



Australian Government
Foreign Investment Review Board

REGULATOR PERFORMANCE FRAMEWORK

Administration of Australia's Foreign Investment Framework

REPORT 2016–17

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INTRODUCTION

The Government's Regulator Performance Framework (the Framework) is a key part of its Regulatory Reform Agenda.

Treasury's Foreign Investment Division (FID) and the Australian Taxation Office (ATO) are responsible for implementing Australia's foreign investment legislation. The Foreign Investment Review Board (the FIRB) is a non-statutory body established to advise the Treasurer and the Government on foreign investment matters, including the application of the foreign investment legislation to particular investment proposals. For simplicity, the foreign investment framework is often referred to as the 'FIRB process' and the Treasury and ATO referred to as 'FIRB agencies'.

The Framework establishes a set of six key performance indicators (KPIs) as follows:

1. Regulators do not unnecessarily impede the efficient operation of regulated entities;
2. Communication with regulated entities is clear, targeted and effective;
3. Actions undertaken by regulators are proportionate to the regulatory risk being managed;
4. Compliance and monitoring approaches are streamlined and coordinated;
5. Regulators are open and transparent in their dealings with regulated entities; and
6. Regulators actively contribute to the continuous improvement of regulatory frameworks.

The performance of FIRB agencies is assessed annually through externally validated self-assessments. The inaugural report covering financial year 2015-16 is available on the FIRB website.

The Framework encourages regulators to minimise the regulatory burden created through their administration of regulation. It is focussed on the administration, monitoring and enforcement of regulation, not the setting of policy. FID and the FIRB do however provide input on policy development and on the broader issues associated with the foreign investment regime.

The established Treasurer-approved metrics for each KPI is a base from which the annual assessment of performance is determined. Many of the metrics appear in several measures and KPIs. To avoid repetition, metrics that appear multiple times are not addressed against every KPI.

METHODOLOGY

Members of the Foreign Investment Committee of the Law Council of Australia (the Committee), along with other organisations that interact with the foreign investment framework on a regular basis, were consulted on the performance of FIRB agencies as regulators to inform this assessment and to determine areas of focus for the coming year.

This self-assessment draws on a range of quantified statistical analysis and annual survey feedback from key stakeholders; complemented by qualitative information to support evidence of actions taken during the reporting period. In addition to ongoing stakeholder engagement and outreach activities, FIRB agencies invited feedback from the Committee and a range of key industry stakeholders through an annual survey. This was followed by targeted discussions with respondents to inform the findings of this report.

It is important to note that the results detailed in this self-assessment are not the sum total of achievements, but are used to illustrate performance claims.

OVERVIEW OF 2016–17

During the reporting year the Government introduced regulatory changes to clarify, simplify and further strengthen Australia's foreign investment framework.

The changes were announced in the 2017-18 Budget and will make foreign investor obligations clearer and allow for more efficient allocation of screening resources. In addition, the changes were designed to facilitate business investment and reduce unnecessary red tape. The changes include (but are not limited to):

- improving the treatment of residential applications by allowing failed off-the-plan purchases to be considered as 'new';
- streamlining and simplifying foreign investment business application fees, including legislating existing fee waiver arrangements; and
- introducing new exemption certificates to streamline the processing of multiple transactions.

From 1 April 2017, Treasury's responsibility for screening certain commercial real estate and internal reorganisation (restructure) applications has been undertaken by the ATO.

In January 2017, the Treasurer and Attorney-General jointly announced the establishment of the Critical Infrastructure Centre (CIC) within the Attorney-General's Department. The CIC complements the foreign investment framework by delivering coordinated national security advice to support foreign investment decision making for sales of critical infrastructure assets. The CIC also supports a proactive approach to assessing national security risks to critical infrastructure assets outside any sale process. Over time, this will reduce the time required to assess national security risks through foreign investment screening processes.

In 2016-17, approximately 1500 residential and 1300 non-residential proposals were assessed under Australia's foreign investment framework. Final figures will be published in the 2016-17 FIRB Annual Report. Foreign investment approvals data is based on investor intentions and does not reflect actual purchases.

