



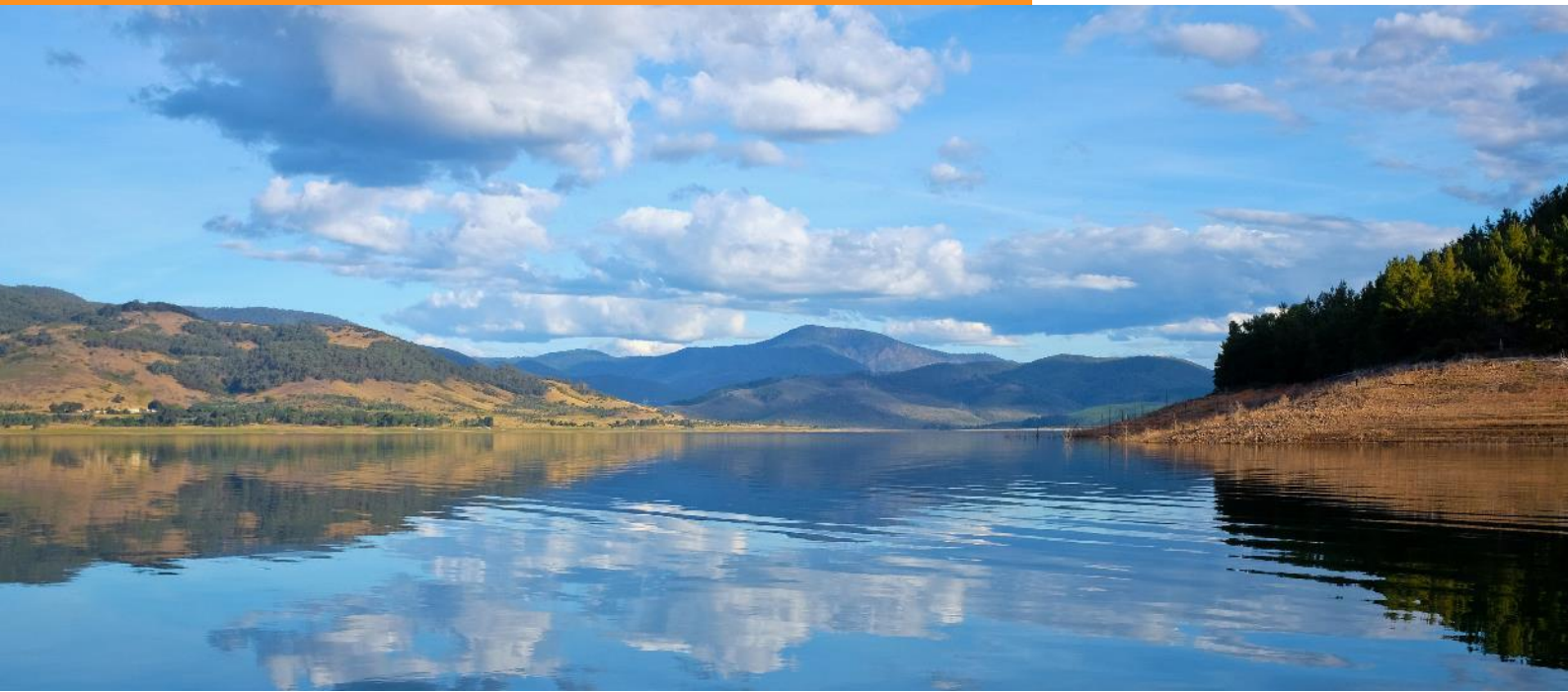
WATER SERVICES
ASSOCIATION OF AUSTRALIA



WSAA Submission

Enhancing Australia's Foreign
investment framework (Feb 2022)

Public Consultation





11 March 2022

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SUBMISSION: Enhancing Australia's Foreign investment framework

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I confirm that this submission can be made available in the public domain.

About WSAA

The Water Services Association of Australia (WSAA) is the peak body that supports the Australian urban water industry. Our members provide water and sewerage services to over 24 million customers in Australia and New Zealand and many of Australia's largest industrial and commercial enterprises. WSAA facilitates collaboration, knowledge sharing, networking and cooperation within the urban water industry. The collegiate approach of its members has led to industry wide advances to national water issues.

WSAA supports enhancing Australia's foreign investment framework and welcomes the opportunity to provide a submission. This submission should be read in conjunction with WSAA's submission on the Evaluation of Foreign Investment Reforms dated August 2021.

Government response to the evaluation of the foreign investment reforms and discussion paper

The Department of Treasury is seeking stakeholder views on how the foreign investment framework could be further enhanced. WSAA's submission focusses on Tranche 2 of the discussion paper and the balance between facilitating investment and protecting national security.

