estimate of zero cases removed from the screening framework has been assumed. For those where the current data set makes it easier to estimate a number of cases removed from the screening process, it has been costed.

1.255 All of the detailed changes are assumed to affect only business applications under the framework. Accordingly the estimated cost saving per case removed from screening is assumed to be \$10,000 to reflect the varying complexity of cases.

1.256 The overall compliance cost saving per annum from Option 8 is estimated at \$1.5 million (based on an estimate of 150 cases being removed from the system).

Consultation

Agriculture thresholds

1.257 The development and implementation of the Government's commitments in relation to lowering agricultural land and agribusiness thresholds have been subject to broad stakeholder consultations over a sustained period beginning with the Coalition's Policy Discussion Paper on Foreign Investment in Australian Agricultural Land and Agribusiness in August 2012.⁴⁶

1.258 Prior to the release of the revised Australia's Foreign Investment Policy on 1 March 2015, Treasury undertook targeted consultations with key legal stakeholders to ensure the proposed implementation of the \$15 million (cumulative) threshold for agricultural land was consistent with intended objectives.

1.259 Full public consultation was undertaken between 25 February 2015 and 20 March 2015 on definitions of agricultural land and agribusiness associated with implementing these thresholds. This was part of the Australian Government's Options Paper entitled 'Strengthening Australia's foreign investment framework'.

Non-agriculture elements of the reform package

1.260 Full public consultation was undertaken between 25 February 2015 and 20 March 2015. The Australian Government released an Options Paper titled 'Strengthening Australia's foreign investment framework'.

1.261 The objective of consultation was to seek the views of stakeholders on options for reforming the foreign investment framework, and providing them with the opportunity to identify any key issues with the proposals.

1.262 There were 192 submissions received during the consultation process. The non-confidential submissions are available on the Treasury website. In addition, Treasury held targeted consultation with key stakeholders, including legal practitioners, institutional investors and industry bodies.

1.263 Most of the submissions from individuals argued against allowing foreign investment into Australia. While submissions from businesses, peak bodies, and law firms were generally concerned with maintaining an appropriate balance between integrity of the framework and not discouraging foreign investment.

1.264 As part of the day to day application of the foreign investment screening framework to foreign investment proposals, specific issues are identified and representations received from a variety of stakeholders, including umbrella organisations (for example, the Law Council of Australia), law firms and major Australian and foreign companies. In recent years, further targeted consultation with legal representatives has been undertaken as part of the annual updates to Australia's Foreign Investment Policy, including on specific issues.

1.265 Potential changes to the regime have also been identified or lobbied for through public reviews (for example, the Productivity Commission's Trade and Assistance Review 2012-13) and

46 This consultation paper can be found [here](#).

reports by umbrella organisations (e.g. the Business Council of Australia's April 2010 report Foreign Attraction: Building on Our Advantages through Foreign Investment).

1.266 Australian government agencies were also consulted prior to the release of the Options Paper.

1.267 The Commonwealth is consulting with the states and territories on developing a national foreign ownership of land register.

Modernisation package

1.268 During consultation on the Options Paper, stakeholders were advised that the options for modernising the foreign investment framework would be subject to targeted consultation with legal practitioners and key stakeholders.

1.269 Full public consultation was undertaken between 18 May 2015 and 29 May 2015 on the Modernisation Paper. The paper can be found at www.treasury.gov.au/ConsultationsandReviews/Consultations/2015/Modernising-Australias-foreign-investment-framework.

1.270 The objective of consultation was to seek the views of stakeholders on options to modernise and simplify Australia's foreign investment framework.

- (i) There were 22 submissions received during the consultation process. Stakeholders were very supportive of the Government's commitment to simplify the framework and generally supported the options put forward as they reduce complexity and streamline existing processes.

1.271 Australian government agencies were also consulted on the Modernisation Paper.

Additional consultation

1.272 Consultation on the Exposure Drafts of the Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015 and the Register of Foreign Ownership of Agricultural Land Bill 2015 legislation and explanatory material occurred between 6 July 2015 and 17 July 2015. There were 19 submissions received during the consultation process. .

- (i) Further public consultation on the regulations are planned to occur in September 2015.

