



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: BLC:RH1b1965955

31 August 2020

Manager
Policy Framework Unit
Treasury
Langton Cres
Parkes ACT 2600

By email only: FIRBStakeholders@treasury.gov.au

Dear Sir/Madam,

Major Reforms to the Foreign Investment Review Framework

The Law Society of NSW welcomes the release of the exposure draft of the *Foreign Investment Reform (Protecting Australia's National Security) Bill 2020* ("Bill"), which is proposed to amend the *Foreign Acquisitions and Takeovers Act 1975* (Cth) ("FATA"), and appreciates the opportunity to comment on these proposed reforms. The Law Society's Business Law Committee contributed to this submission.

The Bill

Treasurer's powers *Review*

The Bill gives the Treasurer broad discretion to approve and attach conditions to no objection notifications together with expansive 'call in' powers. While these powers are potentially subject to merits review by the Administrative Appeals Tribunal, many investors may be reluctant to pursue review of a foreign investment decision where the investment in question is commercial in confidence. Alternatively, investors who are likely to make future investments may be reluctant to pursue such a review. These investors may be concerned about reputational damage, or that they may be subject to a prohibition order if they do not comply.

Breadth of Treasurer's discretion in the application process

The proposed amendments grant the Treasurer broad discretion to collect information in the course of foreign investment applications. We are concerned that this information may be used for unrelated purposes to achieve regulatory outcomes, particularly in the tax jurisdiction, that would not otherwise be possible under the existing legislative framework. Appreciating that the Treasurer is not able to compel the production of information or specific documents in the course of reviewing a foreign investment application, prospective investors are likely to, in practice, volunteer information in good faith to facilitate a smooth foreign investment approval process. In the interests of procedural fairness, we are of the view that information provided to the Foreign Investment Review Board ("FIRB") during a foreign investment application should not be used other than for the purpose of considering the relevant foreign investment application. Given these concerns, and as the Australian Tax Office assesses many of the foreign investment applications lodged, we suggest that granting the Inspector-General of

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Taxation and Taxation Ombudsman's office oversight of this process would be a welcome procedural safeguard.

Certainty

A key element that foreign investors look for when investing in a jurisdiction is certainty of process. The breadth and expanse of the Treasurer's powers may deter foreign investment due to the lack of certainty in relation to the foreign investment process, including how and when the Treasurer will exercise his powers, the lack of certainty of outcome, potential additional costs for responding to the Treasurer's exercise of his powers, and limited rights of independent recourse.

Foreign Ownership Register

Foreign ownership

These reforms contemplate the creation of a register of foreign ownership, which is to record certain actions taken by foreign persons ("Register"). The Bill contemplates that a foreign person who acquires or disposes of an interest (other than an equitable interest) must give a notice to the Registrar to be recorded on the Register. As currently drafted, the content of this notice only includes details of the action and does not include the conditions (if any) attaching to the relevant no objection notification in respect of the relevant action. Where a change of ownership occurs, which has been sanctioned by a no objection notification imposing conditions, we recommend the Register also include the conditions included in the notification.

The Registrar has, pursuant to proposed section 130ZH of the Bill, the ability to prescribe certain 'data standards' by legislative instrument. Such standards may plausibly include the requirement to provide information relating to the conditions attaching to the relevant no objection notifications in a notification to the Registrar. However, in our view, it would be appropriate to include this as a requirement of any notification provided to the Registrar. The inclusion of the conditions attaching to the relevant no objection notifications in the Register would provide a useful reference point for enforcement activities and would enable this data to be reported to Parliament (pursuant to proposed section 130ZG of the Bill), providing a useful evaluation of Australia's foreign investment position.

We welcome and support greater reporting to Parliament and the public in respect of Australia's foreign investment position as proposed in the Bill. It would also be conducive to the legislative aims of the Government in encouraging foreign investment to provide greater transparency in relation to the character, nature and requirements of conditions imposed in no objection notifications. This could be achieved by broadening the Registrar's reporting requirements in proposed section 130ZG of the Bill. As the Bill currently stands, the Registrar is to report only in relation to the proposed Part 7A of the FATA and 'statistics derived by the Registrar from information in the Register'. Creating a further legislative requirement to provide de-identified information in respect of the conditions imposed in no objection notifications would provide a useful reference point for foreign investors and their advisors in anticipating conditions that may be imposed by the FIRB.

Prospective foreign investors would also welcome this degree of transparency in relation to the types of conditions that may be imposed.

Ultimate beneficial owners

We note that the FATA contains tracing provisions and that current applications to the FIRB require disclosure of the ultimate beneficial owners of investors in Australian assets. The Commonwealth has previously foreshadowed the introduction of an "ultimate beneficial ownership" register, equivalent to the one operating in the United Kingdom. We recommend that these registers be created on the same basis as the register in existence in the United Kingdom and be administered by the Australian Securities and Investments Commission to

reduce the reporting and compliance burden of foreign investors and their Australian subsidiaries.

Disclosure of the financing of transactions

In a number of recent transactions, the FIRB has requested further information from foreign investor applicants in relation to how certain transactions are proposed to be financed. In the interests of creating greater certainty for prospective foreign investors, we suggest that the requirement for investors to provide information regarding the financing arrangements in relevant transactions be specified in the FATA. This would enhance the transparency of the foreign investment application process.

Foreign Acquisitions and Takeovers Regulation 2015

Definition of “national security business”

Critical infrastructure assets

The first part of the draft amendments to the *Foreign Acquisitions and Takeovers Regulation 2015* provide the details of the definition of national security business. We note that the Treasury has referred to the consultation being undertaken by the Department of Home Affairs on the definition of “critical infrastructure” in the *Security of Critical Infrastructure Act (Cth) 2018*. We note that some of the proposed expanded definitions of critical infrastructure may require a co-ordinated approach between the Minister for Home Affairs and the Treasurer. We recommend that the commencement of paragraphs 10A(2)(a) and (b) of the draft regulation (which refer to the definition of “critical infrastructure” in the *Security of Critical Infrastructure Act 2018 (Cth)*) be potentially delayed or subject to further review once that legislation has been reviewed and amendments tabled or finalised.

Personal data about Australian citizens

We note that other security commentators have called for the inclusion of ‘personal data’ and/or ‘health information’ about Australian citizens to be included in the FATA regime. The definition of “national security business” does not refer to “data” specifically and where personal information is referenced, it is only referenced in respect of military and defence personnel or members of the Australian national intelligence community (see paragraphs 10A(2)(j), (k) and (l)). We note that this may be one of the areas subject to the Commonwealth’s Cyber Security Review and we recommend that the Treasurer consider how to protect the personal and health information of Australian citizens from foreign interference and/or influence.

If you have any questions about this submission, please contact Liza Booth, Principal Policy Lawyer, at liza.booth@lawsociety.com.au or on (02) 9926 0202.

Yours faithfully,



Richard Harvey
President