



Australian Government

Foreign Investment Framework 2017 Legislative Package

Consultation Paper
March 2017

NOTES TO PARTICIPANTS

The principles outlined in this paper have not received Government approval and are obviously not yet law. As a consequence, this paper is merely a guide as to how the principles might operate.

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CONSULTATION PROCESS

Request for feedback and comments

Submissions will be made available on the Treasury website unless you clearly indicate that you would like all or part of your submission to remain confidential. Automatically generated confidentiality statements in emails do not suffice for this purpose. A request made under the *Freedom of Information Act 1982* for access to a submission marked confidential will be determined in accordance with that Act.

Submissions should include the name of your organisation (or your name if the submission is made as an individual) and contact details for the submission, including an email address and contact telephone number where available. While submissions may be lodged electronically or by post, electronic lodgement is strongly preferred. For accessibility reasons, please email responses in a Word or RTF format. An additional PDF version may also be submitted.

Closing date for submissions: Wednesday 29 March 2017

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FOREIGN INVESTMENT FRAMEWORK 2017 LEGISLATIVE PACKAGE

BACKGROUND

1. The Government welcomes foreign investment because it plays an important and beneficial role in the Australian economy. It has helped build Australia's economy and will continue to enhance the wellbeing of Australians by supporting economic growth and prosperity.
2. Notwithstanding the benefits of foreign investment to the community, there is a need to ensure foreign investment is consistent with Australia's interests and the community retains confidence in the benefits of foreign investment.
3. The Government reviews foreign investment proposals against the national interest on a case-by-case basis. The Treasurer has the power to block foreign investment proposals or apply conditions to the way proposals are implemented to ensure they are not contrary to the national interest.
4. The foreign investment review framework is set by the legislative framework through the *Foreign Acquisitions and Takeovers Act 1975* (FATA) and the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (Fees Act) and their associated regulations. The legislative framework is supported by Australia's Foreign Investment Policy (the Policy) and Guidance Notes on the specific application of the law.
5. On 1 December 2015, the most significant changes to Australia's foreign investment framework in over 40 years were introduced. The reforms provided for stronger enforcement of the rules, a better resourced system and clearer rules for foreign investors. The reforms included:
 - 5.1. increased enforcement of the residential real estate rules by establishing a dedicated unit within the Australian Taxation Office (ATO) to review cases and strengthen compliance,
 - 5.2. stricter and more flexible penalties to make it easier to pursue foreign investors that breach the rules,
 - 5.3. application fees to ensure that Australian taxpayers no longer have to fund the cost of administering the system,
 - 5.4. increased scrutiny around agricultural investments by lowering the applicable thresholds,
 - 5.5. improved transparency through comprehensive foreign ownership of land and water registers,
 - 5.6. an overhaul of the legislation including bringing foreign government investor screening requirements into the legislative framework, and
 - 5.7. reducing regulatory burden by removing some routine cases from the screening system.

6. In the year since the reforms were implemented, the Government has been seeking ongoing feedback from stakeholders on how the reforms are working in practice. Unintended consequences stemming from the 2015 reforms and opportunities for red tape reduction have been identified through this process.
7. This consultation paper seeks formal views from stakeholders on a suite of proposed changes in the areas of residential land, non-vacant commercial land, low sensitivity business investment and fees. Stakeholders are invited to provide feedback on the proposed changes and the estimated regulatory costs of the options.
8. The paper also provides an opportunity for stakeholders to present examples on how technical issues in the legislation could be addressed and any other ideas for reform.
9. The final legislative package and the approach to its implementation will be determined by the Government following consultation.

ISSUES FOR DISCUSSION

10. There are five areas where unintended consequences have been identified and where the regulatory burden can be reduced.
 1. **Residential land:** Some of the settings may incentivise non-compliance and may have distortionary affects.
 2. **Non-vacant commercial land:** Some lower sensitivity investments are still subject to the framework. This is inconsistent with the intent of the 2015 reforms to remove low sensitivity cases from the system.
 3. **Low sensitivity business investment:** The framework still casts a broad net in relation to some of the investments that must be notified to the Treasurer. This results in some relatively low value and low sensitivity investments being captured. The introduction of fees in 2015 has further reinforced the concern about the level of regulatory burden for such investments.
 4. **Fees:** The fees framework can be difficult for stakeholders to apply and burdensome to administer. There are also situations where the size of the fee varies with the form of the investment.
 5. **Miscellaneous technical issues and ideas for further reform:** There is an opportunity to address technical issues in the legislation that are mostly minor or machinery in nature as well as for stakeholders to provide further reform ideas not covered in the paper.
11. Stakeholders are invited to provide views on both the options which should be pursued, and the estimated regulatory cost/cost saving of each option. Stakeholders are also invited to provide comments on the costings assumptions detailed at **Attachment B**.
12. The options put forward include making changes to the *Foreign Acquisitions and Takeovers Regulation 2015* (Regulation), the Fees Act and the *Foreign Acquisitions and Takeovers Fees Imposition Regulation 2015* (Fees Regulation). Changes to the FATA are not being considered in this process.

