Australian Government

The Treasury

Regulation Impact Statement

Foreign Investment Reform Package 2020

OBPR ID 25692

October 2020

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1. Description of the problem

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

Foreign investment promotes healthy competition among businesses, leading to greater innovation and productivity. It also facilitates the transfer of international skills and knowledge to Australian businesses, improves access to overseas markets, and supports Australian jobs (Australian firms with foreign direct investment support one in ten jobs in Australia, and one in five jobs that are trade-related[1]).

Australia is one of the world's most attractive destinations for foreign investment, with that attractiveness founded on a range of factors: our stable democracy; our strong rule of law; a highly-skilled and highly-educated workforce; our proximity to dynamic and fast-growing markets; our abundant natural resources and world-class industry capabilities; and a strong and well managed economy. Over recent years, foreign investors have submitted approximately 9,900 applications for investment approval to the Government each year, worth around $200 billion in direct investment to the Australian economy.

However, the Productivity Commission identified[2] that ambiguous and unforeseen risks can arise suddenly. Risks, from foreign investment to Australia's national interest, particularly national security, have increased recently due to a confluence of developments – as identified by the Organisation for Economic Co-operation and Development (OECD) in a 2019 research paper[3]. The paper noted that many countries are now reconsidering their foreign investment policies in light of increasing risks – and heightened awareness – from foreign ownership, including:

- technological developments and digitalisation that have turned personal data – and companies that possess such data – into sensitive assets that may be subject to misuse or malicious manipulation;
- a shift in global economic weights (i.e. the rising share of global economic activity from developing economies, relative to the established economies of Europe and North America) that has created new dependencies, interests and threats;
- heightened sensitivity over the control of assets that constitute critical infrastructure; and
- new and more widely shared concerns, in addition to espionage and sabotage, about diversity of suppliers and access to advanced technology, today and in the future.

The OECD research found that in the two years from 2017 to 2019, nine out of the world's largest ten economies modified or introduced new, comprehensive policies to manage acquisition or ownership related risks from foreign investment[4].

[1] ABS cat. no. 5494.0 — Economic Activity of Foreign Owned Businesses in Australia, 2014-15.
[2] Productivity Commission 2020, Foreign Investment in Australia, Research paper p81.
[3] OECD, J Phol 2019 – Acquisition and ownership related policies to safeguard essential security interests: new policies to manage new threats.
[4] Ibid.

The Australian Security Intelligence Organisation's (ASIO) 2018-19 Annual Report identified the benefits of foreign investment but also the risks, particularly insofar as Australia continues to be a target for espionage and foreign interference. "Foreign intelligence services seek to exploit Australia's businesses for intelligence purposes," the report stated. "That threat will persist across critical infrastructure, industries that hold large amounts of personal data, and emerging sectors with unique intellectual property that could provide an economic or strategic edge".

As the Productivity Commission recently noted[5], national security risks linked to foreign investment generally reflect the nature of the risk, their prominence, and the specific circumstances at the time. For example, consideration may be given to the:

- dependency on foreign-controlled suppliers, creating opportunities for the supplier to delay, deny, or place conditions on the provision of crucial goods or services;
- transfer or leakage of sensitive national security technology or expertise to a foreign-controlled entity; and/or
- creation of an additional channel for infiltration, espionage or sabotage by a foreign power.

Consistent with this, the Government considers all proposed foreign investment applications on a case-by-case basis, taking into account the particular facts and circumstances of each case. Examples of foreign investment proposals that have raised national security concerns include:

- A 2009 bid to acquire certain assets of OZ Minerals, including the Prominent Hill mine in South Australia, which raised national security concerns over the mine's proximity to the Australian Defence Force's Woomera Prohibited Area weapons testing range; and
- A 2016 proposal to acquire interests in the NSW electricity distribution network, Ausgrid, which raised national security concerns regarding the critical power and communications services that Ausgrid provides to businesses and governments.

While there are a range of Commonwealth and state and territory laws that regulate certain elements of foreign business behaviour in Australia (as well as domestic business behaviour) – such as competition laws, environmental regulations and industry policy – these laws are not able to adequately mitigate all of the risks that can arise from foreign ownership. As such, the foreign investment review framework remains an important mechanism.

Australia's current foreign investment review framework, however, is insufficiently equipped to capture and manage many of the risks that foreign ownership can pose. Most notably, our framework has a 'screening gap', whereby low-value private foreign investments can proceed into Australia without any government oversight, even where they may pose significant national security risks.

Under the current framework, foreign persons are only required to seek government approval for investments above certain monetary and percentage thresholds that are dependent on the target sector and country of investor. While foreign government investors face a zero dollar threshold, for most private investors this threshold is $275 million (or up

[5] Productivity Commission 2020, *op.cit.*

to $1,192 million for investors from certain Free Trade Agreement countries). The presence of such thresholds means that low-value investments, even into our most sensitive sectors, can occur without any government screening. These sectors are particularly vulnerable as their specialised expertise often means they are comprised of a large number of new and/or smaller firms, with valuations that are frequently well below existing screening thresholds.

Having the capability to screen these acquisitions will ensure that the Government has a greater ability to identify and address national security risks that may arise, including risks to critical Defence and intelligence capabilities, supply chains, and data.

In order to ensure that the foreign investment review framework can effectively address current and future risks, the Government must also have a credible monitoring and enforcement capability to ensure that foreign investors comply with the foreign investment rules, including the legislation and the Government's stated policies.

However, the Government's current compliance monitoring and enforcement tools are limited, and do not act as an effective deterrent to non-compliance. For example, current penalty amounts are low, and the Government lacks sufficient monitoring and investigative powers to be able to draw reliable compliance conclusions in some situations. The Government also cannot currently respond proportionately to issues of identified non-compliance, and would be forced to take court action to enforce conditions, for example, even if the breach of condition was only minor.

Conditions are an important tool that assist the Government mitigate risks, while still allowing the investment to proceed. Over recent years, as the risks from foreign ownership have increased, so too has the use of conditions. In 2018-19, 80 per cent of approved cases by value had conditions attached to them, compared to just 35 per cent in 2015-16.

The Foreign Investment Review Board (FIRB) and Treasury draw on advice from a range of agencies to ensure that any conditions recommended to the Government are proportionate to the identified risks of the individual case. Common types of conditions that have been used in recent years include: tax conditions, that require the investor to provide additional reporting where its financing or capital arrangements may create a risk to tax revenues; management and control conditions, such as prohibiting the investor from seeking a board seat; and data security conditions, to ensure that a change of ownership does not create an unmanaged risk of unauthorised access to personal, government or sensitive operational data.

This increased use of conditions has, and will continue to, require a greater focus from the Government on compliance and enforcement efforts. Strengthening the Treasury and ATO's ability to monitor and enforce compliance with conditions will build confidence in the foreign investment framework, alongside ensuring that any investors who do not follow the rules are appropriately penalised.

The Government's ability to identify and assess national interest risks in foreign investment, and to monitor investor compliance with the rules, hinges on the quality, accuracy and currency of its foreign investment data. However, the availability and accessibility of such data can at times be limited. For example, while the Government collects data on proposed investments through applications, it does not collect data on actual investments made into certain sectors of the economy, including many Australian businesses. This makes it difficult to enforce conditions that only take effect upon the action occurring, as the Government has no visibility over if and when the investment actually occurs.

Even the data the Government does hold is spread out across different government regulators and is underpinned by different legislation. This makes it difficult to form a cohesive picture, identify trends, and properly assess the benefits and risks of foreign investment. The lack of data on what foreign investors actually own in Australia also risks undermining the Government's ability to provide robust and evidence-based information to the community, including, for example, in response to Parliamentary questions and inquiries and in annual reports.

As the Productivity Commission recently noted, foreign investment stirs strong community reactions. In its 2020 research paper, the Productivity Commission noted that "while Australians are generally supportive of globalisation and free trade, many members of the community express reservations about Australia's openness to foreign investment. In polls of community attitudes, large majorities of respondents consistently state that foreign investment is a threat to Australian interests, and agree that there should be more restrictions on foreign ownership" [6].

The changes proposed in this reform package will strengthen the foreign investment review framework to ensure it continues to be fit-for-purpose and meets community expectations. The improvements will strengthen the integrity of the framework, and ensure that the Government has greater oversight of foreign investment that raises national security concerns, which, in turn, should positively contribute to maintaining the community's support for, and confidence in, the foreign investment regime.

Maintaining an effective foreign investment review framework that is fit-for-purpose is crucial for Australia to be able to continue to attract the beneficial foreign investment needed in our economy. Equally, it is important that the framework meets community expectations regarding the acquisitions that fall within the framework. For example, the effects of certain capital reductions (i.e. a company undertaking a strategy of share buybacks) present a potential gap in the Government's ability to address national interest risks with respect to previously approved foreign investors increasing their percentage. Another example is the inconsistent application of the tracing rules[7]. The current tracing provisions only apply to interests in trusts and companies; they cannot be applied to unincorporated limited partnerships. This limits the Government's ability to effectively address national interest and security risks, particularly where limited partnerships are used as a vehicle for investment in critical infrastructure and other sensitive sectors. Feedback from stakeholders over recent years, including through this consultation process, has consistently called for these issues to be clarified to give investors greater confidence in the framework.

While Australia is one of the world's most attractive investment destinations, some stakeholders have stated over recent years that the current framework can be burdensome and complex to navigate, particularly for lower risk investments, such as those made by large privately controlled and managed investment funds which are regularly screened under foreign government investor screening rules due to the presence of foreign government investors in their funds. Delays in case processing times have also been consistently raised by some stakeholders as an ongoing source of concern – with the indicative median processing time for Treasury cases in 2018-19 being 45 days, relative to the statutory deadline that sets an initial case processing timeframe of 30 days. These shortcomings have been some of the

[6] Productivity Commission 2020, *op.cit*.

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

most frequently raised concerns during the consultation process for these reforms. They frustrate investors (both lower risk investors, and those whose applications take longer than 30 days to process), and risk impeding valuable foreign investment into Australia.

It is important for the Government to get the balance right. While some extra regulation is warranted to better protect the national interest in high risk situations, there may be scope in other situations to reduce red tape, improve the investor experience, and streamline the handling of some less-sensitive cases.

In 2015, the Government introduced foreign investment application fees to ensure that the cost of administering the foreign investment framework was borne by foreign investors, not Australian taxpayers[8]. This policy is now well understood by investors. However, the fee framework has evolved over time to become quite complex and difficult to navigate. For example, fees are spread across both the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* and the *Foreign Acquisitions and Takeovers Fees Imposition Regulation 2015*, making it difficult and time consuming for applicants and their advisers to determine the appropriate fee. The complexity of the framework can impose uncertainty on both investors and government in determining the correct application fee, and would benefit from review and simplification.

2. Why is Government action needed?

The regulation of foreign investment is a long-standing function of the Government. The legal framework is set out in the *Foreign Acquisitions and Takeovers Act 1975* (FATA), along with its supporting regulations, fees framework and data collection Acts.

The regulation of foreign investment, and the problems that this reform package aims to address, both involve consideration of highly sensitive issues – including risks to the national interest (particularly national security), the assessment and monitoring of investor's commercial information and activities, and balancing Australia's economic interests. The need to ensure that risks to national security are properly assessed with full access to all of the necessary information, and the concurrent need to keep investors commercially sensitive information confidential, means the Government is the only appropriate body to perform this function.