ASSESSMENT AGAINST KEY PERFORMANCE INDICATORS

KPI 1 – REGULATORS DO NOT UNNECESSARILY IMPEDE THE EFFICIENT OPERATION OF FOREIGN INVESTORS

Measures of good regulatory performance	Activity-based evidence and metrics
<p>Demonstrate an understanding of the operating environment of the industry or organisation, or the circumstances of individuals and the current and emerging issues that affect the sector.</p>	<ul style="list-style-type: none"> • Regular, ongoing consultations or engagement with stakeholders on policies and processes to be undertaken, including industry associations: <ul style="list-style-type: none"> – Number of FIRB information sessions. – Number of meetings with industry associations. – Number of meetings with government agencies. • Reporting will include a qualitative assessment of stakeholder satisfaction with these consultations. • Have in place processes and regularly monitor to ensure the confidentiality of information provided by applicants.
<p>Minimise the potential for unintended negative impacts of regulatory activities on foreign investors.</p>	<ul style="list-style-type: none"> • Incorporate feedback from stakeholders into our processes. • Seek feedback on processes from other Government agencies and how this impacts on the FIRB processes.
<p>Implement continuous improvement strategies to reduce the costs of compliance for foreign investors.</p>	<ul style="list-style-type: none"> • A qualitative assessment on processes will be undertaken and appropriate changes made to processes. • Ensure a consistent and commercially neutral approach to reviewing applications: <ul style="list-style-type: none"> – An internal manual is available to staff which provides guidance on reviewing applications consistently and on a commercially neutral basis.

The FIRB agencies hold regular sessions with stakeholders ranging from individuals to peak bodies, industry advisors and government agencies. These sessions allow the FIRB agencies to provide advice on the foreign investment framework, seek input on proposed legislative and policy changes and receive feedback on its role as a regulator. Number of sessions held (Appendix A).

The amount of consultation increased during the reporting period. The majority of survey respondents reported that there was enough consultation while more than half rated the quality of consultation as high or very high with the remainder rating it as acceptable.

KPI 2 – COMMUNICATION WITH FOREIGN INVESTORS IS CLEAR, TARGETED AND EFFECTIVE

Measures of good regulatory performance	Activity-based evidence and metrics
Provide guidance and information that is up to date, clear, accessible and concise through media appropriate to the target audience.	<p>Information on the website is clear, accessible and up to date.</p> <ul style="list-style-type: none"> • Where possible, the FIRB website conforms to the Government’s accessibility guidelines and web content is aligned across ATO, FIRB and other relevant government agencies. • A qualitative assessment will be made on the clarity and timing of the website publication.
Consider the impact on foreign investors and engage with industry groups and representatives of the affected stakeholders before changing policies, practices or service standards.	<ul style="list-style-type: none"> • In consultation with stakeholders, FIRB considers the possible impacts of potential policy changes when making recommendations to Government. <ul style="list-style-type: none"> – Number of FIRB information sessions. – Number of meetings with industry associations. – Number of meetings with government agencies. • A qualitative assessment of stakeholder satisfaction with the consultation process will be undertaken.
Provide decisions and advice in a timely manner, clearly articulating expectations.	<p>A qualitative assessment of stakeholder satisfaction with the timeliness of general advice will be undertaken. Awareness of commercial deadlines under which applicants are operating.</p> <ul style="list-style-type: none"> • Notification on the decisions taken is provided as soon as possible after that decision has been reached. • Proportion of applications completed within the statutory period of 30 days.

The FIRB agencies communicate with foreign investors in a number of ways including through the FIRB website, the publication of an annual report, regular meetings with stakeholders, national roadshows and consultation on specific issues such as proposed changes to the foreign investment framework. The FIRB agencies have telephone, email and formal correspondence avenues, with all applications allocated to an individual case officer.

Three-quarters of survey respondents rated the quality of information and timeliness of updates on the FIRB website as high or very high. No respondents felt that the quality of the website was unacceptable.

A number of survey respondents commented that while they appreciate the dedication of the FIRB agencies in assisting applicants meet commercial deadlines; most applications require an extension beyond the statutory time period of 30 days.

