



Australia China Business Council
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To: FIRBStakeholders@treasury.gov.au

**ACBC Submission: Foreign Investment Reform
(Protecting Australia's National Security) Bill 2020**

1. The Australia China Business Council (ACBC) is a membership-based, non-profit, non-governmental organisation comprised of over 700 member companies engaged in bilateral trade and investment. Founded in 1973, we actively promote two-way trade and investment between Australia and China for the benefit of our members and the Australian community.
2. The ACBC acknowledges the government's responsibility for striking a balance between welcoming the foreign investment needed to underpin Australia's economic growth and development, and providing protections that ensure foreign investment proposals serve the national interest.
3. The ACBC notes that the measures outlined in the exposure draft of the Foreign Investment Reform (Protecting Australia's National Security) Bill 2020 seek to strengthen Australia's foreign investment regulatory framework by improving the government's ability to protect critical infrastructure, and to respond to geopolitical risk and technological changes.
4. The proposed changes are threefold: creation of a new national security test, strengthening of the compliance and integrity framework, and streamlining of the approval process for passive investment.
5. The ACBC's comments on the proposed changes focus on the potential damage to Australia's global reputation as a reliable destination for investor capital, the concentration of decision-making authority in the hands of the Treasurer, and the potential impact on portfolio investors.

Risk of Reputational Damage

6. Changes to Australia's foreign investment laws must take care to guard Australia's reputation as a nation that needs and welcomes foreign investment. As noted by the Productivity Commission, "Australia has a broadly open policy towards foreign investment, but is more restrictive than many other advanced economies, by some measures". Further restrictions warrant careful consideration.
7. Investors are sensitive to policy changes by governments. Care is needed to ensure the proposed changes do not undermine Australia's global reputation as a market with a low level of sovereign risk. Investors value certainty and stability - in their absence, investment capital either seeks different locations or it adds a premium to proposed investments. Investment capital is liquid, so it quickly flows around obstacles.
8. The proposed changes require Foreign Investment Review Board (FIRB) scrutiny of every bid for assets classified as a "sensitive national security business", regardless of whether the bidder is state-owned or private, and regardless of the value of the asset. This injects an element of uncertainty into the foreign investment process and invites a change to the perception of Australia's sovereign risk.
9. The FIRB will apply the new national security test to entities operating in the energy, telecommunications, ports, water and data sectors. The Treasurer will be given new intervention powers to have a bid re-examined if fresh national security concerns arise and, as a last resort, could order an already-purchased asset to be forcibly divested. Investors will be cautious of exposure to retrospective action by regulators and, again, care will be needed to guard against damage to Australia's reputation as a trusted destination for global capital.
10. The treatment of entities that access personal data with potential national security implications will be critical to investment decisions. The security of personal data is a sensitive and complex issue. Ideally, FIRB will provide investors with guidance that ensures investment decisions are able to account for security concerns that, by their nature, are often difficult to define. Striking an appropriate balance will be important in deflecting possible concerns about sovereign risk.
11. The ACBC welcomes assurances that the proposed changes are country agnostic. However, despite the Treasurer's assurances, sentiment among investors in Singapore, the US and UK suggests that the proposed changes may undermine

investment certainty.

12. In confidence, a number of major investors in Australia have told members of ACBC's national board that the changes may threaten the ability of foreign investors to adapt and grow investment opportunities as market conditions change. The proposed changes may prompt angel investors to reconsider their appetite for risk in the Australian market. For example, they may hesitate to invest in technology start-ups developing goods or services that might be deemed, at some later date, to have dual use potential and which could therefore trigger compulsory divestment provisions.

Decision-Making Authority

13. The proposed changes vest significant decision-making powers in the Treasurer. For example, the changes give the Treasurer new powers to have an already approved deal reviewed on national security grounds if circumstances change. He will be able to impose new conditions on a foreign investment and, as a last resort, compel a foreign owner to forcibly divest an asset.
14. The ACBC recommends that the legislation include an explicit obligation for the Treasurer to consult with ministerial colleagues including the Attorney General and the Ministers for Trade and Investment, Foreign Affairs, Defence, and Home Affairs respectively. Such a reference would send a welcome signal to the investor community that critical powers will not be vested entirely in the hands of a single minister.

Portfolio Investments

15. Care is needed to mitigate the risk of the proposed changes having an unintended impact on portfolio investors. For example, foreign company Singapore General Investment A invests in a project and then at a later stage, Singapore General Investment A is acquired by another foreign company, China Investment Fund B. If China Investment Fund B becomes subject to divestment action due to its dealings with sensitive or non-approved defence and security assets, what impact, if any, might the Treasurer's action have on Singapore General Investment A? Could divestment action extend to Singapore General Investment A?
16. Further to this example, this situation may also arise if foreign company Singapore General Investment A invests in a project and then, at a later stage, foreign company China Investment Fund B comes onto the share register of Singapore General Investment A. If China Investment Fund B becomes subject to divestment action due

to its dealings with sensitive or non-approved defence and security assets, what impact, if any, might the Treasurer's action have on Singapore General Investment A? Could divestment action extend to Singapore General Investment A simply because of changes to its share register?

17. A balance needs to be struck to prevent back-door listing risks vs the normal spread of, and changes to, international business exposure. Similarly, some ACBC members are concerned that the proposed changes could impact on portfolio investors with holdings in Chinese equities or Exchange Traded Fund index funds.

Other Issues

18. The definition of “**notifiable national security action**” includes actions to acquire an interest in Australian land “in which an agency in the national intelligence community has, or will have, an interest if, at the time of the acquisition, the foreign person could reasonably be expected to be aware of the agency's interest or prospective interest”. This definition is too broad and vague.
19. It requires a foreign person to “surmise” what could be a “prospective” interest of a large range of security agencies. Many of these agencies will have commercial dealings with owners or operators of Australian land assets. Is the existence of any commercial relationship sufficient to arouse a reasonable expectation that the agency “might” have a prospective interest in such land?
20. The Treasurer's **last resort powers** are enlivened in three situations where:
- a. the Treasurer has been given false or misleading information in a material particular;
 - b. the business, structure or organization of the person undertaking the action or their activities have materially changed; and
 - c. the circumstances or market in which the action was taken have materially changed.
21. There is no requirement of “intention” in relation to the false or misleading information trigger. That is, even if the person provided the information in good faith and did not intend for it to be false or misleading, the trigger may be activated.



22. The remaining two triggers relating to changes to the person or the market in which the action was undertaken can give rise to uncertainty. As the trigger, particularly re market, may be outside the control of the person undertaking the action there is a risk that the person goes to considerable expense to undertake an action or prepare to undertake an action based on a no objection notification or exemption certificate only to have the action prohibited or made subject to conditions as a result of something outside its control.

Yours sincerely

A handwritten signature in blue ink, appearing to read "David Olsson".

David Olsson

National President