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

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

The reforms are not expected to significantly impact on foreign capital inflows to Australia. While it is estimated that the reforms will likely impose some additional regulatory burden on investors (discussed further in sections 4 and 6), this is not expected to be a significant

[8] This policy was outlined in the 2015 Regulation Impact Statement - Strengthening Australia's foreign investment framework.

deterrent to foreign investment in Australia. Foreign investor survey data consistently reinforces that market factors play the most significant role in a firms' foreign investment decisions.

The reforms are also expected to improve case processing times, in part, due to an improved IT case management system, better data collection, better reporting of foreign investments realised in Australia from the new Register and additional staff resourcing which will be welcomed by investors.

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

Australia is not alone in recognising and responding to the rising national security challenges posed by foreign ownership. Many other countries — including Canada, China, the European Union, Japan, New Zealand, the United Kingdom and the United States — have also recently updated their foreign investment rules for similar reasons.

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

The proposed reforms will ensure that the foreign investment framework continues to balance:

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

3. What options have been considered to address the identified problems?

The Treasury, in consultation with its stakeholders, has considered three broad options to address the identified problems:

Option 1: Maintaining the existing arrangements without amendment.

Option 2: A balanced option that provides for adequate protection of the national interest, particularly national security, while still facilitating and attracting foreign investment into Australia.

Option 3: An option that significantly increases (or decreases) the protection of Australia's assets, depending on the relevant policy objective.

3.1 Protecting Australia's national security

As noted above, the risks from foreign investment to Australia's national interest, particularly national security, have increased recently as a result of a confluence of developments, including rapid technological change and changes in the international security environment.

Option 1 – status quo

Under this option, the Government will continue to screen only those foreign investments that meet certain criteria, such as monetary or percentage thresholds that are dependent on the nature of the investment, the target sector, and the country of the investor.

This means that investments below the existing screening thresholds, or otherwise outside of the FATA notification parameters, will continue to proceed without Government oversight. While foreign government investors face a zero dollar screening threshold, most private business investments under $275 million (or $1,192 million for our Free Trade Agreement partners) are not screened.

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

Under this option, the Government will continue to have limited ability to manage foreign involvement in sensitive sectors, including in situations where point-in-time approvals (including conditions to protect our national security) are made redundant due to rapid technological change, or where the nature of the security risks change subsequent to approval.

Option 2 – a balanced approach

Under this option, the Government will expand the foreign investment regime to enable the review of proposed actions categorised as notifiable national security actions or reviewable national security actions. In general, these actions fall below the existing monetary or percentage screening thresholds, but in some way raise national security concerns, such as being close to a Defence premises. These actions will be assessed as to whether they are contrary to national security.

Under this test, a foreign person acquiring a direct interest (generally at least 10 per cent, or a position of control) in a 'national security business', starting to carry on the activities of such a business, or acquiring an interest in Australian land or a tenement that is 'national security land', will need to notify and obtain foreign investment approval prior to making the investment. This will ensure foreign investment that raises national security concerns is screened irrespective of the value of the investment or the investor's nationality, or whether the acquirer is a private investor or a foreign government investor.

'National security land' is generally a defence premises or land that is of interest to an intelligence agency and that interest is publicly known or confirmable.

In brief, a 'national security business' can be any of the following:

- 'Responsible entities' and 'direct interest holders' of critical infrastructure assets, within the meaning of the *Security of Critical Infrastructure Act 2018* (SOCI), and 'carriers' and 'carriage service providers' to which the *Telecommunications Act 1997* applies;

- Businesses that develop, manufacture or supply critical goods, technologies or services that will be used (or are intended for use) by defence and intelligence personnel, or the defence force of another country, in activities that may affect Australia's national security; and

- Businesses that own, store, collect or maintain classified data, or personal data relating to Australia's defence and intelligence personnel that, if disclosed or accessed, could compromise Australia's national security.

The overwhelming majority of stakeholders during the exposure draft consultation periods were supportive of the Government's proposed 'national security business' definition and did not raise substantive issues. However, some stakeholders did express concerns that in the case of a hostile takeover (for example), the target may not provide the required information for the acquirer to be able to determine whether it falls within the definition. Similarly, the acquirer may not be able to ascertain such information, or more broadly, what constitutes 'defence land' from public information. To address this concern, a reasonableness test will be included in the proposed measure to take into account instances where investors may not have notified the Government because they (reasonably) did not know the target fell into the definition of a national security business.

The Government intends to provide guidance material on the definition of 'national security business' and 'national security land' to clarify the application of the definition and to support investors in navigating the reforms more broadly.

In addition, certain investment not otherwise notified under the existing national interest or new national security mandatory pre-investment notification processes will be able to be 'called in' before, during or after the investment, on a case-by-case basis if the Treasurer considers the investment raises national security concerns. Once called in, an investment will be reviewed under the national security test to determine if it raises national security concerns, consistent with the same process as those investors who notify on a mandatory basis.

The use of the 'call in' power will be time-limited and public guidance will be provided on the type of investments where the 'call in' power is most likely to be used. This is consistent with existing practice, where guidance material is provided on the FIRB website.

Example of the use of the call-in power:

> The Treasurer becomes aware through media reports that a foreign person is proposing to acquire a private company that provides after-hours maintenance services to state and territory government offices. The target company is estimated to be worth around $90 million.
>
> While this investment is not a significant or notifiable action, it does meet the criteria of being a reviewable national security action.

Given perceived sensitivities, the Treasurer decides to use the call-in power to review the action on national security grounds.

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

Example of a voluntary notification:

> A foreign person has recently acquired a direct interest in an entity whose core business is manufacturing textiles for the fashion industry, while also researching and developing experimental textiles. This action did not require mandatory foreign investment approval as it was not a significant or notifiable action, nor was it a notifiable national security action.
>
> Upon acquiring the company, the foreign person recognises the potential to sell one of the experimental textiles for use in a national security context. The foreign person decides to voluntarily notify in order to remove the possibility that this investment is called-in at a later date.

Investors will also be able to apply for a time-limited, investor-specific exemption certificate which will enable them to make eligible acquisitions without the need for case-by-case screening. This investor-specific exemption certificate is additional to the existing exemption certificates available for acquisitions of businesses, land and land entities, and mining and exploration tenements. Exemption certificates may range in length and value, and will be subject to conditions, including reporting conditions where necessary.

Finally, under this option, the Government will also introduce a national security last resort review power to reassess approved foreign investments where subsequent national security risks emerge. The last resort review power will allow the Treasurer to impose conditions, vary existing conditions or, as a last resort, require the divestment of foreign interests in a business, entity or land. The last resort review power will not be retrospective and will only be applicable to any future foreign investment that is reviewed under the FATA.

Example of the use of the last resort power:

> A foreign person, was approved to acquire a controlling stake in an online gambling company operating in Australia. At the time of the application, the foreign person failed to declare the connection of several directors to terrorist financing. This omission was material and misleading. The Treasurer may review this action under the last resort power.

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

Recognising the significant implications for investors, and the need for transparency and investor certainty, this power will be subject to significant safeguards, including the availability of merits review, and requirements that the Treasurer be satisfied that:

- reasonable steps have been taken to negotiate in good faith with the foreign investor to achieve an outcome of eliminating or reducing the risk without action under the FATA;

- requiring the investor to comply with an order is reasonably necessary to eliminate or reduce the national security risk; and

- there are no other regulatory mechanisms outside the FATA that can be used to adequately address the identified risk.

Option 3 – significant increase in the protection of Australia's assets

This option will permanently lower the monetary screening thresholds for all investments subject to the FATA to zero dollars, consistent with current temporary arrangements that were introduced in March 2020 in response to the coronavirus outbreak.

Notwithstanding these temporary coronavirus measures, under existing arrangements private investors face monetary thresholds which, dependent on a number of factors, can be as high as $1,192 million. All foreign government investors face a zero dollar screening threshold.

This option will significantly tighten the screening arrangements of the FATA for private investors, and require more investments (for example, low-value investments that are ordinarily out of scope of screening) to be notified to the Government for pre-acquisition screening.

3.2 Improving the integrity of the foreign investment review framework

As noted above, the foreign investment framework currently has a number of shortcomings that detract from the integrity of the framework. These shortcomings create investor uncertainty and inhibit the Government's ability to effectively administer the foreign investment framework.

Option 1 – status quo

Under this option, the foreign investment framework will continue to have various shortcomings that detract from its integrity and raise uncertainties about its application in a range of situations. Investors will continue to be able to exploit the gaps and loopholes in the legislation, should they choose, and the Government will have limited ability to screen or prohibit these investments. Even where they sought to do the right thing, in certain circumstances investors will continue to be unsure about their obligations. For example:

- The effects of share buyback programs and other forms of capital reductions present a potential gap in the Government's ability to address national interest risks with respect to foreign investment. Where a foreign person's percentage holding in an Australian entity increases as a result of not participating in a share buyback, the Government may have no recourse even where the investment raises national interest concerns, because the foreign person has not acquired any additional securities and so is not considered to be taking an action under the FATA.

- Certain investors may be able to increase their holdings above 20 per cent in target companies incrementally over time, and unless the acquisitions result in a change in control, the Government may be unable to impose conditions or prohibit these further acquisitions under the FATA even where the investment raises national interest concerns.

- Section 27 of the *Foreign Acquisitions and Takeovers Regulation 2015* exempts for all purposes, the acquisition of an interest in securities, assets, a trust, Australian land or a

tenement if the interest is held solely by way of security for the purposes of a moneylending agreement. The exemption applies even in cases where sensitive assets are being acquired. While lenders are required to make a genuine attempt to dispose of the interest, this requirement applies only to foreign government lenders rather than foreign lenders more broadly.

- The FATA provides for substantial interests in a corporation or trust to be traced back through the ownership of relevant entities. These tracing rules, however, do not apply to unincorporated limited partnership. This limits the Government's ability to effectively address national interest and security risks, particularly where limited partnerships are used as a vehicle for investment in critical infrastructure and other sensitive sectors.

Maintaining the status quo will also mean that the Government will continue to face legislative and administrative barriers to sharing and using its foreign investment data. This will continue to inhibit its ability to effectively administer the foreign investment framework.

Option 2 – a balanced approach

Under this option, the Government will clarify that foreign persons may require further foreign investment approval for increases in actual or proportional holdings above what has been previously approved, including as a result of creep acquisitions and proportional increases through share buybacks and selective capital reductions.

Currently, not all increases in shareholdings of an Australian business or entity are significant actions if the acquisition does not result in a change of control as provided under section 54 of the FATA. This means that private investors may be able to increase their holdings in a target Australian business or entity over time, and the Treasurer's powers under the FATA are not enlivened. The amendments will provide that in some circumstances, the 'change of control' test will no longer be a factor in determining that an action is a significant action once a foreign person controls an entity or business – thereby clarifying a current source of uncertainty under the law.

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

The types of government assets that will be subject to scrutiny under the FATA will also be expanded (from critical infrastructure asset sales) to include acquisitions of sensitive national security businesses or land, including where they involve the privatisation of government functions or services in those areas. This will ensure that national security factors are considered in the context of such sales, consistent with the new national security test under the FATA.