ISSUES FOR CONSULTATION

1. RESIDENTIAL LAND

Background

13. Foreign persons generally need to apply for foreign investment approval before purchasing residential land in Australia.
14. The Government's policy is to channel foreign investment into new dwellings as this creates additional jobs in the construction industry and helps support economic growth.
15. Consistent with this aim, non-resident foreign persons are generally prohibited from purchasing established dwellings. However, temporary residents can apply to purchase one established dwelling to use as a residence while they live in Australia.
16. The framework is based on foreign persons receiving individual approval for a specific property prior to making the purchase. Broad pre-approval through 'exemption certificates' can be granted for eligible foreign persons seeking to acquire an established dwelling (the Established Dwelling Exemption Certificate (EDEC)), or for developers seeking to sell new dwellings to foreign persons (the New Dwelling Exemption Certificate (NDEC)).

The problem

Inconsistent exemption certificate framework

17. Broad pre-approval through an exemption certificate can only be granted for foreign persons wanting to purchase an established dwelling or for property developers wanting to sell new dwellings to foreign persons.
18. Foreign persons wishing to purchase a new dwelling or vacant residential land need to apply individually for each property they are considering, even if they only want to make one purchase. This results in higher fees and application costs compared with an established dwelling exemption certificate as multiple applications may be required.
19. These arrangements may also incentivise non-compliance where it is cheaper for a foreign person who considers multiple properties, but only wishes to buy one, to pay a fine and notify after they have purchased the property, rather than apply multiple times in advance.

Treatment of failed off-the-plan settlements

20. Where a person enters a contract to acquire an off-the-plan dwelling and that contract becomes binding, the dwelling is considered sold under the FATA. If the parties do not complete settlement, the dwelling would then be considered an established dwelling for any future acquisitions. This would preclude most foreign persons from later purchasing the dwelling.

21. Not allowing foreign persons to purchase these dwellings, for which the title has never been transferred, may affect the ability of developers or the initial purchaser of the dwelling, to on sell these dwellings.
22. On 26 November 2016, the Treasurer announced that foreign buyers would be allowed to purchase an off-the-plan dwelling (as a new dwelling) when another foreign buyer has failed to reach settlement. Currently, an administrative solution is in place that allows foreign persons making individual applications to receive approval in these circumstances. For purchases in a development where the developer has a NDEC, the developer should report the purchase and the ATO will not pursue these purchases as breaches.
23. However, these purchases remain legally in breach of the FATA provisions if they do not have a separate approval, which creates a lack of certainty for investors about whether their purchases are compliant with the law.

Residential land used for commercial purposes

24. Currently, land meets the definition of 'commercial land' under the FATA if a dwelling is not located on the land, or the dwelling located on the land is considered a 'commercial residential premises'. The term 'commercial residential premises' has the same meaning as set out in the *A New Tax System (Goods and Services Tax) Act 1999* (GST definition).
25. The GST definition of commercial residential premises excludes some land that for the purposes of the foreign investment framework would be considered commercial in nature. These include aged care facilities, retirement villages and certain student accommodation.
26. As all acquisitions of residential land require notification, commercial developments in this sub-sector face different treatment from other sectors. Further, foreign owners of these facilities must also receive approval each time they use a mandatory buyback mechanism such that they receive ownership of dwellings internal to a greater complex temporarily, before on selling the dwelling to new residents in their facilities.

Case for government action

27. Given that the Government is responsible for regulating foreign investment, the Government should ensure that the foreign investment framework is operating efficiently and as intended so to align with the Government's policy objectives.
28. In relation to residential land, some of the changes to the residential land rules through the 2015 reforms have resulted in unintended consequences.

Policy options

Option 1: No change

29. This option would see no change to the residential land rules, and current administrative work-arounds regarding failed off-the-plan settlements would continue to operate outside the regulatory framework.

Option 2: Introduce a new exemption certificate(s) for new dwellings and vacant residential land

30. This option is the introduction of a new exemption certificate(s) which will allow foreign persons to receive broad pre-approval to purchase one new dwelling or vacant residential block.
31. Conditions will be applied in a manner that is consistent with the policy and foreign persons will be required to notify where an actual purchase has been made. Fees are likely to align with the highest potential purchase as currently implemented with EDECs.

Option 3: Introduce a new exemption certificate for failed off-the-plan settlements

32. On 26 November 2016, the Treasurer announced that a new exemption certificate will be introduced to allow developers to sell dwellings to foreign persons which have been the subject of a failed settlement.
33. The certificate will be issued in conjunction with all NDECs and it is proposed that no additional fee will be charged.

Option 4: Amend the treatment of residential land used for commercial purposes

34. Amend section 52 of the Regulation so that residential land that is an aged care facility, retirement village or certain student accommodation is aligned with the non-vacant commercial land screening thresholds (either \$55 million or \$252 million).
35. As foreign government investors are subject to a zero dollar screening threshold regardless of the type of property to be acquired, they will still be required to seek approval. This will be retained for purchases of an overall facility. However, an exemption from notification will be introduced for foreign government investors who are operators of facilities that utilise a mandatory buyback mechanism.

Question for consultation: How should student accommodation be defined?

Option 5: Introduce Options 2-4

36. This option would introduce all of the amendments as outlined above.

Cost/benefit analysis of each option

Option 1: No change

Benefits

37. The benefit of this option is that there are no additional regulatory impacts for foreign investors as the current arrangements would not change.

