The Commonwealth Government has proposed additional reforms to Australia’s foreign investment rules, targeted at reducing the regulatory burden on foreign investors.

**IN BRIEF**

- **Significant reforms** to Australia’s foreign investment rules were implemented on 1 January 2021.

- The Commonwealth Treasury has now evaluated these reforms, and the Government is proposing additional reforms following a period of public consultation.

- The first tranche, due to come into effect on 1 April 2022, are targeted at reducing the regulatory burden on foreign investors.

- These are largely welcome reforms covering a range of topics, including expanding the ‘moneylending’ exemption for acquiring security interests, increasing the threshold for acquisitions of interests in unlisted Australian land entities and Australian media businesses, clarifying the exemption for pro rata increases and capitalising wholly-owned subsidiaries.
TWO TRANCHES OF NEW REFORMS

On 1 January 2021, some of the most significant reforms to Australia’s foreign investment framework since 1975 were implemented.

Now, with a year having passed since those reforms were introduced, the Commonwealth Treasury has undertaken a comprehensive evaluation of them. In response, the Commonwealth Government has announced commitments to further reform Australia’s foreign investment rules to ensure it remains fit for purpose.

These new reforms will be undertaken in two tranches, exposure draft legislation for the first of which has now been released for public consultation. Those proposed reforms are discussed below.

The second tranche of reforms is to be a broader package of legislative and regulatory reforms, scheduled for implementation in the second half of 2022. Treasury has sought submissions from stakeholders (due on 11 March 2022) on a number of topics related to those reforms, including additional types of transactions that might be exempted from FIRB screening, further refinements that might be made to the exemption certificates regime, feedback on existing notification, compliance and enforcement regimes, and a broad request for feedback on any other ways to improve the overall design and operation of Australia’s foreign investment framework. We have been actively involved in the consultation and will be making submissions.

UPCOMING REFORMS: REDUCING THE REGULATORY BURDEN ON INVESTORS

The first tranche of reforms are proposed to come into effect on 1 April 2022, and will apply to actions taken, or proposed to be taken, on or after that date. The reforms include:

BROADENING THE MONEYLENDING EXEMPTION

The current ‘moneylending exemption’ under the Foreign Acquisitions and Takeovers Regulation 2015 (Cth) (FATR) provides an exemption from the foreign investment rules for the acquisition and enforcement of security interests, where this occurs in the context of a moneylending business.

Under the proposed reforms, the moneylending exemption will be broadened slightly, including notably to expressly clarify that newly created entities that are created by an existing foreign moneylending business for the predominant purpose of moneylending are covered by the exemption.
As part of the significant reforms that came into effect on 1 January 2021, the definition of an ‘Australian media business’ under the FATR was broadened to include online media businesses (with the previous definition only capturing newspaper, broadcast TV or radio media businesses).

Following feedback from stakeholders as part of Treasury’s evaluation of the 2021 reforms, the Government is proposing to:

- **(raise the percentage threshold)** change the relevant ‘notifiable action’ for acquisitions of interests in Australian media businesses so that the acquisition threshold is increased from 5% to a ‘direct interest’ (which is generally 10%, absent special arrangements or rights to participate in or influence central management and control of the entity) - this is a very welcome change and brings the threshold in line with the general thresholds for other categories of more sensitive acquisitions (e.g. national security businesses and investment by foreign government investors); and

- **(refine the ‘Australian media business’ definition)** refine the definition of ‘Australian media business’, which contains both a ‘content test’ and ‘threshold test’, so that:
  - in relation to the content test, a media service simply delivering online content to an Australian audience on “current issues or events of interest to Australians” will be insufficient to be an Australian media business, rather the service will need either report, investigate or explain “issues or events that are relevant in engaging Australians in public debate and in informing democratic decision making” or “current issues or events of public significance for Australians at a local, regional or national level”; and
  - in relation to the threshold test, the average daily audience for the media service must consist of at least 10,000 people in Australia (rather than 10,000 people anywhere in the world).

We are pleased to see these changes as the existing language is very broad and had the potential to inadvertently capture non-media businesses.

**RAISING THE THRESHOLD FOR THE ‘UNLISTED LAND ENTITY’ EXEMPTION**

An important and useful exemption from the foreign investment rules are the exemptions for acquisitions of interests in listed and unlisted Australian land entities (i.e. land-rich entities).
Currently, the general position is that foreign investors can acquire an interest of less than 10% in an Australian land entity that is listed, and an interest of less than 5% in an Australian land entity that is not listed, without having to apply to FIRB for approval.

Under the proposed reforms, these percentage thresholds will be aligned, so that the exemption for acquiring interests in unlisted Australian land entities will cover the acquisition of interests of ‘less than 10%’.

**ACQUERING ADDITIONAL SECURITIES WITHOUT INCREASING PROPORTIONATE HOLDING**

There is currently a broad exemption under the FATR for acquisitions made under a rights issue (where the interest being acquired has not been previously offered for issue under the rights issue).

Under the proposed reforms, an additional limb will be added to this category of exemption to cover acquisitions of interests in securities where the proportionate shareholding or unitholding of the investor will not increase as a result of the person’s acquisition - the availability of the exemption turns on an objective test of whether there are “reasonable grounds” to believe that the percentage interest the person holds in the relevant entity will not increase as a result of the person’s acquisition.

The Explanatory Statement to the proposed reforms provides two examples of where this new exemption might apply:

- clarifying that the capitalisation of a wholly-owned subsidiary will not require FIRB approval (as the holding company’s proportionate shareholding will not increase as a result of the capitalisation (it remains at 100%)); and

- in a capital call situation where a person is required to contribute additional funding to an investment vehicle along with other investors who are also required to contribute additional funding in their respective ownership proportions (and no other persons are expected to provide capital to the investment vehicle).

The definition of ‘rights issue’ is also proposed to be clarified so that it has the same meaning as in the *Corporations Act 2001* (Cth).

**FOREIGN CUSTODIAN CORPORATIONS**

The proposed reforms look to narrow the current exemption for the acquisition of interests by foreign custodian corporations to provide that the exemption only applies where the equitable interest in the relevant Australian assets are not held by *any* foreign person.
In practice, this significantly limits the exemption available to foreign custodian corporations (to those who do not provide custody services to foreign persons) without serving any policy purpose given that underlying foreign investors are already separately regulated under our foreign investment rules. This issue has been raised with Treasury and we hope to see it addressed in the finalisation of the amendments to the regulation.

**KEY CONTACTS**

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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