Preferred options

Agricultural investments

1.273 Community concerns about the level of foreign investment in agriculture have put pressure on the existing approach of maintaining consistent thresholds for business investments regardless of sector. The existing thresholds show Australia's non-discriminatory, non-preferential approach to business investment but do not sufficiently account for the relative significance of an investment in the agriculture sector where asset, business or land values are generally lower than they would be for others such as the mining sector.

1.274 The consultation process has shown community stakeholders are increasingly concerned that foreign investment in agricultural land is a concern and are supportive of additional scrutiny and transparency in this sector.

1.275 While consultations with the stakeholders identified the positive impact of foreign investment in the agricultural industry, the nature of the sector means that non-government investors are currently able to acquire a number of properties across the country to build up their business without scrutiny. The community is concerned that the current screening threshold only captures a small number of agribusinesses. Lowering the threshold for agribusiness investment and creating a cumulative threshold for foreign investment in agricultural land will result in an increase in the number of proposed agricultural investments being screened and help to restore confidence in the foreign investment framework.

- (i) The available data suggests that the vast majority of agribusiness and farmland is Australian owned but without a comprehensive land register and ongoing census, it will be difficult to regain the confidence of the general public in this sector.

1.276 Stakeholders have indicated they support the Government introducing a clearer definition that better captures 'productive' agricultural land.

1.277 A national foreign ownership register that is considered comprehensive may help to improve community perceptions about the overall level of foreign ownership of Australian land.

1.278 The options already operating are:

- a lower, cumulative \$15 million screening threshold for agricultural land (or the extent allowed by trade commitments) for privately-owned investors; and
- a national foreign ownership register of all land and undertaking a stocktake of existing agricultural land holdings.

1.279 The preferred proposed options are:

- **Option 2B:** expanding the definition of agricultural land to 'land used, or that could be reasonably used, for a primary production business'; and
- **Option 3C:** introducing a \$55 million threshold for agribusiness (with thresholds varying on the basis of free trade agreement commitments) that captures primary production businesses and certain downstream manufacturing businesses beyond the farm gate
- **Option 4:** introduction of application fees on all foreign investment applications as outlined in Table 2;
- **Option 5:** introducing a civil penalty regime including an infringement notice regime and increased criminal penalties; and
- **Option 8:** a modernised and simplified foreign investment framework.

1.280 While lower thresholds marginally increase the regulatory burden on investors and increase the cost of administering the regime, the Government must balance the concerns of the community around increasing foreign investment in agriculture against the increased compliance costs for both investors and Government.

1.281 Option 2B was chosen to better capture agricultural land that is, or could be, used for productive agricultural purposes. Option 2A would have resulted in a significant increase in the number of agricultural investments falling under the definition of urban land (that is, land that is not wholly and exclusively used for a business of primary production).

1.282 Introducing a screening threshold specific to agribusiness that captures certain downstream businesses beyond the farm gate will also deliver on the Government's election commitment to introduce a new \$55 million screening threshold for non-government investments in agribusiness.

There were wide ranging views on the definition of agribusiness from the consultations. The proposed definition includes primary production businesses within the farm gate and certain downstream businesses (including the processing of meat, poultry, seafood, dairy, and fruit and vegetables, plus oil and fat, grain and sugar manufacturing) and should help to reassure the community that investments in these sectors are not contrary to our national interest. Option 3C was chosen over options 3A and 3B based on stakeholder engagement.

1.283 The absence of available information on what foreign investors have purchased and how much Australian land is held by foreigners is undermining the integrity and public confidence of the foreign investment framework.

1.284 Having the ABS conduct a census of the land holdings of all foreign owners every two years may address some concerns regarding the lack of data about the level of foreign investment in Australian agricultural land and businesses but is unlikely to satisfy them all. Therefore, Option 7 is not recommended.

- (i) The infrequency of data collection and the lack of information on the value of holdings limits the usefulness of this approach. The census is also based on a sample methodology and does not capture all foreign investments in land. Without a comprehensive register of all land, it would be difficult to fully evaluate how much land is being held by foreigners.

1.285 Establishing a foreign ownership register of all land and undertaking a stocktake of agricultural land may help to address concerns from the community that foreign investments are not being appropriately screened.