Costs

38. This option would not meet the policy objectives of reducing regulatory burden and addressing unintended consequences from the 2015 reforms. Foreign investors would continue to be required to meet screening arrangements that could otherwise be reduced.

Option 2: Introduce a new exemption certificate(s) for new dwellings and vacant residential land

39. The benefits of this option are that each of the unintended consequences that have been identified would be addressed. The regulatory burden would be reduced for foreign investors who only wish to purchase one property.
40. It is assumed that around 100 cases per year would be removed by introducing the new exemption certificates. This will result in a regulatory cost saving of approximately \$100,000 per year.

Average annual regulatory cost saving from business as usual

Change in costs (\$ million)	Business	Individuals	Total change
Total	No change	0.1	0.1

Option 3: Introduce a new exemption certificate for failed off-the-plan settlements

41. Option 3 would introduce a new exemption certificate for failed off-the-plan settlements, as announced by the Treasurer on 26 November 2016. This will enable property developers to sell dwellings that have not completed settlement as 'new dwellings' to foreign persons.
42. As these new exemption certificates will be given in conjunction with the existing NDEC and no additional compliance will be required upon application, the overall regulatory cost is estimated to be negligible.

Option 4: Amend the treatment of residential land used for commercial purposes

43. Option 4 will ensure that residential land that is an aged care facility, retirement village or certain student accommodation is aligned with the non-vacant commercial land screening thresholds (either \$55 million or \$252 million). All investors, including foreign government investors, will also be exempt from notification where they make purchases as the operator of a facility that are of a mandatory buyback nature. This will reduce regulatory burden for transactions that are routine commercial transactions.
44. It is assumed that around 10 cases per year would be removed and that these cases would have costs in line with an average business application. This will result in a regulatory cost saving of approximately \$300,000 per year.

Average annual regulatory cost saving from business as usual

Change in costs (\$ million)	Business	Individuals	Total change
Total	0.3	No change	\$0.3

Option 5: Introduce Options 2-4

45. The benefits of Option 5 are the same as the combined benefits for Options 2-4.

Average annual regulatory cost saving from business as usual

Change in costs (\$ million)	Business	Individuals	Total change
Total	0.3	0.1	\$0.4

2. NON-VACANT COMMERCIAL LAND

Background

46. Part of the policy intent of the 2015 reforms was to reduce the number of routine cases from the system. This included raising the monetary screening threshold for non-vacant commercial land from \$55 million to \$252 million (a \$1,094 million threshold applies for agreement country investors¹).
- 46.1. Foreign government investors are required to notify before acquiring any interest in Australian land, regardless of the value and their country of origin.
47. However, non-vacant commercial land has a lower \$55 million screening threshold if the requirements for the lower threshold are met. Land that is subject to the lower threshold land is considered sensitive and includes land under prescribed airspace, buildings where all or part of the building will be leased to an Australian government agency or body, or land where public infrastructure will be located. The full definition of sensitive land is included at sub-section 52(6) of the Regulation.

The problem

48. In practice, the lower threshold land definition has had the effect of capturing more applications than intended when developing the 2015 reforms. This is imposing an unnecessary regulatory burden on applicants and diverting screening resources from potentially more sensitive cases.
49. In particular, the inclusion of 'land under prescribed airspace' in the definition means that most buildings in capital cities are subject to the lower threshold. For example, land under prescribed airspace in Sydney stretches from Newcastle to Wollongong.
50. Stakeholders have raised concerns that the lower threshold is placing an unnecessary regulatory burden on investment, particularly because of the prescribed airspace element.

1 Agreement country investors are Chilean, Chinese, Japanese, New Zealand, South Korean and United States investors, except foreign government investors. This will also include Trans Pacific Partnership countries, when the TPP comes into force for that country (if higher thresholds do not already apply). TPP countries are: Brunei, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore, the United States and Vietnam. This will also include Singapore when the Agreement to amend the Singapore-Australia Free Trade Agreement enters into force.

Case for government action

51. The low-threshold land definition is not operating in accordance with the intent of the 2015 reforms to remove routine cases from the system and is creating unnecessary regulatory burden. Government action is required to review the current arrangements and better align them with the intended policy outcome.

Policy options

Option 1: No change

52. This option would see no change to the current definition of 'low-threshold' non-vacant commercial land.

Option 2: Narrow the scope of the 'low-threshold' non-vacant commercial land definition

53. Under this option the scope of the 'low-threshold' non-vacant commercial land definition would be narrowed. In particular 'land under prescribed airspace' would be removed from the definition.

Option 3: Remove the 'low-threshold' land notification requirement

54. This option would remove the requirement to notify for 'low-threshold' land. Non-vacant commercial land would only be screened at the \$252 million or \$1,094 million thresholds.

Cost benefit analysis of each option

Option 1: No change

Benefits

55. The benefit of this option is that there are no additional regulatory impacts for foreign investors as the current arrangements would not change.

Costs

56. This option would not meet the policy objectives of reducing regulatory burden and removing routine cases from the system. Foreign investors would continue to be required to meet screening arrangements that could otherwise be reduced. Further, screening resources will continue to be dedicated to screening relatively low-sensitivity proposals, diverting resources from assessing more sensitive proposals.