FIRB agencies will continue to work with stakeholders and consultation partners to improve the efficiency of our processes. The establishment of the CIC, over time, will support more efficient assessment of national security considerations for the sale of critical infrastructure.

KPI 3 – ACTIONS UNDERTAKEN BY REGULATORS ARE PROPORTIONATE TO THE REGULATORY RISK BEING MANAGED

Measures of good regulatory performance	Activity-based evidence and metrics
<p>Apply a risk-based, proportionate approach to compliance obligations, engagement and regulatory enforcement actions. Recognise the compliance record of foreign investors.</p>	<p>FIRB ensures that there is sufficient and appropriate public information to aid stakeholders in complying.</p> <ul style="list-style-type: none"> • FIRB website information is updated in a timely manner. • Reporting will be based on a qualitative assessment of the timeliness of web updates and, more generally, the comprehensiveness of information provided to assist stakeholders to comply. <p>Compliance action and scrutiny is risk-based (that is, the level of scrutiny takes account of the compliance record and degree of risk).</p> <p>Application of penalties takes account of factors such as the compliance record of the foreign investor.</p>
<p>Consider all available and relevant data on compliance.</p>	<p>Compliance strategies utilise a range of information available, including information from third parties with a view to reducing the burden of compliance on the foreign investor.</p> <ul style="list-style-type: none"> • Types of information sources used such as information from ATO, Immigration and Austrac. • Qualitative assessment undertaken on types of information sources used.

To assist foreign investors to comply with their obligations under the foreign investment framework, FIRB agencies ensure information conveyed is regularly reviewed and updated to remain clear, relevant and current. Survey respondents thought that the updates to the FIRB website were made in a very acceptable timeframe.

FIRB agencies consider each application on its merit and whether the investment is contrary to the national interest. As part of the risk assessment process, consultations are held with Australian federal, state and territory government departments, national security agencies and authorities with responsibilities relevant to the applications. If specific risks to the national interest are identified, conditions may be recommended to the decision maker and in rare cases a recommendation may be made to prohibit the action.

As part of their compliance activities, FIRB agencies conduct data matching from various sources including taxation, immigration, banking, land titles etc. FIRB agencies also receive annual and exception-based reports from foreign investors on compliance with conditions, as well as information from third parties such as other regulators and the public more generally. These reports are assessed by FIRB agencies and appropriate actions taken. Data on compliance activities (Appendix A).

During 2016–17 two real estate applications and two non-real estate applications were declined. Thirty residential properties were required to be divested. Penalties issued under infringement notices were applied to minor breaches.

FIRB agencies aim to work closely with foreign investors to assist them to meet their obligations under the foreign investment framework and ensure that regulatory action is risk-based and appropriate.

KPI 4 – COMPLIANCE AND MONITORING APPROACHES ARE STREAMLINED AND COORDINATED

Measures of good regulatory performance	Activity-based evidence and metrics
<p>Utilise existing information to limit the reliance on requests made to foreign investors and share the information among other regulators, where possible.</p>	<p>Information is shared among government agencies.</p> <ul style="list-style-type: none"> • Number of inter-departmental committee (IDCs) meetings. • Consult with relevant government agencies. • Draw on other government agencies' information, data and systems (as appropriate) to reduce information requests to applicants where possible. • Draw on previous applications as appropriate and where possible. • Utilise public sources of information including information such as search engines and stock exchange filings. <p>A qualitative assessment undertaken on the sharing and use of existing information.</p>
<p>Base monitoring and inspection approaches on risk and where possible, takes into account the circumstance and operational needs of foreign investors.</p>	<p>Regular review and assessment of agreed conditions and undertakings imposed on foreign investment proposals.</p> <ul style="list-style-type: none"> • Number of reviews of conditions and undertakings in a year.

When assessing an application or compliance with the Treasurer's decision, FIRB agencies consult with Australian federal, state and territory government departments, security agencies and authorities (collectively, consult partners) on an as needs basis. This affords the FIRB access to expert advice that forms part of the Government's decision making process.

Conditions and undertakings are imposed on a case-by-case basis to mitigate risks and ensure that investments are not contrary to the national interest. Similarly, foreign investor reporting obligations range from regular submissions to those on an exception basis, depending on a number of factors including the type of investment and the nature of the acquisition.

