



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: BLC:JWib310821

31 August 2021

Manager
Policy Framework Unit, Foreign Investment Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: FIRBStakeholders@treasury.gov.au

Dear Sir/Madam,

Evaluation of the 2021 foreign investment reforms

The Law Society of NSW appreciates the opportunity to participate in this consultation to evaluate the 2021 foreign investment reforms. The Law Society's Business Law Committee contributed to this submission.

Our comments are general in nature rather than specific responses to the questions set out in the Consultation Paper "Evaluation of the 2021 foreign investment reforms".

One concern expressed by multiple stakeholders at the recent roundtables is that, notwithstanding the Foreign Investment Review Board's (FIRB) latest report, the processing times for certain applications are increasing in length. While we note that the FIRB Annual Report of 2019-2020 notes the Treasury median processing time has extended from 41 days in 2018-19 to 48 days in 2019-20 (average period), our members are aware of instances where processing periods have substantially exceeded the average period. Anecdotally, we understand that there is a strong perception that extended processing periods for foreign investment applications are jeopardising foreign investment in Australia and the attractiveness of Australia as a destination for foreign direct investment. This development is contrary to the expressed intention of the FIRB in facilitating investment.

We also note that there are potential legislative changes arising from current consultations that are likely to have a significant impact on the legislative reforms that were introduced from 1 January 2021. These include proposed changes to the definition of "national security business".

Under the new "national security test", proposed investments concerning a "national security business" or "national security land" are subject to mandatory notification to the FIRB. A "national security business" is one carried on wholly or partly in Australia that concerns a critical infrastructure asset, telecommunications, or goods, services, or information for military or intelligence use. "Critical infrastructure asset" has the meaning given in the *Security of Critical Infrastructure Act 2018* (Cth) (**SOCI Act**) – currently defined to cover critical assets in electricity, gas, water and port sectors.

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As you will be aware, the Security Legislation Amendment (Critical Infrastructure) Bill 2020, amending the SOCI Act, proposes to substantially broaden the categories of critical infrastructure to include new classes of assets in 11 industry sectors (including data storage and processing, financial services, food and grocery, transport and communications sectors). If the Bill, which is currently under consideration by the Parliamentary Joint Committee on Intelligence and Security, passes the Parliament, it could have significant implications for what would constitute a national security business under the *Foreign Takeovers and Acquisitions Act 1975* (Cth). We note that this consultation also coincides with the work of the Department of Home Affairs on potential options for regulatory reforms and voluntary incentives to strengthen the cyber security of Australia's digital economy.¹ This work may also impact on the "national security business" definition.

Appreciating the foreign investment regulatory regime involves a balance between facilitating foreign investment, while protecting Australia's national interest, there are concerns that the growing complexity of the foreign investment legislative regime is undermining previous legislative efforts to simplify Australia's foreign investment regulation. The *Foreign Acquisitions and Takeovers Legislation Amendment Act 2015* (Cth) (Amending Act) essentially repealed the *Foreign Acquisitions and Takeovers Act 1975* (Cth) in favour of a simplified and modernised legislative framework. There was a recognition at the time by the FIRB and the Parliament that the *Foreign Acquisitions and Takeovers Act 1975* (Cth) had become too complex. That 2015 reform to bring greater simplicity to Australia's foreign investment regulation is likely to be compromised with these further proposed amendments.

Arguably there should be a further evaluation of the foreign investment reforms to gauge the effect of these related critical infrastructure reforms, if implemented. Part of such an evaluation should, in our view, involve consideration as to whether the foreign investment regulatory regime can be simplified, notwithstanding the significant reforms that have been introduced over the last 12 months and are likely to be introduced in the short term.

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 sincerely,

A handwritten signature in black ink, appearing to read 'JRW', followed by a horizontal line extending to the right.

Juliana Warner
President

¹ Australian Government, Department of Home Affairs, '*Strengthening Australia's cyber security regulations and incentives*' July 2021 accessed at <https://www.homeaffairs.gov.au/reports-and-publications/submissions-and-discussion-papers/cyber-security-regulations-incentives>