Option 4: Introduction of fees

1.286 The preferred option is to introduce fees on all foreign investment applications as listed in Table 2. The fees will be used to improve service delivery for foreign investors and improve compliance and enforcement.

1.287 While concerns have been raised that the proposed fees may reduce Australia's attractiveness as a desirable destination for foreign investment, investment decisions are based on a broad range of factors. Treasury's assessment is that an application fee of less than 1 per cent of the value of the investment is unlikely to be considered high enough to result in a material behavioural impact on foreign investment decisions.

Option 5: Penalties

1.288 The preferred option proposes the introduction of a civil penalty regime supported by an infringement notice regime, as part of the regulatory framework for foreign investment. Currently, only divestment orders and criminal penalties apply for breaches of the Act.

1.289 Consultation has shown community support for the proposed civil penalty regime for residential real estate applications and mixed views on whether civil penalties should apply to agriculture, business and commercial applications.

1.290 Community confidence in the level of compliance with the current penalty regime is lacking. Existing measures had previously been considered to be effective but the surge in investment in residential real estate, particularly in Sydney and Melbourne, has increased concerns that non-compliant investors are not being tracked and appropriately penalised.

1.291 The view put forward in some submissions is that there is a lack of evidence of non-compliance in agriculture, business and commercial real estate applications. This does not sufficiently justify not introducing civil penalties or infringement notices as those who are complying with the existing regime will not be impacted by the expanded regime.

1.292 The existing penalties available have only been criminal, and there have been very few successful prosecutions. A civil penalty has a lower burden of proof in order to take a matter before a court. The proposed penalties also mean that not only will someone who breaches the rules be more likely to be taken to court, the potential financial penalty could be both the sale of the property and up to 25 per cent of the purchase price or market value of the property. It is considered that these penalties, in conjunction with ATO enforcement of the rules, will act as a significant deterrent to breaching the rules.

Screening and compliance

1.293 The preferred option has commenced and involves moving the role of screening residential real estate applications and undertaking compliance and enforcement of the foreign investment framework to the ATO.

1.294 The previous compliance regime largely relied on information provided to the 'dob-in' hotline and media reporting due to the fact that Treasury has limited access to the information sources that could be used to identify foreign purchasers who have purchased property without foreign investment approval.

1.295 The creation of a new, dedicated compliance and enforcement area within the ATO, which already tracks compliance of a range of property transactions, will streamline the compliance, investigation and enforcement activities in one location and provide the Government with sufficient data to track non-compliance and act accordingly.

1.296 Streamlining compliance and enforcement activities will lead to better tracking of non-compliant investors and should result in an increase in penalties handed out and help restore public confidence in the foreign investment framework.

Option 6: Information campaign

1.297 An information campaign by itself is not considered sufficient to reduce community concerns around foreign investment and restore confidence in the foreign investment framework.

1.298 Measures relating to the land register, penalties, agribusiness and lower agriculture screening thresholds are aimed at improving the integrity of the foreign investment framework and reducing community concerns with the existing system.

1.299 The Government is considering the best approach to ensure that investors and their advisors are aware of their obligations and how to better inform the community about the benefits of foreign investment for the Australian economy.

1.300 Together, the new measures and information campaign will best address community concerns and provide advice to investors of their obligations under the framework.

Option 8: Modernising and simplifying the foreign investment framework

1.301 The Government has committed to modernise and simplify the framework. Stakeholders were very supportive of this commitment to simplify the legislation and the options being considered.

- (i) There is a strong expectation in the business community that adoption of the options outlined will reduce complexity and streamline existing processes.

1.302 The preferred package of modernisation options is that which was included in the consultation paper⁴⁷ with some minor refinements. This package includes:

- (i) incorporating the additional Policy only requirements into the legislative framework;
- (ii) addressing legal risks to the framework by legislating to allow applicants to voluntarily agree to extend the screening period, allow the Treasurer to impose conditions if foreign investors fail to notify, and issue exemption certificates with legally enforceable conditions; and
- (iii) amending the legislation so that it equally applies irrespective of the transaction structuring.

1.303 These options increase the efficiency of the system without detracting from its national interest objectives.

1.304 They also largely offset the increases in regulatory burden resulting from increased screening of agricultural investments. This is due to the expected number of non-sensitive cases being removed from the framework through the modernisation process.