Further amendments will ensure that the tracing rules can be applied to unincorporated limited partnerships, as they are to corporations and trusts, so that beneficial interests can be traced. Currently, under the tracing rules, a person is taken to hold interests in securities in companies or trusts which are lower in the corporate structure where certain requirements are met. These tracing rules cannot be applied to unincorporated limited partnerships, limiting the Government's ability to impose conditions where an unincorporated limited partnership is used in a business structure. Extending the tracing rules to apply to unincorporated limited partnerships will enable the Government to impose conditions on the higher entities in the

organisational structure where required to manage national interest risks. Depending on the type of acquisitions and the risks being mitigated, conditions may vary from tax conditions, conditions relating to the proximity of an asset from a Defence establishment, or conditions relating to the management of data.

Furthermore, under this option, the FATA will also be amended to enable greater information sharing among government agencies in particular circumstances, as well as with foreign governments, for the purpose of enhancing compliance and better addressing national security risks.

Option 3 – significant increase in the protection of Australia's assets

This option proposes a more stringent approach to the screening of foreign investment proposals than under *Option 2*. For example, under this option, the 'change of control' requirement within the FATA will be removed completely, which will be likely to result in more foreign investment proposals being subject to the Treasurer's powers.

In relation to foreign investors whose proportional holdings increase, for example as a result of a company share buyback, this option will require affected investors to notify any increase, rather than only notifying when they start to hold more than 20 per cent in the company (for foreign persons) or more than 10 per cent (for foreign government investors or foreign persons investing in an agribusiness).

The information sharing provisions of the FATA will also be significantly expanded under this option, on a broad principles-based approach, to allow the regulator to share protected information with any government agencies where it is in the national interest to do so.

3.3 Stronger compliance and enforcement powers

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

However, as noted above, there is a need to expand the Government's compliance monitoring and enforcement powers, as the current tool-kit is not an effective deterrent to non-compliance.

Option 1 – status quo

Under this option, the Government's compliance and enforcement powers will remain quite limited. The FATA currently does not include monitoring powers and investigative powers are limited to requests for information and documents under section 133. Monitoring compliance will continue to be facilitated through reporting requirements on conditions attached to approvals, while investigations will remain largely desk-top and paper based by searching existing government and public databases. Other than for residential real estate, enforcement powers will remain reliant on the courts.

The Government will continue to have no directions powers under the FATA, leaving it without a tool to pursue early and effective action to remedy a breach of conditions. Penalty amounts will also remain low, usually at 250 penalty units, and an ineffective deterrent to non-compliance.

The Government will continue to have limited ability to respond proportionally to issues of non-compliance, with no ability to use infringement notices for minor offences.

Option 2 – a balanced approach

Under this option, the Government will have the resources, powers and penalties to effectively monitor, investigate and prosecute breaches of foreign investment laws.

The Government will have standard monitoring and investigative powers (in line with those of other business regulators) by enlivening the relevant provisions in the *Regulatory Powers (Standard Provisions) Act 2014*. This will enable authorised officers to access premises with consent or by warrant, gather documents, information or equipment, and interview people for relevant information. Investors will also be required to notify the Government where certain events occur in relation to actions taken (e.g. where an asset is sold), consistent with the requirements of the new foreign ownership register. This measure will improve regulators' capability to monitor investor compliance and/or investigate potential non-compliance.

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

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

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

As such, directions will vary depending on the circumstances, but may include removal of persons from corporate boards, providing audited financial statements to verify funding sources, or ceasing certain activities. The directions may require the conduct to be completed within a set timeframe or until a specified condition is met.

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

Civil and criminal penalties under the FATA will also be increased to ensure they act as an effective deterrent. These amounts will be maximums to enable Treasury to make submissions to the court to impose penalties appropriate to the circumstances of the contravention and relevant action.

In general, civil penalties will be the greater of the 5,000 units or 75 per cent of the value of the investment to a maximum monetary value of 250,000 penalty units. Criminal penalties will increase to 15,000 penalty units for individuals and 150,000 penalty units for

corporations. A key exception is a failure to notify, where the civil and criminal penalty will be capped at 250 penalty units.

Option 3 – significant increase in the protection of Australia's assets

Under this option a more stringent penalty regime will be implemented, with fewer (and less scalable) enforcement mechanisms available. Matters could only be enforced with court proceedings, which is a resource and cost intensive approach for both Treasury and the investor.

In this scenario, infringement notices could be issued for any civil penalty provision in the FATA, but will not be tiered. Rather, the infringement notices will be set at tier 3 under *Option 2*. That is, infringement notices for individuals will be 300 penalty units and 1,500 penalty units for corporations.

The investigative and monitoring powers will be the same as proposed under *Option 2*, but will be coupled with increased reporting obligations on various events that occur across the lifetime of the action. The type of events to be reported depends on the type of action taken, but would include instances where an investor has a no objection notification but ultimately does not take the action, consistent with *Option 3* of the new foreign ownership register; any changes in interests in securities; changes of senior officers; or changes in supply of services, goods or technology to defence personnel.

There will be no option for enforceable undertaking or directions under this option. Matters will only be enforced through civil penalty proceedings or criminal prosecutions, which is resource intensive and costly. Penalty amounts will also be increased to be the same as *Option 2* to ensure they act as an effective deterrent and proportionate penalty.

3.4 Streamlining less sensitive investments

As noted above, some stakeholders have stated that the foreign investment framework can be complex and burdensome in some situations. This is particularly relevant for privately controlled and managed institutional investors that are regularly screened under the foreign government investor screening rules due to large investments by foreign government investors in their funds.

Option 1 – status quo

Under this option, investment funds in which a foreign government investor holds at least a 20 per cent interest, or where multiple foreign government investors hold at least a 40 per cent interest, will continue to be classified as a foreign government investor themselves.

These funds will continue to be subject to the foreign government investor screening requirements of the FATA, such as a zero dollar screening threshold for all investments, which require them to notify the Government of a range of actions that are not otherwise required to be notified by private investors.

Option 2 – a balanced approach

Under this option, the Government will no longer treat certain entities (that is, some investment funds) as foreign government investors under the broader national interest test where their foreign government investors are passive – meaning they have no influence or

control over the investment or operational decisions of the entity or any of its underlying assets. This measure will be given effect in two ways:

- Entities which have more than 40 per cent foreign government ownership in aggregate (without influence or control) but less than 20 per cent from any single foreign government will no longer be deemed foreign government investors.

- Entities which have a single foreign government investor with at least 20 per cent ownership (without influence or control) will still be deemed foreign government investors, however they will be able to apply for a broad exemption certificate on a case-by-case basis that could exempt non-sensitive acquisitions below the private investor thresholds.

  – These exemption certificates may be granted for a specified time period (such as five or ten years, or up to the life of the entity), and may include conditions, such as conditions regarding the passivity and control of foreign governments over the investment fund and target entities.

  – If granted, the investor will effectively be in the same position as if the foreign government investor met the amended definition of aggregate substantial interest, in addition to being exempted from the notification requirements relating to an acquisition of a substantial interest on its own.

These entities will still be considered as 'foreign persons' for the purpose of foreign investment screening, and will be subject to the usual screening thresholds for private foreign investors.

In the case where a limited partnership investment fund may seek an exemption certificate, the entity will need to demonstrate the absence of foreign government investor influence or control. As part of the exemption certificate application, the fund will be required to show that their foreign government investors:

- do not have management rights in the investment;

- typically do not know which and when particular investments will be made (but may know the broad nature of the investment strategy); and

- do not have influence or control, directly or indirectly, and could not be perceived to have any influence or control, over the investment entity or strategy (including decisions to increase holdings or divest holdings in a sector or industry) of the investment fund.

The fund may also need to commit to the passivity of foreign government control through the use of conditions on the exemption certificate.

Option 3 – significant decrease in the protection of Australia's assets

This option will remove the zero dollar screening threshold that applies to all foreign government investor investments under the FATA. Investments made by foreign government investors into Australia will be subject to the same monetary screening thresholds as private investors.

While foreign government investors currently face a zero dollar screening threshold for all investments, private investors can be subject to a range of higher thresholds, sometimes up to $1,192 million.

By removing the specific zero dollar foreign government investor threshold, and applying the higher thresholds to all investors, many foreign government investor investments will no longer need to be notified to the Government – including investments in Australian businesses worth less than $275 million.

3.5 Register of foreign ownership of Australian assets

As noted above, the Government does not currently collect data on all foreign investments made into Australia. This limits the Government's ability to assess cases, monitor compliance with conditions imposed on investments, and draw on a robust data set to inform policy development.

Option 1 – status quo

Under this option, the Government will continue to collect only that foreign investment data that is captured on the small number of existing sector-specific registers. These five existing registers only collect information about realised foreign investments made into certain sectors of the economy – being residential land, agricultural land, water interests, media businesses and critical infrastructure.

In other sectors of the economy, such as commercial land or Australian retail businesses (for example), the Government will continue to have limited visibility of the foreign investments that are actually made into these sectors after an application is approved.

Option 2 – a balanced approach

Under this option, a new Register of Foreign Ownership of Australian Assets will be established to provide greater visibility of foreign investments in Australia. Investors will be required to record on this register all acquisitions they make of Australian land, and all significant actions they take following the receipt of a no objection notification or exemption certificate. Investors will be required to record their level of interest in the asset (e.g. their percentage of ownership), the means by which they acquired the asset (e.g. freehold or leasehold interests in land), and their contact (or agent's) details and nationality. Investors will be required to register their investments and provide this information within 30 days following the action.

The new Register will amalgamate the existing agricultural, residential and water registers, to provide a streamlined user experience. This proposal will not amalgamate or affect the existing critical infrastructure or water registers, as the characteristics of those registers do not easily align with the design of this new register. For example, while the data on the media register is publicly available, this new register will not be searchable by the public due to commercial sensitivities and privacy considerations. However, to provide a degree of public transparency on foreign investment in Australia, an annual report of aggregate de-identified data from the Register will be made available each year.

Stakeholder feedback during the consultation processes led to the refinement of certain elements of this proposal (for both *Options 2* and *3*). Most notably, following feedback that the draft definition of 'registrable land' was too broad, that definition was narrowed to be more consistent with the existing definitions already contained in the FATA.

Option 3 – significant increase in the protection of Australia's assets

Under this option, a new Register of Foreign Ownership will be established to provide the Government with greater visibility of foreign investments being made in Australia, similar to *Option 2*. However, investors will be required to record on this register a broader range of actions than under *Option 2*, including: all acquisitions of Australian land; all non-land acquisitions that would be significant actions, irrespective of their monetary value (i.e. assuming a zero dollar threshold applies); and all instances where an investor may hold a no objection notification or exemption certificate but not take any action. Investors will be required to record their level of interest in the asset (e.g. their percentage of ownership), the means by which they acquired the asset (e.g. freehold or leasehold interests in land), and their contact (or agent's) details and nationality.

Investors will be required to register their actions within 30 days following the action, or at the expiry of their no objection notification or exemption certificate.

Similar to *Option 2*, the new Register will amalgamate the existing agricultural land, residential land and water entitlement registers, to provide a streamlined user experience. The new Register will not be searchable by the public due to commercial sensitivities and privacy considerations. However, to provide a degree of public transparency on foreign investment in Australia, an annual report of aggregate de-identified data from the Register will be made available each year.

3.6 A fairer and simpler framework for foreign investment fees

It is the Government's policy that the cost of administering the foreign investment review framework be borne by foreign investors, not Australian tax payers. This position is widely accepted by investors. However, some stakeholders have still expressed concern that the structure of the fee framework is overly complex and costly to navigate.