Option 2: Narrow the scope of the 'low-threshold' non-vacant commercial land definition

57. The benefit of Option 2 is that regulatory burden will be reduced by removing routine cases from the screening requirement.

58. It is estimated that 15 applications per year would not require screening if 'prescribed airspace' was removed from the definition of sensitive land. This would be a regulatory saving of approximately \$500,000 per year based on the estimated average cost for lodging a foreign investment application.

Average annual regulatory cost saving from business as usual

Change in costs (\$ million)	Business	Individuals	Total change
Total	0.5	No change	0.5

Option 3: Remove the 'low-threshold' land notification requirement

Benefits

59. The benefit of this option is that regulatory burden will be reduced.
60. It is estimated that 20 applications per year would not require screening if the lower value threshold for sensitive land was removed. This would be a regulatory saving of approximately \$600,000 per year based on the estimated average cost for lodging a foreign investment application.

Average annual regulatory cost saving from business as usual

Change in costs (\$ million)	Business	Individuals	Total change
Total	0.6	No change	0.6

Costs

61. Eliminating the lower value threshold entirely may heighten concerns about whether the screening regime is adequately capturing proposals that may raise sensitivities. While narrowing some non-contentious aspects of the definition is not likely to raise concerns, the community may expect other elements to remain part of the screening system.

3. LOW SENSITIVITY BUSINESS INVESTMENT

Background

62. Foreign persons must get approval before acquiring a substantial interest (at least 20 per cent) in an Australian entity that is valued above \$252 million or \$1,094 million for agreement country investors. However, the \$252 million threshold applies to these investors if investing in sensitive businesses.
63. In addition, all foreign government investors must get approval before acquiring a direct interest in Australia (generally at least 10 per cent, or the ability to influence, participate in or control), starting a new business or acquiring an interest in Australian land regardless of the value of the investment.
64. An important change in the 2015 reforms was to incorporate foreign government investor specific screening requirements into the legislative framework. Previously, foreign government investors notified the Treasurer about such proposed investments under the Policy only.

The problem

65. The foreign investment framework necessarily casts a broad net in relation to actions required to be notified to the Treasurer for review. However, in practice a small percentage of acquisitions that must be notified raise national interest concerns that result in the Treasurer imposing conditions or prohibiting the proposal.
66. This results in a higher than desirable regulatory impost on business proposals that are of low sensitivity and have to be notified.
67. Foreign government investors in particular have voiced concerns about the degree of regulatory burden since foreign government investor screening requirements were brought into the legislative framework. While this provided more certainty, these investors are also now required to notify certain acquisitions under the legislation regardless of the size and value of the investment, pay fees, and are subject to potential penalties for non-compliance.

Case for government action

68. Not all foreign investment proposals that are notified to the Treasurer raise national interest concerns, however there is a role to ensure the foreign investment framework is working effectively to assess whether foreign investment is in the national interest and is targeted to those investments that are likely to raise sensitivities.

Policy options

Option 1: No change

69. This option would see no change to the current screening arrangements for low value and low sensitivity business proposals.

Option 2: Introduce new exemption certificates for low sensitivity business proposals

70. This option would introduce two new exemption certificates that would grant broad pre-approval to certain non-sensitive business proposals. Currently, except for the exemption certificate for those in the business of underwriting, available exemption certificates are limited to acquisitions of interests in Australian land.
71. An **exemption certificate for interests in securities** would provide broad pre-approval for foreign persons acquiring securities. The certificate would exempt the foreign person from the requirement to provide notices to the Treasurer for securities acquisitions covered by the certificate. The Treasurer would retain powers to issue divestments or impose conditions if an acquisition was considered contrary to the national interest.
72. An **exemption certificate for foreign government investors** would exempt specific foreign government investor-only screening requirements. The certificate would exempt the foreign government investor from the FATA for actions covered by the certificate, including when acquiring a direct interest by purchasing the assets of an Australian business.
73. The exemption certificates would be subject to reporting requirements and would cover actions within specified parameters (for example, total spend or percentage interest limits). As is the case with existing certificates, conditions may also be applied.

74. In terms of parameters, the Government is considering a \$100 million per transaction limit for actions covered by the certificate. Sensitive business transactions would not be eligible to be covered by an exemption certificate and will continue to require separate notification.
75. The new certificate could be introduced by a broad power that in practice could be more narrowly applied on a case-by-case basis to ensure that the certificates granted would not be contrary to the national interest. Alternatively, limitations on the grant of the certificates could be prescribed in the Regulation (however, falling within these limitations would not necessarily guarantee a certificate, as the granting of such a certificate will still be assessed on a case-by-case basis).

Option 3: Exempt low sensitivity business proposals from notification requirements

76. This option would remove the requirement to notify the Treasurer for acquisitions of securities in an entity where the consideration is \$100 million or less. This will mostly affect foreign government investors who need to notify from a \$0 threshold. The actions would continue to be significant actions (meaning the Treasurer retains certain powers). This will make it voluntary to notify for low-value acquisitions which are less likely to raise sensitivities.

Cost benefit analysis of each option

Option 1: No change

Benefits

77. The benefit of this option is that there are no additional regulatory impacts for foreign investors as the current arrangements would not change.

Costs

78. Continuing to impose regulatory burden on low-sensitivity cases would not meet the policy objective of targeting higher sensitivity cases. Some foreign investments will continue to bear regulatory burden that may be disproportionate to their level of sensitivity.

