AUSTRALIAN INVESTMENT COUNCIL

2 October 2020

Manager
Policy Framework Unit
Treasury
Langton Cres
Parkes ACT 2600

By email: FIRBStakeholders@treasury.gov.au

Dear Sir/Madam,

Major reforms to the Foreign Investment Review Framework – September 2020

The Australian Investment Council welcomes the opportunity to contribute to Treasury's consultation process on the exposure draft of the *Foreign Investment Reform (Protecting Australia's National Security) Regulations 2020 (Exposure Draft Regulations) and the Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020 (Exposure Draft Fees Regulations).*

As a net importer of capital, Australia's economy relies on a dependable and steady flow of foreign capital to drive economic growth and job creation. At this critical juncture in our national response to the COVID-19 pandemic, it is vitally important for our economic recovery, and Australian jobs, that businesses are able to quickly and efficiently access capital from domestic as well as offshore investors. Any changes to Australia's foreign investment review regime must be made with the current state and future economic needs of our economy as a central guiding principle.

A strong and robust foreign investment review regime aligns with this policy lens and is important for maintaining the confidence of the Australian public and to protect our national interests. The Australian Investment Council remains supportive of a comprehensive clear and predictable framework and is broadly supportive of the recent proposals. However, in our view some aspects of the first and second tranche of proposals remain unclear, while others introduce new uncertainties. As highlighted in our submission on the first tranche of proposals, these uncertainties have the potential to dampen foreign investment into Australian businesses, deter overseas financiers from participation in Australian debt markets and increase funding costs, at a time when investment capital and debt finance is of critical importance to the nation's economy. The potential impact of these reforms should not be underestimated – early evidence exists of delays in the flow of investment capital and increased concern amongst investors in relation to perceptions of increased sovereign risk in dealings with Australia.

The private capital industry's key recommendations in respect of the exposure draft legislation are set out below. The Council encourages Treasury, and the Government, to carefully consider all elements of the feedback at both a high level and a more granular transactional level. It is vitally important that policy changes in this area are calibrated to deliver the right long-term outcomes for the nation.

We look forward to participating in future discussions about the proposed reforms to Australia's foreign investment policy framework. If you have any questions about the recommendations or any specific points outlined in this submission, please do not hesitate to contact me or Brendon Harper, the Australian Investment Council's Head of Policy and Research, on 02 8243 7000.

Yours sincerely

Yasser El-Ansary
Chief Executive

Level 12, Aurora Place
88 Phil ip Street
Sydney NSW 2000
+61 2 8243 7000
mail@aic.co
aic.co

Overview

The Australian Investment Council is the voice of private capital in Australia. Private capital investment has played a central role in the growth and expansion of thousands of businesses and represents a multi-billion-dollar contribution to the Australian economy. Our members are the standard-bearers of professional investment and include: private equity, venture capital and private credit funds, alongside institutional investors such as superannuation and sovereign wealth funds, as well as leading financial, legal and operational advisers.

Private capital fund managers invest billions of dollars into Australian companies every year. Funds under management of Australian-based private capital funds topped $33 billion in 2019, testament to the growth in available capital to support investment into businesses across every industry sector of the economy. Private capital investment offers smart, patient capital to privately backed companies along with expert guidance and strategic support.

More and more businesses are choosing to raise capital from private investors, rather than through public markets, because of the benefits of partnering with venture, private equity and private credit firms. Private capital investors can help unlock the growth and expansion opportunities of businesses through active asset management in a way that public markets simply cannot. This is evidenced by the fact that private capital-backed Australian businesses generate 1 in 9 new Australian jobs and contribute 2.6% of Australia's GDP.[1]

Efficient access to foreign capital is a vitally important ingredient in enabling billions of dollars of investment capital to flow into Australian businesses. The industry's ongoing capacity to continue to invest greater amounts of capital into Australian businesses, leading to the creation of new high-value Australian jobs, cannot be assumed – policy must support, enable and encourage capital investment into the domestic market. While the private capital industry currently has more than $13 billion in available capital to support current portfolio companies, as highlighted in our previous submission, the sector's ability to fund new investments, now and over the coming years, will be increasingly dependent on inbound capital from offshore investors. It also relies heavily on the existence of deep and competitive debt finance markets, with foreign financiers playing a key role.