WSAA's submission

Tranche 2

1. Areas to reduce regulatory burden

In previous submissions WSAA has raised concerns about the uncertainty of reviewable national security actions that can be "Called In". The Treasurer can "Call in for review" actions (including "significant actions") which are not otherwise notified if the Treasurer considers that the action may pose national security concerns. The review can occur:

- If the action is still proposed
- Up to 10 years after the action has been taken

A "significant action" is defined in legislation and includes significant agreements which relates to:

(a) the leasing of, the letting on hire of, or the granting of other rights to use, assets of the business;

(b) the participation by a person in the profits or central management and control of the business.

Of particular concern is the provision of management services for water and sewerage treatment plants. This is often undertaken by foreign owned firms on an 'operate and maintain' basis. These contracts do not extend to influencing or participating in the

management of water entities and the water industry believes these fall into the category of less sensitive transactions that could be exempted providing certainty to the water industry and our service providers.

WSAA has previously raised concerns that the Department of Treasury have prepared guidance notes to assist the water industry in the National Security Guidance Note 8 without any consultation with WSAA nor any impacted water entities, nor their jurisdictional Government owners. Despite WSAA raising these concerns in previous submissions, the Department has still not consulted with the industry.

The guidance requires further clarification on the water industry specific circumstances that might trigger the “Call in” powers such as:

- significant agreements with foreign owned entities such as for the provision of operation and maintenance of water or sewage treatment plants.
- typical exemption or voluntary notification approval criteria for significant agreements with foreign entities. It is understood that the intent of the foreign investment reform is to primarily address actions which give foreign persons potential influence and rights over an Australia entity, such as the ability to influence or participate in the central management of policy or direction of the entity. The guidance should explicitly state that the term ‘significant agreements’ does not apply to agreements with a foreign owned entity in circumstances where the contract or agreement does not confer any ability to influence or participate in the central management of policy of an entity.

Without further clarification, the Call In power has the potential to:

- Require additional government approvals and result in an increased regulatory burden on water utilities.
- Contribute potential time and cost implications associated with contracting delays.
- Create investment uncertainty for foreign owned firms providing services to the Australian water industry and this risk may increase the cost for service delivery.
- create significant cost impost on water businesses through the need to cancel contracts and honour early pay out clauses. Such funds would typically be paid through increased costs to water business customers. The Act and amendments are currently silent on the ability of an affected entity to claim recompense from the Commonwealth should the Call In power be enacted.

WSAA advises that under the Security of Critical Infrastructure Act 2018, the definition of a critical water asset, (servicing 100,000 connections) there would no foreign investment approach which would practically meet that threshold. All foreign investments in the water sector relate to specific single point elements not systems, nor schemes, therefore any suggestion that the Treasurers “call in” powers are relevant, extends the Treasurer’s powers beyond those intended and defined of a “national security business.”

Water utilities have an obligation under the *Security of Critical Infrastructure Act* to manage the risks to critical infrastructure. To facilitate this obligation it is important that the Cwlth recognise the jurisdictional “ownership” of the water sector CI entities and ensure that the respective jurisdictions First Ministers Departments are formally advised of the FIRB applicant in the event that any water entities are subject to the FIRB national security test.

2. Investments requiring greater scrutiny

The Government has identified foreign acquisition of rural water entitlements as warranting further consideration. The main risk in this area relates to situations where a foreign entity seeks to speculate in the rural water market (as opposed to participating in the market to support their farming operations). If they are participating at a scale that warrants attention, then their asset acquisition (the land and equipment required for farming) is likely to trigger oversight by FIRB under existing regulations. Speculation, however might not be in the national interest.

WSAA requests that any changes to the regulations for foreign acquisition of rural water entitlement be undertaken in consultation with the water agencies who manage these markets.

Sensitive foreign investments

WSAA notes the significant globalisation of data management service providers and data assessment services to infrastructure operators, where the data is accessed and offshored for analysis. WSAA requests that the Department review the foreign ownership structures and services provided, as the offshoring access of “*systems*’ data for analysis manifests a potential security risk. These foreign owned services are sector agnostic and the FIRB submissions do not necessarily provide the detail necessarily to allow an informed security risk by the Commonwealth FIRB processes.

Conclusion

There is further work required to define the reviewable national security actions and the “Call in” power. Consequently, for the second time, WSAA requests a meeting with The Department of Treasury to discuss further clarification in the water industry sectoral guidance to address the concerns above. Greater clarification would limit water industry costs, minimise uncertainty and ensure a proportionate response by government.

If you would like to discuss the key aspects of this proposal further please contact James Goode, james.goode@wsaa.asn.au or 0434 609 618.