Option 2: Introduce new exemption certificates for low sensitivity business proposals

Benefits

79. Option 2 has the benefits of significantly reducing the regulatory burden for low sensitivity proposals while reassuring the community that the national interest is still being assessed.
80. It is assumed that up to 80 cases per year would be removed from the regime by introducing the new exemption certificates (based on analysis of the number of cases where a single foreign person has lodged multiple applications). This would save over \$2 million in application fees and would result in a compliance cost saving of approximately \$2.4 million per year.

Average annual regulatory cost saving from business as usual

Change in costs (\$ million)	Business	Individuals	Total change
Total	2.4	No change	2.4

Option 3: Exempt certain low value and low sensitivity business investments from notification requirements

Benefits

81. Option 3 would reduce the regulatory burden for low sensitivity proposals. It is estimated that 298 cases will be saved from the requirement to notify per year (based on analysis about the number of cases received with a consideration of less than \$100 million). This would save over \$7.5 million in application fees and would result in a compliance cost saving of approximately \$9.1 million per year.

Average annual regulatory cost saving from business as usual

Change in costs (\$ million)	Business	Individuals	Total change
Total	9.1	No change	9.1

Costs

82. Raising the notification threshold may heighten concerns about whether the screening regime is adequately capturing proposals that may raise sensitivities.
83. Further, limitations arising from Australia's international commitments in relation to the framework mean that once an exemption is introduced for some actions, the exemption cannot be readily removed for investors of some countries. This will reduce flexibility to address community concerns and respond to changing national interest concerns.

4. COMMERCIAL FEES

Background

84. A key change that took effect on 1 December 2015 was the introduction of application fees. Fees are generally payable by any person who makes an application under the FATA. Applications are not considered made until the correct fee has been paid.
85. Application fees vary based on the type and size of an acquisition. Fees for business proposals generally range from \$25,300 to \$101,500 depending on the size of the transaction. Land fees vary depending on the type of land being acquired, with agricultural land incurring tiered fees based on the value of the transaction, but are capped at \$101,500. The current business fee structure is at [Attachment A](#).
86. There are a range of fee rules that may lower fees in certain circumstances.
87. The Treasurer may waive or remit a fee if satisfied that it is not contrary to the national interest to do so. Fee waivers and remissions are considered on a case-by-case basis and are administered by ATO and Treasury officers under delegation.

The problem

Fee complexity

88. The introduction of fees was a significant change. While teething issues with the introduction of any large change is to be expected, experiences with the fee system indicate that the fee settings for commercial transactions are unnecessarily complex. This consultation paper discusses issues and options with regards to commercial fees. Changes to the residential land fees are not being considered in the context of this legislative package.
89. Fee complexity stems from different fees for different acquisition types, with some fees tiered on a sliding scale based on consideration. For example, a \$20 million commercial acquisition could attract a fee of \$10,100 for vacant commercial land, \$25,300 for an acquisition of securities, \$101,500 for agricultural land or \$203,000 for residential land.
90. In some cases, significant work has to be done to identify the actions that are being notified under the framework and then confirm the correct fee. This has added complexity in administering the system and in some cases has adversely impacted timeliness in processing applications.

Fees for small commercial transactions

91. In some cases where the commercial transaction is low value, the fee represents a relatively large impost and may therefore discourage certain types of investments.
92. Fees are of particular concern to foreign government investors. The \$0 screening threshold means that they can be liable for application fees on minor transactions which are not notifiable for private investors.
 - 92.1. For example, a \$25,300 fee would be payable for a small \$4 million venture capital investment by a foreign government investor, while a private investor would generally only need approval and pay a fee unless the Australian target is above \$252 million). This provides a relatively high fee burden for smaller acquisitions.
93. Another area where there are disproportionate fee outcomes is for businesses acquiring residential land for commercial purposes. The residential land fees (tiered at around \$10,100 per million and uncapped) were aimed at individuals purchasing residential land. As the residential land fees are uncapped, there have been examples of very large fees (up to hundreds of thousands of dollars) being paid by property developers seeking to acquire many titles of residential land for commercial purposes.
94. In response to concerns that the fee framework creates disincentives to investment, the discretionary fee waiver and remission power in the FATA has been used reduce fees in certain circumstances. These are outlined in the box below.

Discretionary Fee Waivers

- 94.1. **Small non-land acquisitions.** A partial fee waiver will generally be considered where an applicant is making a non-land acquisition of \$10 million or less. The fee for these transactions will generally be reduced to \$1000.
- 94.2. **Foreign government investors acquiring developed commercial land.** A partial fee waiver will generally be considered where a foreign government investor is acquiring developed commercial land where the consideration is \$55 million or less. The fee for these transactions will generally be reduced to \$1,000.
- 94.3. **Entities carrying on a business acquiring multiple residential land titles under one agreement:** A partial fee waiver will generally be considered where an entity carrying on a business in Australia is purchasing residential land. The fee waiver may be applied so that the entity will only pay the highest fee applicable for multiple actions occurring under one agreement. For example, a property developer acquiring multiple titles of residential land for redevelopment under one agreement may only pay the highest fee, rather than a separate fee for each title of residential land.
- 94.4. **Entities carrying on a business acquiring securities in an entity that primarily holds residential land:** A partial fee waiver will generally be considered where the fee for an entity carrying on a business in Australia acquiring securities in an entity that primarily holds residential land exceeds \$25,300. The fee waiver may be applied so that the entity will pay a maximum of \$25,300 if the consideration for the transaction is below \$1 billion.