With other measures in this reform package also expanding the Government's functions within the foreign investment framework – in particular, the introduction of a new national security test and compliance powers – the fees framework will also require updating if it is to continue to cover the cost of administering the new system.

Option 1 – status quo

Under this option, the fee framework will remain relatively complex. This will continue to impose a degree of uncertainty on investors which involves an expenditure of their time and resources to navigate.

For example, fees and fee rules are currently spread across both the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* and the *Foreign Acquisitions and Takeovers Fees Imposition Regulation 2015*, making it difficult and time consuming for applicants and their advisers to determine the appropriate fee. Given the requirement for fees to be paid before the Treasurer exercises powers, any uncertainty in establishing and paying the correct fee has the potential to cause unnecessary delays to the foreign investment review process – meaning foreign investors may have to wait longer for a decision. If the other proposed measures of this broader reform package are implemented, under this option, the fee framework will no longer be reflective of the entire costs of the foreign investment regime and not meet the Government's stated objectives.

Option 2 – a balanced approach

Under this proposal, the fee schedule will be updated to reflect the enlarged roles and responsibilities of foreign investment activities across government, including aspects related to national security and compliance measures. It will also take into account the growing complexity of cases, as well as the administrative cost of the review process over recent years. The updated fee schedule will focus on delivering a structure that is fairer and simpler. In particular, it will reduce the complexity of the framework to minimise the compliance and administrative costs for investors in establishing and paying the correct fee.

It will also remove the size of the gaps between existing thresholds for consideration value, which can have a distortionary impact on investment decisions. For example, fees for non-residential land currently only have three thresholds, which means fees rise by around 1,200 per cent between the first and second tier, and by more than 300 per cent between the second and third tier. A smoother, more graduated scale of fees will ensure investors are not incentivised at the margin to restructure transactions around fee tiers, and more generally will lead to more equal treatment of investors across consideration values.

On this basis, individual fees will continue to vary according to the type and value of the investment, with residential land applications continuing to pay the highest fees as a proportion of consideration, followed by agricultural land. Commercial land and business acquisitions will pay the least as a proportion of consideration. Depending on the consideration value, fees for residential land, agricultural land and commercial land and business acquisitions will generally range from $6,600 to $500,000.

There will be concessional fees available for exemption certificates and for actions which are reviewable, but not mandatorily notifiable, under the new national security test. Lower fees for called-in applications and voluntary notifications will help mitigate some of the additional regulatory impost and also encourage voluntary notifications where there may be doubt as to whether an application may present national security concerns.

While fees will increase, they will still represent a relatively small proportion of overall consideration for all application types. In addition, previous consultations have indicated that investors are more concerned about timeliness of FIRB decision-making than the level of fees.

Investors acquiring businesses between $10 million and $150 million will benefit from this new model, as will investors acquiring agricultural land between $2 million and $6 million. The maximum fee for a commercial transaction over $150 million will not be higher than 0.03 per cent of the consideration, or 0.66 per cent for agricultural land (above $6 million). Some fees for small acquisitions may be higher under the new framework; however the existing arrangements enabling fee relief on a case-by-case basis can be applied to ensure fees paid are appropriate for the nature of the transaction.

Recognising the importance of non-sensitive foreign direct investment to the Australian economy, investors will continue to be able to apply for exemption certificates for up-front approval of a program of acquisitions. Rather than the current flat fee, the fee structure for exemption certificates will generally depend on the type of target investments (e.g. businesses, agricultural land or commercial land), and the proposed value of the investments. The fees for these exemption certificates will be 75 per cent of the applicable fee for a single transaction of the same value.

Option 3 – significant increase in the protection of Australia's assets

Under this option, the structure of the fee framework will remain unchanged, and relatively complex.

However, under this option, the size of each of the individual fees will be increased to ensure that they cover the additional expected costs of the new post-reform system.

3.7 Modernising Australia's foreign investment ICT platform for better case management, compliance enforcement and data use

As noted above, the Government's ability to identify and assess national interest and national security risks in foreign investment hinges on a fit-for-purpose case and compliance management system, and the quality, accuracy and currency of data. Treasury's current IT system has not kept pace with evolving operational demands and is not a functional case management system, nor does it effectively support compliance activity. The accessibility and useability of data can at times be limited.

Option 1 – status quo

Under this option, Treasury will continue to use its current IT case management system (known as FIMS3) to administer the foreign investment review framework. This system, however, is no longer fit for current purposes, or expected future purposes.

FIMS3 is not a fully functional case management system, and it is not designed to support compliance management. For example, it does not enable case officers to verify an investor's identity, or to search other data sources to identify national interest risks. It also provides very limited reporting of case flows, and has no compliance reporting functionality.

Maintaining the status quo will mean that Treasury officers will continue to undertake a significant amount of work in an inefficient manual manner, as the current IT capability will not support the existing or new functions.

Option 2 – a considered investment approach

Under this option, a new case management system will be implemented to enable end-to-end case management, including compliance monitoring, and some process automation. It will enable all of Treasury's work to administer the FATA (including case assessments and compliance monitoring) to be completed in the one system.

The system will include a single public front door to channel investors to either the ATO online services portal (for residential and non-sensitive commercial applications) or the Treasury service delivery point (for all other applications), leveraging MyGovID for authentication. This will make it easier for investors to interact with government services.

This option will also include advanced analytics including machine learning, natural language processing, and entity relationship mapping. These technologies will assist case management and compliance officers by identifying potential areas of risk through the accumulation and searching of multifaceted market data sources.

The new system will also be linked to the new Register of Foreign Ownership of Australian Assets to provide case officers with more timely and accurate information on what investors already own in Australia when assessing a case.

This proposed IT system will deliver improved government services through an improved investor portal with enhanced validation to minimise the likelihood that investors will be required to provide additional information after the initial submission. In particular, this option has the greatest impact on improving Treasury's ability to perform its regulatory role, and increases productivity in administering the foreign investment review framework with reduced processing times and costs for government and investors.

Option 3 – a lower investment approach

Under this option, a new case management system will be implemented (as in *Option 2*) to enable end-to-end case management, with all of Treasury's work administering the FATA to be carried out in the one system. Consistent with *Option 2*, the system will also include a single public front door to channel investors to either the ATO online services portal or the Treasury service delivery point, and be linked to the new Register of Foreign Ownership of Australian Assets.

Option 3 will not, however incorporate the further advanced data analytics across large public and non-public data sets of *Option 2*. This option will therefore not assist case management and compliance officers in identifying potential areas of risk in the same manner as in *Option 2*. Therefore the key regulator impacts compared to *Option 2* are reduced processing times and greater manual effort (although an overall reduction compared to *Option 1*), with less efficient consultation processes across government in identifying national interest and national security risks.

4. What is the likely net benefit of the considered options?

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

Australia's attractiveness as a destination for foreign investment is reflected in foreign direct investment (FDI) inflows, which in the three years to 2019 averaged 3.3 per cent of GDP – compared with 1.7 per cent of GDP for the OECD and 1.5 per cent of GDP for the G20 economies[9].

In general, foreign investors face two sources of regulatory burden from the foreign investment review framework. Prior to making an investment, an investor is required to submit an application to the Government for pre-acquisition screening. For investments in certain specified sectors, investors are also required to register their investment on a Government register once the investment is realised (the registers are discussed further in sections 3.5 and 4.5).

Over recent years, foreign investors have submitted, on average, around, 9,900 applications to the Government for pre-acquisition screening each year (worth around $200 billion in investment to the Australian economy), and in addition have made on average around 13,500 post-investment registrations each year – incurring a total annual average regulatory cost of approximately $332 million from the foreign investment framework.

[9] OECD, 2020 – *FDI inflows.*

While there is no fee charged for making a registration, investors do pay fees for submitting a pre-acquisition application for screening. This ensures that it is foreign investors, not Australian taxpayers, that bear the financial cost of administering the foreign investment regime (fees are discussed further in sections 3.6 and 4.6). In 2018-19, the total fees paid by foreign investors was $94 million[10].

Australia's continued attractiveness as a foreign investment destination suggests that the current regulatory costs and fees of the foreign investment review framework are not a significant deterrent to foreign investment in Australia.

4.1 Protecting Australia's national security

Option 1 – status quo

Maintaining the status quo will provide stability for both investors and government. It will not impose any additional regulatory burden on investors, or have any additional financial costs for the Government.

However, without reform, this option will continue to leave Australia exposed to the increasing risks, particularly risks to our national security, posed from foreign ownership in transactions outside of the FATA's existing screening thresholds. It will provide Australia with no additional protection from the national security risks that may arise in some low-valued foreign investments.

Option 2 – a balanced approach

This option will ensure that potentially sensitive investments outside of the FATA's existing thresholds are assessed for national security concerns. This will provide the Government with a greater ability to protect Australia against any national security risks that may arise from a foreign investment proposal.

The key concepts that are proposed to inform the definition of a national security business and national security land are deliberately narrow in recognition of the fact that, outside of those identified national security businesses and national security land, the majority of investments into Australia are not likely to raise national security concerns.

For most investors who undertake investments in non-sensitive sectors of the economy, the introduction of this national security test will not affect how they interact with the foreign investment review framework.

While the 'call in' power may create additional uncertainty for investors, as to whether their investment will be called-in or not, there are a range of safeguards proposed in the design of this option that will mitigate these concerns. For example, the use of the 'call in' power will be time-limited, investors will be able to voluntarily notify to extinguish the ability to be called-in, and public guidance will be issued on the types of investments that may be 'called-in'. While the overwhelming majority of investments are not expected to be called in, investors could still seek regulatory certainty, if they choose, by voluntarily notifying. The use of a call-in power will also avoid investors facing the certain regulatory burden of having to notify, if instead the action was mandatorily (instead of voluntarily) notifiable under the legislation.

[10] Foreign Investment Review Board, Annual Report 2018-19.

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

The introduction of a national security test under this option is expected to increase the number of foreign investment applications submitted to the Government for screening each year. It is estimated that, on average, an additional 161 applications will be made by investors each year, resulting in an additional aggregate regulatory burden on investors of approximately $5.4 million per annum.

In order to have the resources and capacity to screen these additional applications, government agencies will also require additional resourcing from the Government of approximately $3.4 million per annum. These costs can however be recovered from investors through reform to the application fee framework (see sections 3.6 and 4.6).

Option 3 – significant increase in the protection of Australia's assets

This option will provide the Government with greater oversight of proposed foreign investments in Australia by requiring notification of all actions captured by the legislation. It will provide the Government with greater power to review more investments, and could impose conditions on, or prohibit, those investments that may be contrary to the national interest.

This option will also simplify the administration of the foreign investment framework, by removing the many different thresholds that currently exist, and replacing them with just one zero dollar threshold for all investors and all investments.

A zero dollar threshold, will however, significantly tighten the screening arrangements of the FATA for private investors. It will require more investments to be notified to the Government for pre-acquisition screening, and may run counter to other government objectives, such as the liberalisation of screening thresholds under Australia's Free Trade Agreements. In total, it is estimated that this option will result in investors submitting an additional 1,100 applications each year, which will increase the regulatory burden on investors by an average of approximately $36.9 million per annum.