Implementation and evaluation

Implementation

1.305 On 2 May 2015, the Government announced a package of reforms to strengthen the foreign investment framework. The reform package has six key elements, which will take effect on 1 December 2015 (unless otherwise stated):

- (i) stronger enforcement of the foreign investment rules by transferring all of the residential real estate functions to the ATO (between 4 May and 1 December 2015).
- (ii) Stricter penalties that will make it easier to pursue court action and ensure that foreign investors are not able to profit from breaking the rules. The Government also announced a reduced penalty period that applies until 30 November 2015 to encourage investors that have breached the rules to voluntarily come forward and sell their property
- (iii) Application fees to improve service delivery and ensure that Australian taxpayers no longer have to fund the cost of administering the system.
- (iv) Increased scrutiny around foreign investment in agriculture.
 - From 1 March 2015, the screening threshold for agricultural land was lowered from \$252 million to \$15 million (cumulative).
 - A \$55 million threshold (based on the value of the investment) for investments in agribusiness will also be introduced to capture certain downstream activities with links to primary production.

47 The paper can be found at www.treasury.gov.au/ConsultationsandReviews/Consultations/2015/Modernising-Australias-foreign-investment-framework.

- (v) Increased transparency on the levels of foreign ownership in Australia through a comprehensive land register.
 - An agricultural land register with information provided directly to the ATO by investors commenced on 1 July 2015. Further information is available on the [ATO website](#).
 - The Government is in negotiations with the states and territories to use their land titles data to expand the register to include all land.
- (vi) A more modern and simpler foreign investment framework.

1.306 The changes announced represent the most significant reforms to the foreign investment framework in forty years. They are designed to increase transparency, ensure a balance between welcoming foreign investment and providing appropriate safeguards to provide integrity in the system and ensure we retain public support for foreign investment that is in Australia’s national interest.

1.307 A number of measures announced as part of the new policy have already commenced. These relate to a lower agriculture screening threshold, a reduced penalty period and the collection of data for the agriculture land register.

1.308 Legislation is required to legislate these measures and implement the remaining elements of the policy. The Government has set the start date of the majority of the policy measures as 1 December 2015. Legislation to implement these measures is currently before the Parliament.

Policy measure start date

Date	Activity commencement
1 March 2015	New \$15 million cumulative threshold for agricultural land screening
2 May 2015	Reduced penalty period began
1 July 2015	ATO started collecting data for agricultural land register
1 December 2015	<ul style="list-style-type: none"> • Reduced penalty regime ends • Application fees and civil penalties commence • Residential real estate functions transferred to ATO • Modern simplified Foreign Acquisitions and Takeovers Act (including new agricultural screening requirements) takes effect
1 July 2016	Register is expanded to include all land, using data obtained from the states and territories

1.309 There has been extensive consultation between Treasury and the ATO to ensure both agencies understand the new policy and the associated responsibilities. This has been particularly important given the transfer of some functions from Treasury to the ATO.

- (i) Consultation between Treasury and the ATO has also provided the opportunity to ensure systems and resources are established ahead of commencement of the measures.

1.310 The transfer of residential real estate functions to the ATO will improve compliance and enforcement; improving the integrity of the system. Additional resources have been provided to the ATO to undertake this responsibility as part of the 2014-15 Budget measure *Strengthening Australia’s foreign investment framework*.

1.311 The Government will conduct an information campaign to ensure that the foreign investment framework is clearly understood by foreign investors. In addition to ongoing upgrades of the FIRB website, the Government will be launching an educational campaign to ensure that stakeholders have a thorough understanding of their obligations, allowing them to make required updates to their systems and processes ahead of new policy commencing on 1 December 2015.

- (i) Various approaches have been taken to ensure the policy is communicated effectively and broadly, including engagement sessions with stakeholders (including the Property Council of Australia, Law Council and the Real Estate Institute of Australia), industry specific print media (for example industry targeted magazines and reports) and communications through international platforms.

Evaluation

1.312 The policy is intended to improve compliance and enforcement and create a more modern and simplified system. The effectiveness of the chosen policy options to address these factors may be determined through a few mechanisms.

