



31 August 2020

The Hon Josh Frydenberg MP
Treasurer
Parliament House
Canberra ACT 2600
AUSTRALIA
By email: FIRBStakeholders@treasury.gov.au

Dear Treasurer,

AustCham Hong Kong submission: Major Reforms To Australia's Foreign Investment Framework

At the outset, we would like to commend the Commonwealth Government for the considerable effort that has so evidently taken place with respect to this reform exercise and for the highly engaged consultation process. We were grateful for the opportunity to have had two very comprehensive discussions (June 30, August 20) with senior Treasury and FIRB officers from Canberra and Beijing.

Through the Exposure Draft Legislation, the Explanatory Memorandum documentation and our discussions in respect of the proposed *Foreign Investment Reform (Protecting Australia's National Security) Bill 2020*, we were pleased to note the emphasis placed on the continued importance of foreign investment into Australia. We recognise the critical importance ongoing foreign investment provides in terms of contributing to both economic growth and jobs creation today, as well as shaping the Australia of the future for tomorrow. This is particularly relevant in the context of Hong Kong which is currently the second largest overseas investor in Australia in terms of volume of transaction approvals.

On behalf of the Australian Chamber of Commerce in Hong Kong and the broader Hong Kong-based investor community with interests (existing and prospective) in Australia, we hereby submit the following comments in response:

We very much respect the need to allow for proper review in the interests of national security. Our suggestions are intended to address the concern that the unintended consequence of added prescription and optionality may act as a deterrent to much-needed foreign investment which would otherwise be welcomed. This would seem to be a genuine risk when foreign investors have so many investment opportunities available globally.

In this context, a core theme or guiding principle that runs through all the topics raised below is the desire from an investor's perspective, **for transparency, certainty of decision and timing, and as much overall clarity** as possible. Clearly, all investors wish to avoid what they might consider unnecessary complexity – and an excessively long drawn out or expensive application process. We also emphasise the important point that a proposed investment is often a time-sensitive and commercial process as you are aware.

The Australian Chamber of Commerce in Hong Kong
Room 301-2, 3/F, Lucky Building, 39 Wellington Street, Central, Hong Kong
Tel: (852) 2522 5054 Fax: (852) 2877 0860
austcham@austcham.com.hk www.austcham.com.hk

1. Greater Definition of what constitutes a National Security Business

As discussed with Treasury officials on August 20, we fully appreciate the challenges of being overly prescriptive in defining what is considered a “national security business” and, by necessity, any such guidance will tend to be principle-based. Similarly, we understand the difficulty in being very specific about exactly how the new national security test will be carried out.

To provide necessary reassurance to investors, we would suggest that sufficiently comprehensive guidance notes should be provided which examples of where applications might be rejected because of national security concerns; or indeed provide summary examples of successful applications. Such worked examples in the separate standalone guidance notes would promote a greater appreciation of how the new test is likely to be applied in practical terms. We would ask that any such supporting material should be published in advance of the new legislation being enacted.

2. Reassurance for Investors with Multiple International Shareholders

Hong Kong, as a leading international financial centre, is often regarded as a “gateway” for investors in Greater China/other Asian countries to channel investments into Australia. Arguably, a large part of the success of Hong Kong’s financial services industry in recent years has been on account of companies which have chosen to list on The Stock Exchange of Hong Kong. Such companies will frequently have shareholders which are domiciled outside of Hong Kong, being government / state-owned as well as other public and private companies.

While the evaluation of such foreign investment proposals will understandably continue to be on a “case by case” basis (as is the situation with the existing regime), it is clear from discussion with our members that they would welcome further clarity. As above, we would recommend that consideration should be given to publishing separate guidance notes which provide worked examples of both successful and unsuccessful applications. In particular, for such investor companies, there is keen interest to better understand how the extent of shareholder influence is assessed in practical terms, ie the “scope of exercise control” test.

3. Call-In Power

The Explanatory Memorandum notes that the overwhelming majority of investments will not be called-in for review. However, given the far-reaching extent of the proposed powers to be granted, these will inevitably raise considerable uncertainty. A possible consequence of this concern is that investors will choose to “voluntarily notify of an action that could otherwise be called in” which will create an additional compliance overhead for investors – as well as additional upfront cost. During our August 20 discussion with Treasury, this possibility was acknowledged and we were advised that the relevant Treasury team(s) would be sufficiently resourced to cope with higher volumes and to avoid any unnecessary delays.

We would recommend that clear guidance notes be provided to include a range of examples which illustrate how the call-in power might be triggered. We would also recommend that there should be a clearly-defined time period, post investment, after which the call-in power would not be exercised.

It is noted that there will be further consultation on this latter point but, in anticipation, we would suggest that this should be a short period, subject only to limited exceptions.