In finalising its proposals, it is imperative that Treasury carefully balance the current and future needs of Australia businesses against need to maintain public confidence in the system and to safeguard the nation's collective interests.

1. Foreign Government Investors – Passive fund investors

The private capital industry strongly endorses the position in the Treasury's "Summary Paper"[2] that FIRB screening of investments by institutional investors that are privately controlled but caught as foreign government investors (and therefore subject to a zero dollar screening threshold) is unnecessary red tape. These investments typically do not give rise to national interest concerns and discourage investment. Feedback from Council members (a number of whom are in this position) is that this red tape puts them at a competitive disadvantage in a sale process – even against other foreign investors for whom screening thresholds may apply - by increasing uncertainty, delays and transaction costs.

Accordingly, it is critical to many of private capital industry participants that the proposals to streamline these investments are effective. Unfortunately, this will not be the case unless the following issues are addressed.

---

[1] Deloitte Access Economics (2018) *Private Equity: Growth and innovation*, April

[2] Foreign Investment Reforms (June 2020) https://treasury.gov.au/sites/default/files/2020-06/p2020-87595_0.pdf, p 12

40% test

The AIC understands the proposed exclusion to the definition of foreign government investor is intended to exempt investments funds, where the general partner / trustee is deemed to be a foreign government investor as a result of the 40% test in paragraphs 17(1)(b)(ii), (c)(ii) or (d)(ii) of the definition of foreign government investor, where such investors are genuinely passive investors. This new exclusion will currently only operate if:

- the investors in the fund are not able to influence any individual investment decisions, or the management of any individual investments, of the corporation, trustee or general partner under the scheme; and
- the foreign government investor in question does not have access to any sensitive information about investments under the scheme, other than financial information.

As a practical matter, the bar for passivity (based on the examples given in the explanatory statement accompanying the exposure draft regulations (**Explanatory Statement**), discussed in more detail below) has been set too high, having regard to provisions that are overwhelmingly market standard in private equity fund documents, and will mean that virtually no private equity funds with institutional investors will be exempted from the definition of foreign government investor.

Many private equity funds are required to benchmark their funds against the Institutional Limited Partner Association principles[3] (**ILPA principles**) when prospective investors conduct due diligence on their funds. ILPA asserts that alignment of interests, governance and transparency are the cornerstones of effective private equity partnerships. As such, the ILPA principles address key provisions in private equity fund documents and put forward "best practice" approaches to achieve these aims. As a result, the ILPA principles heavily influence the terms of private equity funds around the world. The ILPA principles contain specific principles which are at odds with the guidance set out in the Explanatory Statement. Importantly, there is no suggestion that adherence to these principles makes the investors anything less than passive.

Influence over individual investment decisions

The explanatory statement attempts to distinguish between investors that are able to influence individual investment decisions (for example, the purchase or sale of particular shares or property) on the one hand and investors that have some influence over the broad investment strategy on the other hand. The explanatory statement specifically notes that having an investor representative serve on an advisory committee can fall into the latter category as long as the advisory committee members are not involved in individual decisions for particular investments.

In respect of Limited Partner Advisory Committees (**LPACs**), the ILPA principles recommend that the mandate for the LPAC should be specifically set out in the fund documents and should generally include matters specific to evaluating conflicts of interest as presented by the fund sponsor, and other matters that would require a change to or interpretation of certain provisions within the fund documents, including:

- conflicts of interest such as cross-fund investments and fund sponsor investment in portfolio companies outside of the fund's interest or that violates the stated exclusions policy;
- review of valuation methodologies and any changes thereto as reported by the fund sponsor to the partnership and auditors;
- matters related to key person time and attention, changes to the key person provisions or departures of key staff;

---

[3] The Institutional Limited Partner Association is a global industry association which represents institutional investors. Its membership base is approximately 60% US-based; and 40% from Europe, Canada and throughout the rest of the world. LP type is represented by public pension funds, endowments and foundations, private pension funds, family offices, insurance companies and other institutional investors. A copy of the current version of the ILPA principles can be found here: https://ilpa.org/wp-content/uploads/2019/06/ILPA-Principles-3.0_2019.pdf.