This option will also require a substantial uplift in resources across Government to adequately screen the additional caseload (including over thirty consult partners who form part of the case review process). In the absence of greater resources, the average time taken to review foreign investment applications will likely increase significantly and will negatively impact Australia's reputation for attracting foreign investment.

Summary of regulatory costs of options

Average additional annual regulatory costs, from business as usual ($million)				
	Business	Community organisations	Individuals	Total change in cost
Option 1	$0	$0	$0	$0
Option 2	$5.4	$0	$0	$5.4
Option 3	$36.9	$0	$0	$36.9

4.2 Improving the integrity of the foreign investment review framework

Option 1 – status quo

Maintaining the status quo will provide stability to both investors and government. It will not impose any additional regulatory burden on investors, or have any additional financial costs for the Government.

However, this option will also continue to leave shortcomings in the legislation that will continue to expose investors to regulatory uncertainty. These shortcomings may also undermine the public's confidence in the foreign investment framework.

The restrictive information sharing arrangements will also mean that the Government will remain hampered by its own inability to share data to effectively assess cases and develop informed policy.

Option 2 – a balanced approach

This option will provide a suite of measures to tighten the integrity of the foreign investment framework. It will provide greater clarity and certainty to both investors and government as to whether or not a foreign investment application should be made in certain situations.

A notable benefit associated with this option is it expands the range of actions which the Treasurer has powers over without necessarily requiring foreign persons to notify the Treasurer before undertaking those actions. As such, this option strengthens the Treasurer's ability to manage national interest risks where they arise without significantly increasing the regulatory burden on investors.

Under this option, it is estimated that the total number of applications that investors will submit to the Government each year for screening will be broadly unchanged. However, by providing greater clarity, readability and certainty in the legislation, this option will lower the regulatory burden investors face in navigating the foreign investment framework. In total, it is estimated that this option will reduce the aggregate regulatory burden faced by investors under the foreign investment framework by approximately $775,000 per annum.

Under this option, government agencies will also be enabled to share data and information with one another more easily, which will increase the efficiency of the administration of the framework, particularly with regards to the assessment of case applications. This outcome furthers the Government's commitment to deliver a timely and efficient foreign investment regime which recognises commercial deadlines and does not unnecessarily impede the operation of foreign investors or markets.

Option 3 – significant increase in the protection of Australia's assets

This option will result in increased regulation of foreign investment, compared to either *Option 1* or *Option 2*, with more foreign investment proposals subject to Government screening.

This option may however result in outcomes that ill reflect the relative risk of some of those proposed investments. For example, the removal of the 'change of control' requirement may lead to situations where passive investors in a company will be subject to the same level of Government scrutiny as those investors who are in control of the company. The burden of such regulation will significantly and unnecessarily hold back economic activity.

Under this option it is estimated that investors will likely submit an additional 18 foreign investment applications each year. The total increase in the aggregate regulatory burden on investors under this option will be approximately $500,000 per annum.

While this option will also allow for greater administrative flexibility and discretion by government agencies in the use of foreign investment data, it will significantly broaden the circumstances in which the disclosure of protected information is permitted, and may raise investor concerns over the reduced confidentiality of their information.

Summary of regulatory costs of options

Average additional annual regulatory costs, from business as usual ($million)				
	Business	Community organisations	Individuals	Total change in cost
Option 1	$0	$0	$0	$0
Option 2	($0.1)	$0	($0.6)	($0.8)
Option 3	$0.5	$0	$0.0	$0.5

4.3 Stronger compliance and enforcement powers

Option 1 – status quo

Maintaining the status quo will provide stability for both investors and government. It will not impose any additional regulatory burden on investors, or have any additional financial costs for the Government.

However, this option will continue to leave the Government with an ineffective tool-kit to effectively deter non-compliance. It risks compromising the integrity of the foreign investment framework, and with it, the public's confidence in the Government's ability to administer the framework.

Option 2 – a balanced approach

By enhancing the Government's ability to monitor compliance and address non-compliance, this option will be expected to result in an overall improvement in investor compliance. It will also bring the Government's compliance regime under the FATA into closer alignment with overseas counterparts and other domestic market regulators, providing greater streamlining and consistency for both investors and the Government.

By expanding the infringement notice regime and introducing enforceable undertakings, this option will provide the Government with greater options to pursue an enforcement mechanism proportional to the contravention.

To ensure these greater compliance and enforcement powers can be effectively implemented by the Treasury and ATO, this option will require increased resourcing for these agencies, at a cost to the Government of approximately $9.3 million per annum, on average, over the next ten years. These costs can however be recovered from investors through reform to the application fee framework (see sections 3.6 and 4.6).

The additional powers to monitor compliance and address non-compliance will be increased functions for the Treasurer, Treasury and ATO, and will not impose any additional regulatory burden on investors that comply with the rules.

Option 3 – significant increase in the protection of Australia's assets

The benefit of this approach, over *Option 1* or *Option 2*, is that it will broaden the existing compliance regime by increasing the investigative and monitoring powers and expanding the use of infringement notices for all civil penalty provisions, as well as improving visibility of the regulated population.

The harsher penalties combined with increased investigative and monitoring powers may also be a more effective deterrent to non-compliance.

However, the negatives from this option are a lack of flexibility to impose a proportionate response to non-compliance, particularly where an investor may self-report and is willing to take active steps to rectify the issue. This may turn out to be a more expensive option for the Government in the long-term, due to the cost and resource intensive nature of pursuing court proceedings.

This option will also leave Treasury out of step with the range of powers available to other Commonwealth regulators, potentially leading to a lack of consistency between government regulators. That is, where an event results in multiple contraventions, another regulator may impose an enforceable undertaking, but our options would be limited to doing nothing, imposing an infringement notice or pursuing costly court proceedings. The expanded reporting obligations under this option will also increase the regulatory burden on investors (consistent with information presented in *Option 3* of the new foreign ownership register).

4.4 Streamlining less sensitive investments

Option 1 – status quo

This option will provide stability for both investors and government. It will not impose any additional regulatory burden on investors, or have any additional financial costs for the Government. It will also ensure that the Government continued to have extensive oversight of investments made into Australia by these particular funds.

However, this option will continue to impose a regulatory burden on these funds that may be disproportionate to the national interest risks that they pose. As operational and strategic control of these funds is generally held by a private non-government general partner, there are generally sufficient barriers to foreign government influence in these funds, which make them a lower risk investor than a typical foreign government investor. By maintaining the status quo, however, these funds will continue to be subject to the same higher regulatory screening requirements of foreign government investors.

Option 2 – a balanced approach

This option will streamline the handling of non-sensitive cases and reduce red tape for investors. It will allow these particular entities that are currently screened under the tighter foreign government investor requirements of the FATA, to make investments in Australia under the lighter touch regulatory requirements of private investors.

It is estimated that this measure will result in 60 fewer foreign investment applications being submitted by investors each year, which will reduce the aggregate regulatory burden on investors by approximately $1.9 million per annum.

While there will be less visibility of investments made into Australia by these types of foreign investors under this option, the experience in screening proposals of this nature indicate that they typically do not give rise to national interest concerns. Operational and strategic control over fund investments and fund investment decisions is generally undertaken entirely by the general partners of the funds (which are typically private, non-government entities), and it is common for there to be sufficient barriers against foreign government influence to make them lower-risk or otherwise unlikely to raise national interest concerns.

In addition, investors who rely on this exception will need to sufficiently acquit themselves of any responsibilities under the FATA.

Option 3 – significant decrease in the protection of Australia's assets

This option will significantly liberalise the foreign investment review framework for foreign government investors. Many foreign government investor investments – including where a foreign government investor invests in an Australian business worth less than $275 million – will no longer need to be notified to the Government. It is estimated that this option will reduce the number of foreign investment applications that foreign government investors submit to the Government each year by 565 applications, resulting in a decreased aggregate regulatory burden on foreign government investors of approximately $18.5 million per annum.

While this option will streamline the foreign investment review framework for foreign government investors and reduce their regulatory burden, it may also expose Australia to greater risks due to the reduced rate of screening. The tighter screening thresholds that foreign government investors currently face reflect a long-standing presumption that, on average, foreign government investors can pose a greater risk to Australia's national interest than private investors. By liberalising the screening requirements for foreign government investors, as proposed under this option, this will reduce the Government's oversight of these investments, and increase the risk that an investment that is contrary to Australia's interests may proceed unmitigated.

Summary of regulatory costs of options

Average additional annual regulatory costs, from business as usual ($million)				
	Business	Community organisations	Individuals	Total change in cost
Option 1	$0	$0	$0	$0
Option 2	($1.9)	$0	$0	($1.9)
Option 3	($18.5)	$0	$0	($18.5)

4.5 Register of foreign ownership of Australian assets

Option 1 – status quo

Maintaining the status quo will provide stability for both investors and government. It will not impose any additional regulatory burden on investors, or have any additional financial cost for the Government.

However, under this option, the Government will continue to have little data on what foreign investors actually own in large parts of the Australian economy. Government data will remain constrained to just residential, agricultural, water, media and critical infrastructure.

The lack of comprehensive data will continue to inhibit case assessments, make it difficult to monitor investor's compliance with conditions as there will be limited visibility of when an investment actually occurs, and may undermine the public's confidence in the foreign investment framework.

Option 2 – a balanced approach

The new Register proposed under this option will provide greater visibility of foreign investments in Australia. This greater visibility will provide a number of benefits to the Government across the foreign investment framework.

It will assist with case processing, as the Government will now know what an investor already owns in Australia, which will enable easier identification of systemic trends. It will also likely reduce case processing times as the Government will now have this information on-hand, and will no longer need to expend time and effort searching third party sources.

The new Register will also assist compliance monitoring of any conditions imposed on a proposed investment, as the Government will now know when that investment has been made, and thus when the conditions take effect.

Over time, the data on the Register will also provide the Government with a more robust data set of foreign ownership in Australia, which will help inform any future policy considerations and development.

The IT build and delivery of the new Register requires additional Government funding. As part of the 2020-21 Budget, the Government provided $86.3 million over four years to implement a new ICT platform to support more effective and efficient foreign investment application processing and compliance activities across Government and a new consolidated Register of Foreign Ownership of Australian Assets. These costs can however be recovered from investors through reform to the application fee framework (see sections 3.6 and 4.6).

It is not expected that there will be significant costs to investors from this Register. For most investors, the establishment of the new register will not impose an additional burden over their existing registration obligations. For example, investors already have to register when acquiring or disposing of interests in agricultural land, residential land, water entitlements, media companies, and/or critical infrastructure. In fact, by amalgamating the existing agricultural, water and residential registers, this new Register will even streamline the user experience for investors with interests across these sectors.

It is estimated that under this option there will be an additional 1,800 events registered by foreign investors each year, in addition to the approximately 13,500 events already being registered each year under existing obligations. The registration of these additional 1,800 events will impose an additional aggregate regulatory burden on investors of approximately $65,000 per annum. This is in addition to the approximately $500,000 per annum of regulatory burden from the existing registration obligations.

Option 3 – significant increase in protection of Australia's assets

In addition to all of the benefits outlined in *Option 2*, this option will provide the Government with an even greater amount of data on foreign investment, and foreign investor's activities, in Australia. The expanded data set will better assist the Government with case processing and compliance monitoring, and will provide a more comprehensive evidence base to support future policy development than under *Option 2*.

The IT build and delivery of the new Register requires additional Government funding, similar to *Option 2*.