Internal reorganisations

95. A concessional fee of \$10,100 applies if the transaction meets the definition of an 'internal reorganisation.' Generally, internal reorganisations have captured the transfer of an interest from one entity to another, provided the following definition has been met.

Internal reorganisation definition

Section 4(1) of the Fees Act outlines the definition of internal reorganisation:

internal reorganisation means an acquisition by an entity (the first entity) of:

- (a) an interest in securities in another entity if:
 - i. both entities are subsidiaries of the same holding entity; or
 - ii. the other entity is a subsidiary of the first entity; or
- (b) an interest in an asset or Australian land from another entity if
 - i. both entities are subsidiaries of the same holding entity; or
 - ii. the other entity is the holding entity of the first entity; or
 - iii. the other entity is a subsidiary of the first entity.

96. In practice, the definition is unclear as to whether newly created interests (such as leasehold interest in land) being transferred from one entity to another are captured. Further, a small number of cases have been received that are essentially reorganisations but do not technically meet the definition. This has resulted in uncertainty regarding the fee for some transactions.

Case for government action

97. The current fee settings are complex and potentially discourage certain investments. There is a case to review the fee structure and make amendments to ensure the fees can work as efficiently as possible, without creating distortions in the system.

Policy options**Option 1: No change**

98. This option would see no change to the current arrangements. Certain fee waivers and remissions would continue to be decided via discretion on a case-by-case basis.

Option 2: Minor changes to the fees framework

99. This option would include two main changes to the fees framework:
- 99.1. **Legislate existing fee waiver principles:** This would see the fee waiver principles as outlined above being legislated. Discretionary case-by-case decision making on the fee in these situations would not need to take place.
 - 99.2. **Expand the definition of internal reorganisation:** The definition of internal reorganisation could be expanded which would result in more cases being eligible for a concessional fee.
 - 99.3. Examples of where the definition could be expanded include:

99.3.1. **Capturing newly created interests** rather than the transfer of existing interests as is the current practice. An example of this is a subsidiary acquiring a leasehold interest in land from the subsidiary owning the freehold interest.

99.3.2. **Extending the definition to non-subsidiaries** such as where either the existing holder or new holder does not qualify as a subsidiary of the same group.

99.4. Broadening the definition of internal reorganisation may have the effect of qualifying more cases for a lower concessional fee (currently at \$10,100). Some cases that would previously have received a nil fee from the 'majority owners' fee rule may be disadvantaged by being captured in the internal reorganisation definition.

Question for consultation: Further to the implication of the 'majority owners' fee rule outlined above, are there any other consequences from widening the internal reorganisation definition?

Option 3: Streamline the fees framework

100. This option would move to a simpler overall fee structure to reduce complexity for business fees.

Option 3a: Flat fee structure

101. This option would provide for a flat fee structure where the fee is not dependent on the type of action being taken or the consideration. The number of fee outcomes would be reduced to four making the overall system simpler. The main effect of this change is to streamline the fees for land transactions and bring them in line with corporate transactions. An indicative fee structure is outlined below:

Action*	Fee
Significant and notifiable actions	\$25,300
Applications for exemption certificates	\$25,300
Significant and notifiable actions and applications for exemption certificates where the consideration is over \$1 billion	\$101,500
Reorganisations	\$10,100
Variations	\$5,000

*Does not include residential land

Option 3b: Tiered fees based on consideration

102. This option will provide a tiered fees structure for all business transactions. The fees would be tiered depending on the size of the transaction.

103. An indicative fee structure would be 0.1% of the value of the consideration. The tiered fee structure would be capped, for example at \$100,000.

Consideration	Fee at 0.1%
All transactions at \$1 million and below	\$1,000
\$10 million	\$10,000

\$50 million	\$50,000
\$100 million and above	\$100,000

Cost benefit analysis of each option

Option 1: No change

Benefits

104. The benefits of this outcome are that there are no additional regulatory impacts for foreign investors as the current arrangements would not change.

Costs

105. Under this option, there will continue to be complexity in the fee system with the use of discretionary fee waivers to address some anomalous fee outcomes. The use of discretionary fee waivers will continue to impose administration and delay costs on applicants.

Option 2: Minor changes to the fees framework

Benefits

106. This option will create more certainty regarding the fees for smaller foreign investment applications as the current discretionary decisions will be incorporated into the legislation. It will also save on administration and time costs as discretionary decision making to implement the 'fee waiver principles' will not be required.

107. It is estimated that five additional cases per year would benefit from a widening of the internal reorganisation definition saving \$76,000 in fees per year. As there will be no additional compliance costs required, the regulatory change is estimated to be neutral.

108. It is estimated that 180 cases per year would benefit from regulatory cost savings from legislating the fee waiver principles. Assuming three hours were saved per fee waiver application, there is an estimated compliance cost saving of \$400,000 per year.