4. Last Resort Power

In extreme circumstances, the Treasurer will have the power to change previous conditions of approval or indeed make a disposal or divestment order. Investors will be understandably concerned at this type of lingering open-ended uncertainty. Such concerns have been raised across the board by a number of members. We note that these powers would not be exercised lightly.

To reassure investors and to underpin the message that “Australia remains open for business”, we would recommend that guidance notes be published – in advance of the new legislation – which clearly outline what safeguards/limitations/review processes would be available to investors. In particular, we would be in favour of very specific guidelines which protect investors in the event that previous disclosures – which were considered at the time to be acceptable – cannot be easily reopened, not least due to geo-political factors.

It would be important to make abundantly clear to investors that the last resort power would only be applied in situations where a material difference is identified (versus the initial review) or if material misstatement in the information that was provided should come to light. We would further suggest that this can only be applied to statements made in writing. We would also recommend that rather than proposing to exercise these powers based on a *negative* test (that is, these powers may be exercised as long as the change is not against the national interest), consideration should be given to a *positive* test (that is such powers may be exercised only where it is in the national interest to do so).

Clearly demonstrating that the appropriate checks and balances are in place would inspire much greater confidence in the application of the new measures and would not inadvertently deter much-needed capital investment in Australia.

5. Residential Real Estate Investment – Removal of “Presumption of Advancement”; impact of current zero threshold

- As discussed in our August 20 meeting, the changes proposed allow the Treasurer to better scrutinise intended acquisitions of residential real estate in Australia by residents but with financial assistance provided from overseas. It is acknowledged that these changes are not due to national security issues but are intended to address “integrity” concerns. However, it is believed that the draft legislation, in its current form, may have some unintended consequences. In particular, we anticipate unnecessary complexity as a result of the proposed inserts in the Exposure Draft Bill (Integrity Amendments) Part 3 – Presumption of Advancement – where there is not sufficient clarity about the definition of a “second person”.

Culturally, it is quite normal for Asian families to seek to provide places of residence for other family members who may be living, working or studying in Australia (and elsewhere). The changes in the legislation appear to seek to address concerns that the overseas providers of financial support to acquire residential real estate in Australia may not be properly screened. We respect this intention, however it needs to be understood that, in this instance, financial support is often secured by overseas family members from local banks in their country of domicile, eg a financial institution which provides loans directly to the purchaser for the acquisition of residential real estate in Australia for use by a family member or friend.

To prevent any unnecessary complexity in such a transaction, we recommend that the definition of a "second person" be refined to specifically exclude overseas third-party lending banks. We would also suggest that the Treasury might consider placing a clearly defined limit on the number of residential properties in Australia that may be acquired by a resident via lending support from overseas financial institutions; this could be easily monitored through the proposed Register of Foreign Owned Australian Assets.

- We also note the temporary reduction of monetary screening threshold for all investments to AUD0 announced in March 2020 has created significant challenges, most notably in the context of leases to a foreign investor. We ask that impact of this zero threshold on leasing transactions be acknowledged as an immediate priority as an unintended consequence of this move. We propose that the original monetary threshold be reinstated as soon as possible to provide certainty to businesses and reduce an unnecessary deterrence in confirming appropriate commercial leasing transactions which we understand were not the intention of the introduction of this zero threshold.

6. Sectors Where Australia Welcomes Foreign Investment

Finally, in discussion with AustCham members in Hong Kong, it is clear there is a keen interest to better understand in **what industry sectors Australia welcomes foreign investment**. Investors request more clarity and guidance with respect to permitted investments versus those which are regarded as sensitive or are less likely to be approved. It is understood that responsibility for the compilation of any such list primarily rests with Austrade, however, no doubt the Treasurer would be a key stakeholder. As we mentioned earlier in this submission, there is now considerable competition globally for foreign investment and overseas investors in Australia – whether existing or prospective – would value much greater transparency in respect of which industry sectors are actively seeking foreign investment capital.

On behalf of the Australian Chamber of Commerce in Hong Kong and its members, I would like to express our sincere thanks for the opportunity to provide feedback in respect of this critical legislation.

We also look forward to commenting on the remainder of the Exposure Draft Legislation once it is released separately in September. But, in the meantime, we stand ready to provide any further clarification or assistance that might prove helpful, recognising the critical importance of ongoing capital to invest in a secure future for Australia.

Yours faithfully,



Jacinta Reddan
Chief Executive
The Australian Chamber of Commerce in Hong Kong
Email: jacinta.reddan@austcham.com.hk

cc: Chairman Australian Chamber of Commerce Hong Kong, Andrew Macintosh
Acting Consul General to Hong Kong Ryan Neelam
Minister-Counsellor (Treasury), Beijing Rachel Thompson