While this more comprehensive data collection option will provide greater benefits to the Government, it will also impose a higher regulatory burden on investors, with a greater number of events needing to be registered. It is estimated that under this option an additional 5,300 events will be registered on average each year, in addition to the approximately 13,500 events already being registered each year under existing obligations. This will impose an additional aggregate regulatory burden on investors of approximately $200,000 per annum. This is in addition to the approximately $500,000 per annum of regulatory cost from the existing registration obligations.

Summary of regulatory costs of options

Average additional annual regulatory costs, from business as usual ($million)				
	Business	Community organisations	Individuals	Total change in cost
Option 1	$0	$0	$0	$0
Option 2	$0.1	$0	$0	$0.1
Option 3	$0.1	$0	$0.1	$0.2

4.6 A fairer and simpler framework for foreign investment fees

Option 1 – status quo

Maintaining the status quo will provide stability to investors, and will not impose any additional regulatory burden on them. However, this option will also continue to expose them to a degree of uncertainty in determining and paying the correct application fee. This will continue to impose a time and resource cost on investors.

Without reform, the fee framework will also be unlikely to satisfy the Government's objective of ensuring that foreign investors bear the entire costs of the foreign investment framework into the future once the other reform measures are adopted. This option will impose additional financial costs on the Government to cover the new capabilities and

functions of the other reform measures (these costs are outlined under each of the relevant measures).

Option 2 – a balanced approach

This option will reduce the complexity of the fee framework and minimise the compliance and administrative costs for investors in establishing and paying the applicable fee. It is estimated that the reform under this option will reduce the aggregate regulatory costs on investors of making an application by approximately $650,000 per annum.

While investors may face higher fees under this option, it will ensure foreign investors continue to bear the costs of administering the foreign investment regime into the future, in accordance with the Government's stated policy.

While fees will increase, they will still represent a relatively small proportion of overall consideration for all application types. Previous consultations have indicated that investors are more concerned about timeliness of FIRB decision-making than the level of fees. Some stakeholders have noted that the revised fee framework may affect the timing of a foreign investment application, whereby an investor may delay paying a fee until an acquisition is nearly finalised. This is supported by evidence from the introduction of foreign investment fees in 2015, where the subsequent decline in applications (particularly in residential real estate) was partly attributed to a reduction in speculative applications.

Option 3 – significant increase in the protection of Australia's assets

By maintaining the current fee structure but increasing the size of individual fees, this option will ensure that the fee framework will continue to cover the costs of administering the foreign investment regime into the future under the new system, in accordance with the Government's stated policy. In addition, maintaining the current fee structure will provide stability to investors and the Government, and will not impose any additional regulatory burden on investors.

However, it will mean that investors continue to face a relatively complex framework that is time-consuming and expensive to navigate. It will also increase existing inequities between fee tiers.

Summary of regulatory costs of options

Average additional annual regulatory costs, from business as usual ($million)				
	Business	Community organisations	Individuals	Total change in cost
Option 1	$0	$0	$0	$0
Option 2	($0.1)	$0	($0.6)	($0.7)
Option 3	$0	$0	$0	$0

4.7 Modernising Australia's foreign investment ICT platform for better case management, compliance enforcement and data use

Option 1 – status quo

Maintaining the existing IT system will provide stability for investors and government. It will not impose any additional regulatory burden on investors, or have any additional financial cost to the Government.

However, the maintenance of an inadequate IT system will continue to hamper the efficient and timely administration of the foreign investment framework. Case assessments will continue to involve significant manual work, meaning that cases are handled more slowly than otherwise could be. This will continue to be an ongoing source of frustration for investors.

Maintaining the current system will also mean that there is no analytical support to underpin the detection of non-notified transactions, and will increase the likelihood that a foreign investment that risks our national interest or national security will be erroneously approved.

Option 2 – a considered investment approach

The improved IT system under this option will enable cases to be handled more quickly and more efficiently. It will automate workflows, reduce data quality issues, especially at the application stage, and enable real time collaboration with consult partners (which currently occurs through inefficient bilateral emails). It will also enable the increasing volume of compliance activities to be more effectively managed, providing greater levels of assurance over foreign investments.

The implementation of this option will help Treasury become a modern, efficient and world class regulator, and in doing so, improve Treasury's ability to perform its regulatory role in a more productive manner. This new system will also enable the Treasury to provide the Government with greater flexibility in its foreign investment reporting, as the Treasurer and Government have previously requested.

The new IT system proposed under this option will make it easier for investors to submit their foreign investment applications and provide the necessary information in an efficient manner. It will provide a faster and more user-friendly experience for investors seeking approval to invest in Australia. It is estimated that this proposed new system will reduce the aggregate regulatory burden on investors from making applications by approximately $650,000 per annum.

The IT build and delivery requires additional Government funding. As part of the 2020-21 Budget, the Government provided $86.3 million over four years to implement a new ICT platform to support more effective and efficient foreign investment application processing and compliance activities across Government and a new consolidated Register of Foreign Ownership of Australian Assets. These costs can be recovered from investors through reform to the application fee framework (see sections 3.6 and 4.6) in line with the Government's policy that the costs of administering the foreign investment regime should continue to be borne by foreign investors, not Australian tax payers.

These benefits will also be provided by the case management system outlined under *Option 3*. However, in addition to these, *Option 2* will deliver greatly advanced data analytics

and will therefore also provide enhanced capability to identify risk and support improved decision making and compliance activities.

These advanced data analytics will support the verification, validation, and certification of core data assets used by the Treasury in undertaking assessment and compliance activities. This capability will significantly reduce the likelihood that national interest and national security risks in foreign investment are not identified or acted upon.

Overall, effective management of Australia's foreign investment regulatory environment is a core responsibility and priority for Treasury as it safeguards Australia's national interest and national security, while also facilitating timely and effective decision-making in support of foreign investment which is consistent with our national interest. *Option 2* provides the greatest direct impact and benefit in support of this function.

Option 3 – a lower investment approach

As with *Option 2*, the improved IT system under this option will enable cases to be handled more quickly and more efficiently. It will automate workflows, reduce data quality issues, and enable real time collaboration with consult partners (which currently occurs through inefficient bilateral manual processes). It will also enable the increasing volume of compliance activities to be more effectively managed, and reduce the aggregate regulatory burden on investors by approximately $650,000 per annum.

Option 3 will not, however, deliver the greatly advanced data analytics delivered under *Option 2*, and will therefore not provide the enhanced capability to identify risk and support improved decision making. The reduced capabilities of this option will therefore not improve case processing times as much as *Option 2*, and will continue to leave investors facing a higher regulatory burden than under *Option 2*.

The IT build and delivery requires additional Government funding (but less than under *Option 2*). These costs can however be recovered from investors through reform to the application fee framework (see sections 3.6 and 4.6), in line with the Government's policy that the costs of administering the foreign investment regime should continue to be borne by foreign investors, not Australian tax payers.

Summary of regulatory costs of options

Average additional annual regulatory costs, from business as usual ($million)				
	Business	Community organisations	Individuals	Total change in cost
Option 1	$0	$0	$0	$0
Option 2	($0.1)	$0	($0.6)	($0.7)
Option 3	($0.1)	$0	($0.6)	($0.7)

5. Consultation process

The Treasury has engaged extensively with a range of key stakeholders in developing this reform package. Consultation has occurred across three broad phases, and has involved consultation with legal practitioners, foreign governments, institutional investors, domestic industry owners and operators, business councils and peak bodies, relevant government agencies, and the community.

In the first phase, Treasury worked closely with relevant government agencies and departments (for example, the Department of Prime Minister and Cabinet, the national intelligence community, the Department of Defence, the Department of Home Affairs, the Australian Taxation Office and the Australian Competition and Consumer Commission) to build a sound understanding of the identified problems, and to develop draft policy options for further consideration. This engagement involved extensive officer-level briefings, SES roundtables, and Deputy Secretary and Secretary committee meetings.

The Treasury also engaged closely with the Department of Foreign Affairs and Trade and the Attorney General's Department (including the Office of International Law) to ensure that the reforms were carefully considered in light of Australia's international trade and investment obligations.

On 5 June 2020, the Government publicly announced that it was considering major reforms to the foreign investment review framework, and released a summary booklet of its draft proposals. This commenced the second phase of stakeholder engagement.

During this phase, the Treasury undertook approximately 40 engagements across its stakeholder network, with over 1,000 stakeholders attending these sessions from across industry, Australian and foreign governments, peak bodies, multilateral institutions, investors and advisory groups.

The Treasury also participated in targeted foreign government and foreign investor engagements facilitated by the Department of Foreign Affairs and Trade and Austrade. This included a number of engagements involving the chair of the Foreign Investment Review Board, Mr David Irvine AO.

These engagement opportunities provided a clear picture of the key stakeholders in the reform process and informed the development of the exposure draft legislation consultation process, particularly with those who expressed a keen interest to be involved in the ongoing work.

On 31 July 2020, the Government released an exposure draft Bill of its proposed reforms. This commenced the third phase of stakeholder engagement, with the draft legislation available for public comment for a period of just over four weeks to 31 August 2020.

The first part of the exposure draft Regulations – outlining a proposed definition of a sensitive 'national security business' – were publicly released for consultation alongside the draft Bill. Further exposure draft Regulations – outlining the time limit for the proposed national security call-in power, streamlining measures, and other technical amendments – were released for public consultation on 18 September 2020.

During this consultation phase, Treasury hosted both targeted stakeholder engagement sessions and public information sessions on the proposed reforms. Treasury led proactive and dedicated discussion sessions with key stakeholders identified through previous engagements. All interested stakeholders were also welcome to attend the public sessions, ensuring the consultation process was transparent, genuine and comprehensive.

Treasury hosted 19 targeted stakeholder sessions in this consultation period, reaching close to 200 organisations including legal and financial advisers, state and territory governments, domestic industry owners, operators and vendors, industry groups, and business councils and peak bodies. Treasury also engaged with offshore investors and advocates facilitated by the Department of Foreign Affairs and Trade and Austrade.

Two public information sessions were also held to raise awareness of the proposed reforms, and to engage any other affected organisations or individuals that missed the targeted engagements. Over 120 stakeholders registered for these two sessions.

In addition to these engagements, the Treasury invited stakeholders to make written submissions on the exposure drafts. In total, fifty-five submissions were received, with fourteen of these submitted being confidential. The non-confidential submissions can be viewed on the Treasury website at: https://treasury.gov.au/consultation/c2020-99761. The main theme raised in the submissions was the need for the Government to balance the necessary regulatory capture of the national security business definition, with Australia's reputation as an open and attractive foreign investment destination.

Other commonly raised concerns centred on the need for a timely application process, ensuring due process, and compliance with Australia's international obligations. Some stakeholders raised issues with the new treatment of share buy backs and the need to distinguish between active and passive investors. Others raised concerns that the registration obligations associated with the new Register of Foreign Ownership of Australian Assets may be onerous and increase compliance costs.

These targeted consultation processes complemented the extensive and ongoing engagements that the Treasury already maintains with its stakeholders. For example, in 2018-19, the Treasury convened over 300 events with a broad range of stakeholders, including investors and their advisers. These engagements provide the Treasury with a deeper understanding of the global business environment and commercial drivers of mergers and acquisitions. They also allow Treasury to explain Australia's foreign investment framework, hear the views of stakeholders, and answer any questions that stakeholders may have.