Average annual regulatory cost saving from business as usual

Change in costs (\$ million)	Business	Individuals	Total change
Internal Reorganisation	No change	No change	No change
Fee waiver principles	0.4	No change	0.4
Total	0.4	No change	0.4

Option 3: Streamline the fees framework

Benefits

109. The benefits of streamlining the fees framework is that the fees will be simpler for foreign investors to understand and simpler for the government to administer. It is anticipated that any changes to the business fees framework will be revenue neutral overall.

110. If a flat fee is implemented, it is assumed that approximately 1300 business cases would be affected, with a reduction in 1.5 hours per case to determine the fee and a

further 1.5 hours reduced in correspondence during case assessment. This results in an estimated \$3.1 million compliance cost saving per year.

Average annual regulatory cost saving from business as usual

Change in costs (\$ million)	Business	Individuals	Total change
Flat fee	3.1	No change	3.1
Total	3.1	No change	3.1

111. If a tiered fee is implemented, it is assumed that approximately 1300 businesses cases would be affected, with a reduction in 1 hour in determining the fee and a further reduction of 1 hour in correspondence during case assessment. The time savings are estimated to be less for the tiered fee option compared with the flat fee, as it is estimated more time will be required to determine the correct consideration. A tiered fee is estimated to result in a \$2.1 million compliance cost saving per year.

Average annual regulatory cost saving from business as usual

Change in costs (\$ million)	Business	Individuals	Total change
Tiered fee	2.1	No change	2.1
Total	2.1	No change	2.1

5. MISCELLANEOUS TECHNICAL ISSUES AND IDEAS FOR FURTHER REFORM

112. It is common with major legislative reform to follow with subsequent technical amendments that are mostly minor in nature or seek to align more closely with the intended policy outcomes and commercial practices. Stakeholders are encouraged to provide examples of where technical amendments could be made to the FATA Regulation, Fees Act and Fees Regulation.
113. Stakeholders are also invited to provide feedback on their experiences of the foreign investment framework since the 2015 changes, and provide any other ideas for reform, that are not covered in the paper.

CONCLUSION

114. On 1 December 2015, the most significant changes to Australia's foreign investment framework in over 40 years were introduced. The reforms provided for stronger enforcement of the rules, a better resourced system and clearer rules for foreign investors.
115. In the year since the reforms were implemented, the Government has been seeking ongoing feedback from stakeholders on how the reforms are working in practice and on any unintended consequences stemming from the reforms.
116. The Government has released this consultation paper to seek formal views from stakeholders on a suite of proposed changes in the areas of residential land, non-vacant commercial land, low sensitivity business investment and fees. The paper also

provides an opportunity for stakeholders to provide examples on how technical issues in the legislation could be fixed, and any other ideas for reform.

117. Stakeholders are invited to provide feedback on the proposed changes and the estimated regulatory cost/cost savings of the options.
118. The final legislative package and the approach to its implementation will be determined by the Government following consultation.
119. Further targeted consultation will take place on the exposure drafts of any legislative changes that are agreed by Government.

ATTACHMENT A — BUSINESS FEES 2016-17 FINANCIAL YEAR

Action type	Fee Payable
Entity	
Acquiring an interest in securities in an entity or a direct interest in an entity which is an agribusiness A foreign government investor acquiring a direct interest in securities in an entity	Where the consideration for the acquisition is \$1 billion or less: \$25,300 Otherwise: \$101,500
Acquiring an interest in securities in an entity where prior to the proposed acquisition, the foreign person holds an interest of 50 per cent or more in the entity (but excluding internal reorganisations) <i>(Note – this does not apply if the action may be characterised in a different way. For example, for an acquisition of an interest in a land entity, a fee may still be payable for an acquisition of an interest in land)</i>	Nil (no fee)
Australian Business	
Acquiring interests in assets of an Australian business or a direct interest in an Australian business that is an agribusiness A foreign government investor acquiring a direct interest in an Australian business	Where the consideration for the acquisition is \$1 billion or less: \$25,300. Otherwise: \$101,500.
Commercial land	
Acquiring an interest in commercial land that is not vacant	\$25,300
Acquiring an interest in commercial land that is vacant	\$10,100
Agricultural land	
Acquiring an interest in agricultural land where the price of the acquisition is \$1 million or less (\$0 – \$1,000,000)	\$5,000
Acquiring an interest in agricultural land where the price of the acquisition is more than \$1 million and less than \$2 million (\$1,000,001 – \$1,999,999)	\$10,100
Acquiring an interest in agricultural land where the price of the acquisition is between \$2 million and less than \$3 million	\$20,300

(\$2,000,000 – \$2,999,999)	
Acquiring an interest in agricultural land where the price of the acquisition is between \$3 million and less than \$4 million (\$3,000,000 - \$3,999,999)	\$30,400
Acquiring an interest in agricultural land where the price of the acquisition is between \$4 million and less than \$5 million (\$4,000,000 – \$4,999,999)	\$40,600
Acquiring an interest in agricultural land where the price of the acquisition is between \$5 million and less than \$6 million (\$5,000,000 – \$5,999,999)	\$50,700
Acquiring an interest in agricultural land where the price of the acquisition is between \$6 million and less than \$7 million (\$6,000,000 – \$6,999,999)	\$60,900
Acquiring an interest in agricultural land where the price of the acquisition is between \$7 million and less than \$8 million (\$7,000,000 – \$7,999,999)	\$71,000
Acquiring an interest in agricultural land where the price of the acquisition is between \$8 million and less than \$9 million (\$8,000,000 – \$8,999,999)	\$81,200
Acquiring an interest in agricultural land where the price of the acquisition is between \$9 million and less than \$10 million (\$9,000,000 – \$9,999,999)	\$91,300
Acquiring an interest in agricultural land where the price of the acquisition is \$10 million or more (\$10,000,000 or more)	\$101,500
Mining, production or exploration tenements	
Acquiring an interest in a mining or production tenement (except where a foreign person (other than a foreign government investor) is acquiring an interest from an Australian government body or an entity wholly owned by an Australian government body)	\$25,300
A foreign government investor acquiring a legal or equitable	\$10,100