- fund term extensions;
- matters concerning tests of investment strategy, geographic, allocation or concentration limitations;
- use of leverage;
- affiliated transactions;
- reviews of any material ESG incidents and/or risks to the fund's portfolio;
- LP defaults;
- reduction or expansions in fund size; performance considerations such as clawbacks or true-ups;
- reviews of the costs of operational advisors; and
- discussions around fees and expenses.

As per the ILPA principles, most LPACs are able to make decisions on (among other things) the following matters:

- Making an investment outside the parameters set out in the fund documents. The fund documents will typically include diversification limits, prudential limits, geographic restrictions and stated investment strategy.
- Making an investment where the fund sponsor has a conflict of interest (such as where investments are made by two or more funds managed by the same fund sponsor).

These restrictions can generally be overridden by the LPAC, which by definition means the advisory committee members will (as a collective) be able influence individual investment decisions as the issue will only ever come to the LPAC when there is a specific investment that the fund sponsor wishes to make.

Sensitive information

Second, the explanatory statement distinguishes between financial information and "non-public, non-financial information about investments that may affect the financial metrics (for example, knowledge of trial outcomes, resignations of key personnel, intellectual property, legal actions)", all of which the Explanatory Statement assumes is sensitive and which should not be available to investors.

In relation to the specific example of resignation of key personnel, the current version of the ILPA principles states "The investment team is a critical consideration in making a commitment to a fund. Accordingly, any significant change in that team should allow LPs to reconsider their decision to commit, through the operation of the key person provisions". The ILPA principles go on to recommend the following in respect of key person resignations:

- the resignation should trigger a suspension of the investment period;
- the suspension should become permanent after 180 days unless a defined majority of LPs affirmatively vote to reinstate the investment period (which typically involves either approving a replacement key person or being comfortable that no replacement is required).

In relation to other non-financial information to be provided to the LPAC, the ILPA principles include the following recommended agenda for LPAC meetings:

- Overall GP (firm) update (not to the exclusion of the other items on the list);
- Overall PE market update, i.e., investment conditions that fund is observing and the effect on strategy;
- Regulatory & legal (if any litigation) update;
- Fund compliance with LPA provisions, e.g., concentration limits, key person, etc.;
- Disclosure of any potential amendment, waiver, vote or matter which may be requested or presented to LPs or the LPAC before the next scheduled LPAC meeting;

- Team changes, e.g., departures, additions, promotions, expected changes; • Review of new deals / realizations;
- Pipeline update;
- Fund overview / dashboard on performance per company relative to original plan;
- Portfolio company snapshot of each unrealized investment (financial and qualitative with initial investment highlights);
- Portfolio company valuations, methodology used over last four quarters (to highlight changes);
- Discussion of potential exits—timing and amounts (preferably in writing);
- Detailed fund expenses including payments to affiliates, broken deal, administrative, etc. and offsets;
- Disclosure of any conflicts or investments completed in similar strategies and why they weren't a fit for the fund;
- Disclosure of capital call line usage, fund performance excluding the capital call line and the terms of line;
- ESG reporting;
- Annual in camera discussion with the auditor regarding financial statements, valuations, carried interest, fees, etc.;
- In camera (LP only) session.

In addition to information about key persons, litigation is specifically called out in terms of information that should be provided to advisory committee members.

The vast majority of fund documents include the provisions described above – the specific details are subject to negotiation and can differ from one fund to the next, but it is almost universally the case that investors (or a subset of them that have representation on the LPAC) will have access to some non-financial information and will have some limited decision-making ability of the nature described above.