- (i) Given one of the key objectives of the new system is to improve community confidence, it will be difficult to effectively evaluate the individual role this policy has had. However, greater compliance with the rules is likely to result in improved confidence and this is more easily assessed.

1.313 Higher levels of voluntary compliance may be an effective way to evaluate how well the penalties and enforcement practices are affecting investor behaviour. The ATO could collect this information through its existing practices of consulting with, and receiving feedback from, key stakeholders and users of the system. In this case, this would include real estate agents, lawyers and conveyancers.

1.314 An evaluation of how successful the policy and communication campaign has been could also include assessing the number of detected breaches of the system from ATO compliance activities. Detected breaches and media reporting of resulting action are likely to increase voluntary compliance.

1.315 Self-confessions and dob-ins are a measure of community engagement and confidence in the regulatory framework. The number of self-confessions of breaches and dob-ins can be collected, compared to the pre-announcement period and tracked over time.

1.316 Once the measure has been established for some time baseline levels of compliance may be developed. These could act as a useful long term tool to assess whether the measures are effectively addressing the objective of improving integrity in the system.

1.317 Industry feedback, as part of the day to day application of the framework to proposals, will be a good measure of the success of the policy, particularly in relation to the modernisation measures which are aimed at streamlining the process and reducing regulatory burden.

- (i) Industry feedback through both formal and informal consultations has been incorporated into the proposed policy to improve its effectiveness and success of adoption.

1.318 It will also be important to consider whether the new measures have discouraged foreign investment in Australia. To ensure the policy provides the right mix of integrity and investment measures, the number of approvals granted could be analysed and compared to the growth rate prior to the commencement of these measures.

Attachment A — Regulatory burden

Treasury has estimated that this regulation results in average annual compliance costs of around \$0.05 million. This is outlined in the Regulatory Burden Cost Offset table provided below. The increased regulatory costs are partially offset by the regulatory cost reductions associated with a proposal to align the legal frameworks for personal and corporate insolvency practitioners.

Table A1: Regulatory burden and cost offset estimate table

Average annual regulatory costs (from business as usual)				
Change in costs (\$million)	Business	Community organisations	Individuals	Total change in cost
Existing measure: reduced agricultural screening threshold*	\$1.2m			\$1.2m
Option 2B: Changes to agricultural land definition (associated regulatory costs are captured in the <i>Reduced agricultural screening threshold</i> costs)	-	-	-	\$0m
Option 3C: Introducing a screening threshold for agribusiness	\$0.05m			\$0.05m
Option 4: Introduction of application fees	\$0.008m		\$0.108m	\$0.117m
Option 5: Penalties and enforcement	-	-	-	\$0
Option 6: Information campaign	-	-	-	\$0
Option 7: Increased and improved ABS survey of agricultural land	-	-	-	\$0
Option 8: Modernising and simplifying the foreign investment framework	-\$1.5m			-\$1.5m
TOTAL	-\$0.085m		\$0.137m	\$0.052m
Cost offset from within the portfolio (\$ million)	Business	Community organisations	Individuals	Total, by source
Treasury	-\$13.4m	-	-	-\$13.4m
Are all new costs offset? <input checked="" type="checkbox"/> Yes, costs are offset <input type="checkbox"/> No, costs are not offset <input type="checkbox"/> Deregulatory—no offsets required				
Total (Change in costs — Cost offset) (\$million) = — \$13.35m				
Note: A regulatory offset has been identified from within the Treasury portfolio, relating to the alignment of the legal frameworks for personal and corporate insolvency practitioners.				

Costings assumptions

- The \$0.05 million figure is composed of the cost of implementing options 3, 4 and the existing measures (\$1.55 million) and the cost savings (\$1.50 million) that would arise from the changes to the screening framework to modernise and simplify and remove some non-sensitive proposals (Option 8).
- Activities and purchases are typically made by businesses.
- The average compliance cost per proposal for agricultural land and for the proposals which would be removed from the screening framework was assumed to be \$10,000.
- Average number of business cases over two years was used to determine the cases removed from the screening framework.
- For the proposals which are to be removed from the framework adjustments have been made to the cost offset to take into account overlap between the various reforms proposed.