FIRB agencies meet on a regular basis to ensure Government has a coordinated approach to the review and processing of applications. FIRB agencies formally examine conditions and undertakings imposed on acquisitions on a six-monthly basis as well as proactively considering compliance matters.

FIRB agencies hold regular meetings with consult partners to ensure a cooperative approach to delivering efficient and effective compliance processes. FIRB agencies also hold interdepartmental committee meetings with respect to particular investment applications and foreign investment issues (Appendix A).

KPI 5 – REGULATORS ARE OPEN AND TRANSPARENT IN THEIR DEALINGS WITH FOREIGN INVESTORS

Measures of good regulatory performance	Activity-based evidence and metrics
Ensure information on risk-based frameworks is publicly available in a format which is clear, understandable and accessible where possible.	<p>Clear information on FIRB website, including for example policy documents, guidance notes and annual reports, which gives an overview of the framework, including the decision making process.</p> <p>A qualitative assessment undertaken of the information on the website.</p>
Be open and responsive to requests from foreign investors regarding the operation of the regulatory framework, and approaches implemented by regulators.	<p>Email and phone queries are adequately responded to:</p> <ul style="list-style-type: none"> • Data on phone enquiries including waiting times and number of calls taken. • Number of stakeholder engagement events.
Ensure performance measurement results are published to ensure accountability to the public.	Performance-related information published in annual reports in a timely manner.

FIRB agencies regularly engage with foreign investors, their representatives or agents and Australian businesses to provide information on the operation of the foreign investment framework.

The Government’s approach to the regulation of foreign investment is outlined in [Australia’s Foreign Investment Policy](#). The role of FIRB is available on the website.

Information on the FIRB website provides guidance on the operation of the foreign investment framework, including (but not limited to): residential real estate applications; reporting requirements for proposed investments; monetary screening thresholds and exemptions; application fees for the various types of applications; detailed guidance notes; and the current Acts, regulations and policy documents.

Over three quarters of survey respondents rated the quality of information on the FIRB website as high or very high with the remainder rating it as acceptable.

Some feedback from stakeholders commended FIRB agencies for being more available than in the past and willing to engage on technical and difficult issues. In contrast, other feedback was that extensions are being requested on the majority of applications and this is causing uncertainty for some foreign investors, as well as their representatives or agents, and that more transparency of the process and timing would be helpful.

There is some criticism that due to the complexity of the foreign investment framework, advice provided is often delayed on matters that are complex in nature. However, feedback also noted the advice is usually of high quality. FIRB agencies seek to make every effort to provide clear, accurate and timely advice wherever possible and will continue to work with stakeholders to ensure they are kept informed of developments in the foreign investment framework.

Feedback from certain stakeholders indicated concerns about the rationale of applying standard tax conditions on what they consider to be low risk investments, which results in increased regulatory and administrative burden. A key objective of implementing standard tax conditions was to improve regulatory certainty in response to stakeholder feedback.

Statistics on phone enquiries and stakeholder engagements (Appendix A).

KPI 6 – REGULATORS ACTIVELY CONTRIBUTE TO THE CONTINUOUS IMPROVEMENT OF REGULATORY FRAMEWORKS

Measures of good regulatory performance	Activity-based evidence and metrics
Establish cooperative and collaborative relationships with stakeholders to promote trust and improve the efficiency and effectiveness of the regulatory framework.	Qualitative assessment of processes designed to allow active and regular engagement with stakeholders. <ul style="list-style-type: none"> Number of stakeholder engagement events.
Engage stakeholders in the development of options to reduce compliance costs.	Number of stakeholder events held to facilitate participation in the development and/or amendment of regulatory frameworks and a qualitative assessment of stakeholder satisfaction with those events.
Regularly share feedback from stakeholders and performance information with policy departments and across the Foreign Investment Division (FID) and other areas in Treasury to improve the operation of the regulatory framework and administrative processes.	Processes are in place to facilitate the flow of information between the regulator on policy and regulatory functions in FID, other areas of Treasury and also other government agencies. <ul style="list-style-type: none"> Number of IDC meetings held. Number of stakeholder engagement events. Processes in place to improve understanding of foreign investment regime. <ul style="list-style-type: none"> Attend external meetings and seminars.