Accordingly, the current passivity requirements, as interpreted by the Explanatory Statement, set an unrealistic standard for passivity and render the exclusion in proposed regulation 17(2) completely meaningless.

These kinds of protection are designed to protect the legitimate financial interests of LPs, and we submit that these kinds of protections do not give rise to the kinds of concerns that the Government has expressed in relation to foreign government investors. Funds that in general terms give LPs the kind of limited oversight recommended by the ILPA principles should properly be considered to be passive investment funds, and therefore excluded from the definition of foreign government investor by the operation of proposed regulation 17(2).

The Council recommends that:

- the proposed Guidance Note for this section recognise that the investor protections recommended by the ILPA principles would not constitute influence for the purposes of proposed reg 17(2)(b)(iii);
- the proposed Guidance Note for this section recognise that access to the above information should not constitute "sensitive information" and the following statement should be deleted from the Explanatory Statement (page 10): "However, non-public, non-financial information about investments that may affect the financial metrics (for example, knowledge of trial outcomes, resignations of key personnel, intellectual property, legal actions) should not be available to investors".

20% test

Treasury had flagged in is summary paper that "entities which have a single foreign government with at least 20% ownership (without influence or control) will still be deemed FGIs, however they will be able to apply for a broad exemption certificate on a case-by-case basis."[4] The Councils understands that while the proposed changes do not provide for a specific exemption certificate of this type, it is Treasury/FIRB's intention to issue a Guidance Note to give effect to this regime using its powers to grant exemption certificates under the legislation. In this respect, feedback from Council members in relation to the current process for obtaining exemption certificates (in particular timeframes and conditions) – particularly business exemption certificates to facilitate "roll-up' acquisitions of businesses - has been frustrating.[5] Anecdotally, the business exemption certificate proposed by FIRB, after an extensive and time consuming process, has often not met the needs of the investor. The concern is that, if the current experience with business exemptions certificates is any indication of the process involved with obtaining an investor specific exemption certificate for the 20% test for FGIs (or, for that matter, 40% FGIs that fail to meet passivity requirements), this proposal is highly unlikely to be effective. This is unless the process is streamlined and made more transparent and limited to an assessment of the risk profile of the FGIs that hold the substantial interest. It is noted that this type of exemption certificate will not relieve recipients from needing to seek FIRB approval for notifiable or significant actions above the monetary thresholds applicable to foreign investors. For this reason, the Council submits that the fee for such an exemption certificate should be appropriately moderate.

The Council recommends that the proposed Guidance Note for the investor specific exemption certificate be circulated in advance and subject to consultation and that it is clear in respect of conditions and timeframes for processing.

2. Call-in powers

As previously raised, the private capital industry has concerns about the material risks that would be imposed by the call-in and last resort powers, and the potential impact of these risks on investment flows and the cost of capital.

The proposed period of 10 years for the Treasurer to exercise the call-in power exacerbates these risks as the length of this period creates uncertainty for investors. It is industry's understanding that the sale of an asset to a (new) foreign investor (in circumstances where the transaction is not a significant / notifiable action, or is a significant action for which approval is not sought) would renew the 10 year timeframe.

The 10 year timeframe is significantly longer than most limitation periods - for example, for general contractual claims. It is also longer than the typical holding period for an investment for most fund managers (typically between 5-7 years).

Given the breadth of the concepts associated with the call-in power, the need for certainty to provide confidence to investors, and as the government is the party best placed to identify any national security risks, the Council submits that a period of 2 years is more appropriate.

Otherwise, many foreign investors will be required in practice to seek FIRB clearance as the risk of the call-in power being exercised after a transaction has occurred will not be palatable to them or their financiers. This is particularly the case given the length of the period and the fact that most investors and their advisers will simply not be able to conduct a 'national security' risk analysis themselves.

This will mean that the current high volume of FIRB applications will remain (or even increase as the call-in power applies to a wider range of transactions than even the temporary $0 thresholds).