Throughout all of these consultation phases, the Treasury worked closely with the Foreign Investment Review Board, including its chair, Mr David Irvine AO, to seek its input and advice on the policy problems and proposed reforms. The Foreign Investment Review Board fully supports the proposed reforms.

Interim versions of this Regulation Impact Statement (not assessed by OBPR) were provided to the Government at certain points during the development of these reforms.

6. What is the recommended policy approach?

Based on an analysis of the considered options, and the feedback harnessed from our stakeholders, the Treasury recommends that the Government adopt *Option 2* in each of the policy packages outlined above (and summarised in the tables below).

This comprehensive suite of reforms will strengthen the foreign investment framework to ensure that it keeps pace in a fast-changing world where national interest risks, especially national security risks, from foreign ownership have increased.

Protecting Australia's national security		
	Benefits	**Costs**
Option 1 – status quo	• No additional regulatory burden • No financial cost to Government	• No regulatory oversight of actions that may be contrary to national security

Option 2 – a balanced approach	• Enables Government oversight of actions that could be contrary to national security	• New notification requirements for actions that could be contrary to national security • Increased workload to process new actions
Option 3 – significant increase in protection	• Prohibitive regulatory oversight to ensure investments are not contrary to national security	• Significant reporting burden on investors • Decrease in foreign investment in Australia

Improving the integrity of the foreign investment framework		
	Benefits	**Costs**
Option 1 – status quo	• No additional regulatory burden • No financial cost to Government	• Investor's will continue to face regulatory uncertainty • Case assessments and policy development will remain hampered by lack of information
Option 2 – a balanced approach	• Expands the range of actions the Government will have powers over, without increasing regulatory burden • More efficient and more informed case assessments	• Information flows will remain limited to certain purposes
Option 3 – significant increase in protection	• Greater administrative flexibility and discretion	• Increased regulatory burden • Reduced confidentiality of investor information

Stronger compliance and enforcement tools		
	Benefits	**Costs**
Option 1 – status quo	• No additional regulatory burden • No financial cost to Government	• Limited monitoring and investigative powers to ascertain compliance • Limited enforcement options where non-compliance detected

Option 2 – a balanced approach	• Additional monitoring, investigative and enforcement powers consistent with other regulators • Increased penalty amounts for proportionate penalties	• Increased staffing to implement the monitoring, investigative and enforcement powers. Associated increased training requirements
Option 3 – significant increase in protection	• Detailed oversight of activities by investors	• Significant reporting obligations on investors • Greater resources required in pursuing court proceedings due to lack of alternative enforcement mechanisms

Streamlining less sensitive investments		
	Benefits	**Costs**
Option 1 – status quo	• No additional regulatory burden • Maintain detailed oversight of activities by investors	• Significant reporting obligations for lower risk investments
Option 2 – a balanced approach	• Fewer reporting obligations for lower risk investments	• Decrease in regulatory oversight of actions that may be contrary to national interest
Option 3 – significant decrease in protection	• Significant reduction in reporting burden for foreign government investors	• Substantial decrease in regulatory oversight of actions that may be contrary to national interest

Register of foreign ownership of Australian assets		
	Benefits	**Costs**
Option 1 – status quo	• No additional regulatory burden • No financial cost to Government	• Visibility of realised foreign investment remains low
Option 2 – a balanced approach	• Faster and more robust case processing, with	• Additional regulatory burden

	improved compliance monitoring • Better data set to aid future policy considerations	• Financial cost to Government for IT build
Option 3 – significant increase in protection	• Faster and more robust case processing, with improved compliance monitoring • Larger data set to aid future policy considerations	• Significant increase in additional regulatory burden • Financial cost to Government for IT build

A fairer and simpler framework for foreign investment fees		
	Benefits	**Costs**
Option 1 – status quo	• No additional regulatory burden • No financial cost to foreign investors	• Financial cost to Australian taxpayers to fund reforms • Investor's will continue to face regulatory uncertainty
Option 2 – a balanced approach	• No financial cost to Australian taxpayers • Fairer and simpler fee framework	• Some foreign investors will pay more
Option 3 – significant increase in protection	• No additional regulatory burden • No financial cost to Australian taxpayers	• Investor's will continue to face regulatory uncertainty • Increased inequities between fee tiers

Modernising Australia's foreign investment ICT platform for better case management, compliance enforcement and data use		
	Benefits	**Costs**
Option 1 – status quo	• No additional regulatory burden • No financial cost to Government	• Case assessments will continue to take longer than otherwise necessary with greater delays over time • No analytical support for detection of non-notified transactions
Option 2 – a considered investment	• Cases handled more quickly and more efficiently, with	• IT build and delivery will require additional Government funding

	compliance activities more effectively managed • Greatest reduction in regulatory burden	
Option 3 – lower level of investment	• Cases handled quicker than *Option 1*, but less timely than *Option 2* • Reduced regulatory burden	• IT build and delivery will require additional Government funding

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

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

These recommended reforms are not expected to significantly impact on foreign capital inflows to Australia. While it is estimated that the reforms will likely result in investors making around 100 additional applications and 1,800 additional registrations each year – incurring an estimated $1.5 million of additional annual regulatory burden – this is not expected to be a significant deterrent to foreign investment in Australia, particularly with the steps proposed to streamline the investment application process.

Average additional annual regulatory costs, from business as usual ($million)				
	Business	Community organisations	Individuals	Total change in cost
Total, by sector	$3.3	$0	($1.8)	$1.5

Foreign investor survey data consistently reinforces that market factors play the most significant role in firms' foreign investment decisions. For example, firms surveyed in the *2019 AT Kearney Foreign Direct Investment Confidence Index* listed the most important factors for increasing foreign direct investment to be: the availability of quality targets; the macroeconomic environment; and the availability of funds.

In 2018-19, the Australian Investment Council, Australia's peak body representing private equity and venture capital firms, made 25 submissions to Parliament. None of those submissions mentioned access to foreign capital as an impediment to industry growth.

There is also consistently more capital available for low value investments in Australia than there are investment opportunities. In 2018, the Australian Investment Council reported 'dry

powder' (committed but unspent money) in Australia's private equity and venture capital sectors totalled $11 billion[11].

7. How will the policies be implemented and evaluated?

The reforms will be implemented through legislative amendments to the FATA and its associated regulations and supporting frameworks. The Government has indicated that, subject to Parliamentary passage, the majority of the reforms will commence on 1 January 2021. The requirements under the new Register of Foreign Ownership of Australian Assets will however commence at a later date, to be set by proclamation, once the necessary IT infrastructure within government has been established. Stakeholders will be provided with sufficient notice before these provisions commence.

On 29 March 2020, in response to the coronavirus outbreak in Australia, the Government introduced a temporary zero dollar screening threshold for all investments to ensure that it had appropriate oversight of foreign investment into Australia during this period. The intention is for a smooth transition from the current temporary arrangements to the new reformed system. Under the new system, mandatory screening of investments in sensitive national security businesses will continue at the current zero dollar monetary threshold. For other investments, the temporary screening thresholds will not continue beyond the commencement of the new system (subject to any adverse developments with the coronavirus).

To support investors in understanding and complying with the new reforms, the Treasury will engage in an extensive information and education program. In line with current practice, and building off the relationships generated during the consultation on the reforms, we will hold dedicated information and engagement sessions with key stakeholders, provide additional written guidance on the FIRB website, and utilise Treasury's social media channels to raise awareness of the changes. We will also leverage existing whole-of-government networks – such as the Department of Foreign Affairs and Trade and Austrade's international engagement programs – to ensure as many stakeholders as possible are directly informed of the changes.

In addition, investors will also be able to directly contact the Treasury to ask additional questions, or seek additional clarity, on any matters they wish, through the dedicated FIRB phone hotline and enquiries inbox.

Treasury will monitor and evaluate the operation and performance of these reforms on an ongoing basis, including in light of the impact of COVID-19 on the domestic and global economies. We will closely monitor the feedback we receive from our stakeholders, including through our established stakeholder engagement programs (which involve, for example, monthly senior level *Strategic Foreign Investment Issues* meetings), as well as the feedback we receive through our dedicated FIRB hotline and inbox. We will also closely monitor the number of applications we receive from investors to ensure that the reforms are not impacting foreign investment into Australia.

In addition, the Treasury will undertake a post implementation review of the reforms by 2025 in light of the importance of foreign investment to the Australian economy. We will consult with affected stakeholders, collect and analyse relevant data (including investment values and

[11] Australian Investment Council and Preqin, 2019 Yearbook: Australian Private Equity & Venture Capital Activity Report, May 2019.

application numbers), and evaluate how the reforms are performing in effectively and efficiently meeting the Government's objectives.

Appendix A: Regulatory cost estimates

The costs estimates in this appendix are accompanied by brief summaries of the proposed measures. The appendix should be read in conjunction with the main text of the Regulatory Impact Statement for the Foreign Investment Reform Package 2020.

Protecting Australia's national security

- *Mandatory pre acquisition screening*

A foreign investment application that is screened under the mandatory pre acquisition notification requirement will impose a regulatory burden on investors that is likely, on average, to be equal to an application screened under the existing regime.

While these applications will only be screened against national security risks, as opposed to the broader national interest test, analysis of past foreign investment applications reveals that 'sensitive businesses' screened under the current regime have national security conditions imposed at about the same rate as national interest conditions over all applications. Therefore, applicants will likely bear a similar regulatory burden under the existing national interest screening and the new national security screening.

Stakeholder feedback has indicated that in preparing an application, investors spend approximately one hour consulting Treasury and the FIRB website, 20 hours gathering documents to assist the application, one hour paying the correct fee, and 10 hours conducting ongoing compliance with conditions.

Similar to applicant hours, on average, the legal hours required for an investment screened under the existing national interest test and the new national security test are likely to be the same. Lawyers are estimated to spend: four hours providing preliminary legal advice; 20 hours developing and submitting an application; two hours determining the correct fee; 10 hours corresponding with a case officer during the case screening; and two hours administering ongoing compliance with conditions and/or reporting.

The regulatory cost per hour of an applicant's time is the default OBPR rate of $73.05 per hour. Stakeholder feedback indicated that the average cost of legal counsel, and therefore regulatory burden, is $800 per hour.

Therefore, for each application, the regulatory burden is estimated at $2,338 for an applicant's time and $30,400 for legal counsel. This results in a total estimated regulatory burden of $32,738 for each proposed investment screened due to the mandatory pre-acquisition notification of a sensitive national security business.

It is difficult to estimate the number of investments that will require mandatory notification under the national security test. This difficulty is due to the lack of foreign investment transaction data below existing thresholds and the imperfect alignment between sensitive businesses and industry codes. Using a combination of international experience, foreign investment application data, public databases and transaction data provided by Dealogic, we estimate that annually, 90 additional applications will be screened as a result of the mandatory notification requirement.

- *‘Call in’ power*

Any investment not otherwise notified, will be able to be called in before, during or after the investment, on a case-by-case basis, if the Treasurer considers it raises national security concerns.

In view of the types of businesses that will be captured under the national security test (e.g. critical infrastructure, telecommunications and defence related industries), and the opportunity for investors to voluntarily notify, it is expected that the call in power will be used sparingly (currently estimated at one investment per year). Evidence from other jurisdictions with similar powers indicates that a combination of public guidance and sparing use of the call in power will result in the investment community forming an understanding of the types of acquisitions which should be voluntarily notified.