FIRB agencies actively engage with potential foreign investors and their representatives, foreign governments, industry peak bodies and Australian federal, state and territory government departments, security agencies and authorities that are relevant to the foreign investment review process.

Frequent, regular and ad-hoc engagement sessions are held with these organisations, which are designed to develop a shared understanding of the foreign investment environment and to improve the experience of all participants.

In March 2017, Treasury released a consultation paper inviting feedback on options to improve and streamline the foreign investment and cost recovery framework. During the four week process, Treasury undertook targeted consultation with key stakeholder groups. This consultation process informed a suite of regulatory amendments announced in the 2017-18 Budget which took effect on 1 July 2017.

In May 2017 following the Budget, Treasury met with state governments, investors and their legal and financial advisers to inform them of the proposed changes. As a result of this engagement, five further measures were included in the legislative amendment package that took effect on 1 July. The amendments received positive feedback, particularly fee changes and the introduction of business exemption certificates. The amendments are expected to reduce compliance and regulatory burden.

Treasury supported the establishment of the CIC and consultation on proposed regulatory measures to better manage the national security risks of foreign involvement in critical infrastructure.

FIRB agencies are also members of the Community of Practice for Commonwealth Regulators (CoP). The CoP is a platform used to share knowledge and understanding of the different approaches adopted by other regulators to the common challenges of implementing regulatory reform.

PREVIOUS FOCUS AREAS

Key areas that FIRB agencies focussed on in the reporting period were:

- improving the timeliness of information request responses and application processing times more generally by working closely with consult partners to agree timelines and priorities and to improve the flow of information;
 - feedback from stakeholders has been positive towards Treasury’s continued work with stakeholders and consult partners on improving the timeliness of responses to information requests.
- streamlining the fee process by addressing system issues with the calculation of fees for certain types of applications;
 - stakeholder feedback on the finalised changes for a simplified fee structure has been positive.
- redesigning the online application portal to provide a more flexible, user-friendly experience for all foreign investors;
 - Treasury continues to work closely with stakeholders to inform the design and implementation of the new online application portal.
- ensuring sufficient guidance is available on the FIRB website that is complete and accurate;
 - feedback from stakeholders rate the quality of information and timeliness of updates on the FIRB website as high or very high. FIRB agencies continue to regularly review the website and update information to ensure it remains clear, relevant and current.

FUTURE FOCUS AREAS

Overall FIRB agencies were evaluated as performing well against the standards set by the KPIs and metrics. Survey responses, however, highlighted a number of areas for improvement.

Accordingly, over the next reporting period FIRB agencies intend to focus on:

- improving the timeliness of advice and application processing times;
- progressing the redesign of the online application portal to provide a more flexible, user friendly experience for all foreign investors;
- continuing to encourage investors and their advisors in potentially sensitive assets to engage early with FIRB agencies;
- supporting the CIC to provide investors with greater clarity about the types of critical infrastructure assets that will attract national security scrutiny, potential ownership restrictions and mitigations; and
- enhancing compliance capability and activities.

APPENDIX A – QUANTITATIVE DATA

Metric	Residential	Non residential	Total
Number of FIRB information sessions	25	16	41
Number of IDCs	9	14	23
Number of stakeholder engagement events	25	242	267
Number of attendees at stakeholder events			2,000
Number of phone calls received via the FIRB Enquiry Line (not including calls made directly to case officers)	17,965	3,818	21,783

2016–17 compliance activities	
Number of matters referred for investigation	1,669
*Number of properties required to be sold	30
Value of properties required to be sold	\$34,304,889
Number of Infringement Penalties	417
Value of infringement Penalties	\$1,745,340

**Note properties required to be sold represented by 9 concessional and 21 formal.*

APPENDIX B – EXTERNAL VALIDATION OF THE FIRB’S SELF-ASSESSMENT

The Foreign Investment Committee of the Law Council of Australia (the Committee) is the Ministerial-approved consultation body for FIRB agencies for the purposes of the Framework and this report.

Feedback from the Committee and other external stakeholder informed the drafting of this report.