[4] Foreign Investment Reforms (June 2020) https://treasury.gov.au/sites/default/files/2020-06/p2020-87595_0.pdf, p 13

[5] An investment fund often makes a strategic acquisition of a portfolio company and then seeks to grow that business through "roll-up' acquisitions.

3. Money lenders

The proposed exclusion from the moneylending exemption in regulation 27(1)(c) means that transactions involving security taken over national security land (and exploration tenements in respect of national security land) or assets of a national security business will not be exempt from the operation of FATA. Industry notes as follows:

The Council submits that the moneylending exemption should continue to operate as there is no conflict between the Government's interests in protecting national security, and the routine and low risk nature of moneylending transactions. It is industry's understanding that Treasury is concerned that the exemption could be abused as a back-door method of gaining control of a national security business. However, to be eligible for the exemption the security interest must be granted "in good faith, on ordinary commercial terms and in the ordinary course of carrying on a business (a moneylending business) of lending money," must be held solely by way of security for a moneylending agreement (s27(1)(a)(i)) and must not deal with "any matter unrelated to the carrying on of that business". As such, the exemption is tightly constrained and protected by its own anti-avoidance provisions.

It may be that Treasury's concern derives from the second limb of the moneylending exemption, s27(1)(a)(ii), being an interest "acquired by way of enforcement of a security held solely for the purposes of a moneylending agreement". In fact, this limb is little used as on enforcement a receiver or administrator is appointed by a security trustee on instructions from the financiers with a view to sale to a third party. It would greatly alleviate the dire consequences of revoking the moneylending exemption under the new s27(1)(c) if that new provision could be limited in its effect to the second limb of the exemption (i.e. s27(1)(a)(ii)).

Another less disruptive approach would be to mirror the approach taken with moneylenders that are deemed to be foreign government investors, limiting the period of enforcement to 6 months. The proposed exclusion from the moneylending exemption is likely to result in moneylenders having to seek approval for the same transaction that the acquirer is seeking approval for, meaning two separate FIRB applications and two sets of fees. Borrowers will effectively be required to bear both sets of fees, since lenders can be expected to pass these costs onto borrowers.

The Council suggests that in circumstances where the main transaction also requires FIRB approval, any application fees associated with a lender's or security trustee's application should be eligible for a complete or partial waiver, given some of the work in relation to the application (assessing the target) will be common to both applications.

In addition, it is unclear how application fees will be assessed, given application fees are normally assessed based on consideration and there is no consideration per se in moneylending transactions. The Council suggests a flat nominal fee, rather than a scaled fee, given the routine nature of these transactions and the very low possibility that a lender will ever end up actually acquiring the assets in question (as opposed to a receiver or other controller selling them), given banks are not in the business of operating these kinds of assets. A substantial fee would be a major deterrent to the participation of overseas financiers.

It is also unclear how the moneylending exemption is anticipated to work in respect of after-acquired assets. The way security is typically granted in secured money lending transactions is under a general security deed (which grant a security interest over all present and after-acquired property of the security grantors). This means that it is likely that any asset which is acquired by the grantor under such general security deed will automatically become subject to a lenders' / security trustee's security interest. That could mean that a grantor could acquire an asset which is of the kind referred to in proposed regulation 27(1)(c) without the consent or approval of, or even notice to, a lender or security trustee, such that the lender or security trustee may not be able to prevent the grantor acquiring, or even be aware that the grantor has acquired, such an interest – in those cases, the lender or security trustee could be breaching FATA without even knowing it (or in situations outside its control).

Note this would affect lenders and security trustees in both "new" secured moneylending transactions (i.e., after the Tranche 2 Amendments take effect), but also in existing secured money lending transactions entered into before the Tranche 2 Amendments take effect (as the general security held by the lenders / security trustees in those transactions would likely cover all present and after acquired property of the grantor or be granted over assets which subsequently become of national security significance).