Feedback from consultation indicates that cases being ‘called in’ will likely experience a significant increase in legal correspondence during case assessment. We estimate that the total regulatory burden imposed when an investment is ‘called in’ will be approximately three times that which is subject to mandatory screening (that is, $98,213).

- *Investor certainty: Voluntary notification*

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

When determining whether to notify, investors will likely be primarily influenced by guidance material and outreach provided by the Government and the nature and level of risk surrounding an investment.

It is difficult to estimate the number of investments that will be voluntarily notified under the national security test. This difficulty is due to the lack of foreign investment transaction data below existing thresholds and the imperfect alignment between sensitive businesses and industry codes. Using a combination of international experience, foreign investment application data, public databases and transaction data provided by Dealogic, we estimate that annually, 60 additional applications will be screened as a result of voluntary notifications, though this number may be higher early on as investors familiarise themselves with the new system. The regulatory burden for investors who voluntarily notify will likely be identical to those who have a mandatory requirement to notify. Accordingly, each investor who voluntarily notifies will be expected to experience a regulatory burden cost of $32,738.

- *Investor certainty: Investor-specific exemption certificate*

Investors will also be able to apply for a time-limited investor-specific exemption certificate which will enable them to make eligible acquisitions without case-by-case screening.

The structure and cost of seeking an investor exemption will likely mean that only sophisticated investors will consider applying. In particular, the investors who will likely apply are those who repeatedly invest in sensitive businesses or undertake regular voluntarily notification. Analysis of foreign investment applications since 2016 and ABS data indicate that approximately 10 investors will likely apply for an investor exemption annually.

Each investor seeking the ‘investor exemption’ will likely incur a regulatory cost equal to that of a current business or land exemption certificate application ($43,614). This equivalence is

due to similarities in application, assessment and reporting requirements for all types of exemption certificates.

- *Last resort review power*

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

This power will only be applicable to investments made, or approvals granted, after the proposal comes into effect. Given this power is not retrospective and will only be used as a last resort, it is not expected this power will be used, or used very rarely.

Average additional annual regulatory costs, from business as usual ($million)				
	Business	Community organisations	Individuals	Total change in cost
Mandatory notification	$2.9	$0	$0	$2.9
Call-in	$0.1	$0	$0	$0.1
Investor certainty: Voluntary notification	$1.9	$0	$0	$1.9
Investor certainty: Investor-specific exemption certificates	$0.4	$0	$0	$0.4
Last resort review power	$0	$0	$0	$0

<u>Improving the integrity of the foreign investment review framework</u>

A number of measures designed to improve the integrity of the foreign investment review framework are proposed in the package. These include:

- clarifying that foreign persons may require further foreign investment approval for increases in actual or proportional holdings above what has been previously approved, including as a result of creep acquisitions and proportional increases through share buybacks;
- narrowing the scope of the moneylending exemption so that it will not apply where foreign money lenders are obtaining interests in a sensitive national security business or land under a moneylending agreement; and
- expanding the types of government assets that will be subject to scrutiny under the FATA.

These measures are expected to have a modest impact on the number of applications submitted to the Government each year. The estimated impacts are shown in the table below, based on the assumed cost per application of $32,738.

Average additional annual regulatory costs, from business as usual		
Measure	Estimated change in number of applications	Total change on costs from changed number of applications
Changed treatment of small increases in interests	3	$98,213
Narrowing scope of moneylending exemption	2	$65,475
Ensuring state and territory businesses meet the definition of an Australian business	0.5	$16,369
Tracing rules extended to unincorporated limited partnerships	0	$0.00
Exempting certain royalty streams of mining and production tenements	(4)	($130,950)
Exempting exploration tenements acquired by private investors	(3)	($98,213)
Updating the definition of Australian media businesses	1	$32,738

These integrity improvements are also assumed to reduce the time investors will spend on an application by an average of five minutes. In aggregate, this will save individual investors approximately $585,000, and business investors approximately $80,000, across the approximately 9,900 applications made per year.

Stronger compliance and enforcement measures

Stronger compliance and enforcement measures are designed to ensure Treasury and the ATO will have the resources, powers and penalties to effectively monitor, investigate and prosecute breaches of foreign investment laws. The additional powers will be increased functions for the Treasurer, Treasury and ATO, and will not impose any additional regulatory burden on investors that comply with the rules. Any additional regulatory burden is limited to reporting obligations on the actions, as per the proposed foreign ownership register.

Streamlining less sensitive investments

The proposal to no longer treat certain investment funds as foreign government investors where their foreign government investors have no influence or control over the investment or operational decisions of the entity or any of its underlying assets is estimated to decrease the number of applications by 70 per year, resulting in reduced regulatory costs to investors of approximately $2.2 million. Offsetting this somewhat, it is estimated that eight investment funds will likely apply for a broad exemption certificate, at a total regulatory cost of approximately $350,000.

Average additional annual regulatory costs, from business as usual ($million)				
	Business	Community organisations	Individuals	Total change in cost
Entities exempted from being considered foreign government investors	($2.2)	$0	$0	($2.2)
Entities applying for ECs	$0.3	$0	$0	$0.3

Register of foreign ownership of Australian assets

- *Residential land*

All foreign purchases of residential real estate in Australia require approval under Australia's foreign investment review regime. If the acquisition is approved, the approval is conditional on the foreign investor notifying the ATO of the acquisition and disposal of the property. As such, the introduction of the proposed foreign ownership register will impose no additional regulatory impact on foreign owners of residential real estate.

- *Agricultural land and water entitlements*

The Register of Foreign Ownership of Water or Agricultural Land already requires foreign owners of these assets to register their interests with the ATO within 30 days of the action occurring or the end of the financial year. The introduction of the proposed foreign ownership register will therefore impose no additional regulatory burden on foreign owners of either agricultural land or water entitlements.

- *Commercial land*

Every proposed foreign acquisition of vacant commercial land is currently screened. Across 2017-18 and 2018-19 there were on average 198 applications a year. Based upon the number of residential real estate investments that proceed (80 per cent), we estimate that 158 of these proposals will proceed and be required to register. In addition, 35 exemption certificates for vacant commercial land were approved on average per annum across 2017-18 and 2018-19. On average, exemption certificates cover five acquisitions, and therefore five registrable actions, each.

With regards to developed commercial land, market analysis from CBRE estimates that there are 983 acquisitions of Australian commercial property (of over $5 million) annually. Research from the RBA also indicates that in Australia, upwards of 40 per cent (by value) of commercial property purchases are being conducted by foreign investors. Assuming that this ratio holds true for the number of acquisitions, the register will receive approximately 393 notifications per annum for the acquisition of developed commercial land.

Therefore, a total of 726 notifications will likely to be made per annum to the proposed foreign ownership register that relate to commercial property.

The amount of information that an investor will be required to supply to the register will likely be similar to that of the existing Register of Foreign Ownership of Water or Agricultural Land. Estimates for this register suggest that each registration will impose a regulatory burden of approximately 30 minutes of an applicant's time, valued at $36.53.

- *Exploration and mining tenements*

All foreign investment applications for mining tenements are currently screened, except for those from private investors from certain Free Trade Agreement partners. Across 2017-18 and 2018-19 there were, on average, 111 applications for mining tenements screened per annum. In addition, there were a further seven applications, on average per annum, for mining tenement exemption certificates. Assuming that Free Trade Agreement partners will contribute an additional 10 per cent to this number if screened, that 80 per cent of applications proceed to acquisition, and that each exemption certificate will cover five registrable actions each, it is estimated that there will be a total of 136 additional registrable mining tenement actions each year.

Most investors are likely to acquire an exploration tenement to investigate the commercial viability of a project before proceeding to acquire a mining tenement. As such, we have assumed that the number of exploration tenements will be at least as many as the number of mining tenements. Typically, a number of those exploration tenement investigations do not proceed to actual mining. Therefore we have factored into our modelling an assumption that the number of registrable exploration tenement actions will be 110 per cent of the number of mining tenement actions, or in total, 149 additional registrable actions.

- *Business acquisitions*

Following the implementation of the proposed reforms, we expect that there will be 441 non-land (that is, business) applications screened under Australia's foreign investment review regime, on average, each year. This estimate includes investments that are already screened, in addition to the expected additional applications from the reforms, including the new national security tests. All businesses acquisitions that proceed will be required to notify to the proposed foreign ownership register.

The only estimate as to the proportion of foreign investment applications that proceed is from residential real estate. Residential real estate approval data suggests that 80 per cent of all approvals proceed. Assuming this rate of realised investment is consistent for business acquisitions, 353 business acquisitions will be added to the register each year.

In addition, we anticipate that a further 45 non-land (that is, business) exemption certificate applications will also be screened, on average, each year. Assuming that each exemption certificate leads to five applications, and therefore registrable actions, it is estimated that there will be a further 225 non-land registrations on the register.

- *Sales*

In addition to the expected acquisitions outlined above that will be registered on the new register, investors will also be required to notify of the sales and divestments of those assets.

Across 2018-19 and 2019-20, the number of sales events on the existing agricultural, water, and residential registers were approximately 12.5 per cent of the number of total purchases.

Applying that same ratio to the additional acquisitions outlined above that will be registered, suggests that approximately 199 sales events will also be registered each year.

Average additional annual regulatory costs, from business as usual				
	Business	Community organisations	Individuals	Total change in cost
Residential land	$0	$0	$0	$0
Agricultural land and water	$0	$0	$0	$0
Commercial land	$26,517	$0	$0	$26,517
Mining and exploration tenements	$10,431	$0	$0	$10,431
Business (non-land)	$21,096	$0	$0	$21,096
Sales	$7,255	$0	$0	$7,255

A fairer and simpler framework for foreign investment fees

It is estimated that by reducing the complexity of the fee framework, this will lower the compliance and administrative costs on investors in establishing and paying the applicable fee.

Over the past two years, investors have submitted, on average, approximately 9,900 applications to the Government for screening each year. Stakeholder feedback suggests that legal counsel currently spend approximately two hours in determining the correct fee for a no objection notification application. It is assumed that the proposed new fee structure will reduce this time burden by approximately five minutes per application on average.

Average additional annual regulatory costs, from business as usual ($million)				
	Business	Community organisations	Individuals	Total change in cost
Simpler and fairer fee framework	($0.1)	$0	($0.6)	($0.7)

An improved IT capability for better information collection and case assessment

An improved IT system will make it easier for investors to submit their foreign investment applications and provide the necessary information in an efficient manner.

Over the past two years, investors have submitted, on average, approximately 9,900 applications to the Government for screening each year. Stakeholder feedback suggests that legal counsel currently spend approximately 20 hours in developing and submitting an application. It is assumed that the proposed new IT system will reduce this time burden by an average of approximately five minutes per application.

Average additional annual regulatory costs, from business as usual ($million)				
	Business	Community organisations	Individuals	Total change in cost
Improved IT	($0.1)	$0	($0.6)	($0.7)

Total costs of package

The estimated net cost of the proposed reform package to investors is approximately $1.5 million per year. Individual investors will have their costs reduced by about $1.8 million in aggregate, while aggregate regulatory costs to business will increase by approximately $3.3 million.

Average additional annual regulatory costs, from business as usual ($million)				
	Business	Community organisations	Individuals	Total change in cost
Total	$3.3	$0	($1.8)	$1.5