interest in a mining, production or exploration tenement	
A foreign government investor acquiring an interest of at least 10 per cent in securities in a mining, production or exploration entity	\$10,100
Exemption certificates	
Applying for an exemption certificate in relation to a program to acquire interests in Australian land	Where the consideration for the acquisition is \$1 billion or less: \$25,300. Otherwise: \$101,500.
Applying for an exemption certificate to acquire securities through underwriting	\$25,300
Applying for an exemption certificate to acquire certain interests in tenements or interests in securities in mining, production or exploration entities, if those interests are not interests in Australian land.	\$25,300 or nil if the person or another entity is a member of the same wholly-owned group (see section 6(2) of the <i>Foreign Acquisitions and Takeovers Fees Imposition Regulation 2015</i>).
Other fee rules	
Internal reorganisation	\$10,100
Foreign government investor starting an Australian business	\$10,100
Internal reorganisations by foreign government investors involving tenements that are not an interest in Australian land	\$10,100 (the fee may be nil in particular circumstances).
Entering into an agreement relating to the affairs of an entity and under which one or more senior officers of the entity will be under an obligation to act in accordance with the directions, instructions or wishes of a foreign person who holds a substantial interest in the entity (or of an associate of such a foreign person)	\$25,300
Altering a constituent document of an entity as a result of which one or more senior officers of the entity will be under an obligation to act in accordance with the directions, instructions or wishes of a foreign person who holds a substantial interest in the entity (or of an associate of such a foreign person)	\$25,300
Special rules may apply for actions taken by wholly-owned groups – see section 14 of the <i>Foreign Acquisitions and Takeovers Fees Imposition Regulation 2015</i>	

Variations	
Applying for a variation of an exemption certificate	\$5,000
Applying for a variation of a no objection notification	\$5,000 if for an acquisition of an interest in Australian land. Otherwise, \$10,100.
Fee otherwise would be more than 25 per cent of the consideration (de minimis rule)	
Where the fee for one or more of the actions specified above would be more than 25 per cent of the consideration for the proposed acquisition. This excludes: <ul style="list-style-type: none"> • internal reorganisations; • entering into an agreement relating to the affairs of an entity mentioned in section 40(2)(d) of the Act; • altering a constituent document of an entity mentioned in section 40(2)(e) of the Act; and • entering into or terminating a significant agreement with an Australian business. 	\$1,000
Voluntary notifications	
Giving notice of a significant action that is not a notifiable action	The same fee that would be payable for a notifiable action of the same acquisition type.

ATTACHMENT B — COSTING ASSUMPTIONS

Stakeholders are invited to provide comments on the below costing assumptions used to formulate the estimated regulatory cost or savings for the options outlined in the paper.

LODGING A FOREIGN INVESTMENT APPLICATION OR NOTICE

Business acquisitions

The following table outlines estimated average costs for lodging a foreign investment application or notice for all applications other than for residential land. This cost has been used to estimate the regulatory costs or savings for relevant options outlined in the paper.

Task	Hours	Total Cost (\$)	Comments
Consulted FIRB website and/or phoned/emailed enquiries line	1	65.45	Cost based on Office of Best Practice Regulation (OBPR) default hourly rate
Sought legal advice	4	3,200	Cost based on a legal cost per hour estimated to be \$800.
Gathering documents to assist with developing an application	20	1,309	OBPR default hourly rate
Determining the correct fee	2	1,600	Legal cost per hour
Developing an application and submitting online	20	16,000	Legal cost per hour
Paying the fee	1	65.45	OBPR default hourly rate
Correspondence during case assessment	10	8,000	Legal cost per hour
Ongoing compliance with conditions and/or reporting	2	65.45	OBPR default hourly rate
Total compliance cost per business application	60	30,370.8	

Residential land acquisitions

The following table outlines estimated average costs for lodging a foreign investment application or notice for an acquisition in residential land. This cost has been used to estimate the regulatory costs or savings for relevant options outlined in the paper.

The assumptions for residential land differ from the business assumptions as it is assumed residential land applications are less complex.

Task	Hours	Total Cost	Comments
Consulted FIRB website and/or phoned/emailed enquiries line, gathered documents for an application, payment of the application fee	1.5	98.20*	Cost based on Office of Best Practice Regulation (OBPR) default hourly rate of \$65.45
Sought legal advice, submitted application on behalf of individual, engagement with the ATO.	1.5	1,200	Cost based on a legal cost per hour estimated to be \$800.
Total compliance cost per residential application	3	1,298.2	