At a minimum, any security granted before the Tranche 2 Amendments come into effect should be grandfathered so that changes in the nature of the assets would not cause the lender / security trustee to be in breach of FATA.

For security granted after the Tranche 2 Amendments come into effect, ideally the legislation would operate so that the lender's / security trustee's obligation in relation to FATA is measured at the time the security is first granted and in relation to what they know or ought reasonably to have known in respect of the assets over which security is being granted. If that is not acceptable, then at a minimum guidance should be provided to the effect that enforcement powers will not be used against lenders who have taken reasonable precautions (such as by including covenants in the financing documents) to ensure that they do not end up with security over assets of the kind referred to in proposed regulation 27(1)(c) before they have had the chance to obtain FIRB approval.

4. Proposed definition of Australian media business

The proposed definition of 'Australian media business" as currently drafted is unclear and unworkable. This is a significant concern to industry as:

- the trigger for FIRB notification for investment in an Australian media business is very low - 5% or more, regardless of value; and
- private capital investment is increasingly investing in new technologies which may be caught by the proposed definition.

A definition which is unclear and inadvertently captures start-up Australian technology businesses in the information sharing space (particularly with the zero dollar threshold) will significantly prejudice their ability to raise capital at a time when it is most needed.

Proposed change

The definition 'Australian media business' is currently defined under section 5 of the Foreign Acquisitions and Takeovers Regulation 2015 (Cth) (FATR) as:

> "an Australian business of publishing daily newspapers, or broadcasting television or radio, in Australia, including websites from which those newspapers or broadcasts may be accessed."[6]

Under the proposed legislation, an 'Australian media business' would be defined as:

> "an Australian business of doing one or more of the following:
>
> (a) publishing daily newspapers in Australia;
>
> (b) broadcasting television or radio in Australia;
>
> (c) operating an electronic service (including a service provided through the internet) accessible to persons in Australia that delivers, or allows access to, content that:
>
> (i) is in the form of data, text, sounds, images or in any other form; and
>
> (ii) is similar to a newspaper or radio or television broadcast;
>
> (d) producing content described in paragraph (c), to be delivered, or made accessible, through a service described in paragraph (c).

[6] *Foreign Acquisitions and Takeovers Regulation 2015* (Cth), s5.

Issue 1 – "operating an electronic service"

The proposed paragraph (c) of the definition is unworkable as it could apply to almost any electronic service that shares information.

The draft Explanatory Memorandum states that the purpose of the change is: "updating the definition of 'Australian media business' to better reflect the broader means of communication by which media is accessed". This is possibly because the current definition of "Australian media business" does not include Australian businesses that only publish content through websites and web applications.

Nevertheless, it is unclear how a form of media can be defined by reference to the content of another form of media. In other words, how does an "electronic service" have content similar to a newspaper, radio or television broadcast when the content of the latter is extremely broad. It could span news (for example politics, business), art, editorials, weather forecasts, public notices, crosswords, movies, television series, sport events, games (whether written or shows), live performances, interviews, plays – almost anything conceivable that can be listened to or seen. It is unclear whether the intention is to capture:

- News aggregator sites such as Apples news;
- Social media platforms which may include links to news stories, such as Facebook, TikTok;
- Sites of bloggers and citizen journalists;[7]
- Streaming services for movies, live performances, sport, cartoons;
- An electronic service that provides weather updates; and/or
- A site which reproduces crossword puzzles from newspapers from around the world.

In order for the definition to be workable, it is submitted that the framework for the definition should clearly specify either (1) the form of media, (2) its content or (3) the outlet.[8] Historically, the regulatory framework in this area has been based on specifying the form of media.[9] Acknowledging the changing technological environment,[10] the preference may be to regulate by specifying a reference the content - in which case, paragraph (c) under the proposed definition should be amended to specify precisely the type of content which would need to be shared by the electronic service to trigger the definition. For example, if the intention is that the definition of "Australian media business" captures electronic services which provide news content, then that should be specified.[11] Alternatively, FIRB will need to issue very clear guidance as to precisely what content is similar to a newspaper or radio or television broadcast.

The Council recommends paragraph (c) be amended to specify precisely the content which the electronic service provides or issue very clear guidance as to this content.

---

[7] ACCC Digital Platforms Inquiry Final Report, June 2019, https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf, page 299

[8] In the ACCC's Media Merger Guidelines (2017), "media" refers "to means of mass communication, and the term can be used to cover the message (which may be content or advertising), the medium (mode of delivery) or the messenger (media outlet)."

[9] For example, Broadcasting Services Act 1992 applies only to newspapers and TV and radio broadcasting services. Current definition of "Australian media business" in FATA is similar.

[10] ACCC Digital Platforms Inquiry Final Report, June 2019, https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf

[11] See definition of "News" and "Journalism" at page 282 - ACCC Digital Platforms Inquiry Final Report, June 2019, https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf, page 299

Issue 2 – "producing content described in paragraph (c), to be delivered, or made accessible, through a service described in paragraph (c).

It is submitted that this paragraph be deleted as it has no policy basis and is unworkable.

- The current definition of "Australian media business" does not capture producers of content. There is no policy basis for extending the definition of these businesses. It is submitted that the rationale for media regulation is its reach, and hence its ability to influence. The producers of content have neither of these characteristics. For example, if a content producer produces content which the electronic service decides not to share, where is the national interest concern? Nevertheless, FIRB approval will be required for the acquisition of 5% or more of such businesses regardless of value.
- As submitted above, the definition in paragraph (c) is unworkable without clarification. Assuming it is clarified and Treasury believes there is a legitimate policy basis for this change, what businesses are intended to be captured by paragraph (d)? Presumably, it would capture:
    - Content for electronic services which can be user-generated, such as by citizen journalists.
    - Production companies that produce exclusively for electronic services. Television and film production companies would not be captured if they produce content only for "*broadcasting television or radio in Australia*". However, if such a content producer only produces content for an electronic service, such as a series for a streaming service, is that production company then caught? This is confusing and unworkable, and will only serve to stymy how Australian businesses seek to engage with changing technologies and audience demands.

The Council recommends paragraph (d) of the definition of "Australian Media Business" be deleted.

5. Fees

The proposals include a material increase in the fees that would be charged by FIRB for applications. The increase in magnitude of the fees is compounded by the increased reach of the proposals, including the potential impacts of the changes to the SOCI Act (outlined in the Council's submission on the first tranche of proposed changes). Multiplying this effect is the proposed fees on money lenders. Any fees charged to money lenders will be passed onto the end investor.

This substantial increase in fees will act as a disincentive to invest into Australian businesses at a time when it is vitally important that Australia look to boost its economic growth and access to capital. Additionally, the impact of the hike in fees will disproportionately be felt by smaller funds, which are already facing headwinds from the current economic conditions.

The material increase in fees will further discourage foreign investors that are competing for a target asset in an auction process, particularly in circumstances where there is no certainty that fees will be recovered by an unsuccessful bidder.

The impact of having a regime that is broader than overseas equivalents will be amplified by Australia's reliance on offshore funding. Around two-thirds of the Australian loan market is comprised of foreign lenders (by loan volume). This funding is required to drive Australia's economic recovery. Anecdotal evidence suggests some offshore investors are increasingly concerned about Australia's sovereign and 'FIRB risk'.

Furthermore, any significant lift in fees should be commensurate with an increase in efficiency at FIRB. Industry appreciates the challenges in FIRB needing to manage competing policy priorities along with a substantial increase in applications while onboarding and upskilling new staff. While the Council appreciates the efforts of the FIRB team to service the increase in applications brought about by the changes announced earlier in the year, the current industry experience is that the application process is resulting in increased delays and increased complexity.

In considering the fee structure, Treasury should balance the need to ‘recover costs’ (noting it is not the conduct of industry that is driving the increased regulatory costs) against the quality of the service that is being provided and the economic costs of implementing disincentives to invest into Australian businesses.