



31 August 2020

To: RBStakeholders@treasury.gov.au

EXPOSURE DRAFT FOREIGN INVESTMENT REFORM (PROTECTING AUSTRALIA'S NATIONAL SECURITY) BILL 2020

Amazon Web Services (AWS) welcomes the opportunity to contribute to the Treasury's development of major reforms to the *Foreign Acquisitions and Takeovers Act 1975* announced on 5 June 2020.

AWS acknowledges the reform intent of updating Australia's foreign investment review framework to:

- Address national security risks;
- Strengthen compliance; and
- Streamline investment in non-sensitive businesses.

In this submission, we focus on a limited number of elements of the Exposure draft bills and the draft Regulation that could benefit from amendment or clarification. We offer these observations and suggestions from the perspective of a long-term foreign investor in cloud services infrastructure and corporate facilities in Australia.

Sincerely,

A handwritten signature in black ink, appearing to read 'S. Edwards', with a long horizontal line extending to the right.

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Clarification of Language to Provide Business Certainty

Draft Provision: *Foreign Investment Reform (Protecting Australia's National Security) Bill 2020, Item 10, Proposed Part 1A, Division 2, Section 37B*

Meaning of reviewable national security action

The draft bill proposes the Treasurer have a new power to review actions that have been taken, or that are proposed to be taken, by an entity, when the Treasurer considers the action may pose a national security risk. The Treasurer's power will apply in relation to actions that are 'reviewable national security actions' as defined in proposed Section 37B. This proposed definition is broad and will cover a significant remit of commercial activity.

To assist commercial entities to understand and appreciate their responsibilities and to minimise compliance costs, it is important that the legislation leave as little ambiguity as possible in respect of terms used. To that end, AWS seeks clarification from Treasury in respect of:

- Section 37B (1)(iv) – 'to enter or terminate a **significant agreement** with an Australian business'

We assume that the "significance" of an agreement should be judged by its significance to the relevant business, and not by any national security considerations that the business is ill placed to assess. This is not clear in the draft Bill. AWS recommends that the Explanatory Memorandum ("EM") be amended to include clear and practical guidance about what a "significant agreement" is. By better understanding the perimeters of what constitutes a "significant" agreement, business will be better able to assess when to voluntarily notify the Treasury pursuant to the "call-in" actions framework. Otherwise, it is likely that some businesses will take an overly cautious compliance approach, leading to a situation of over-notification to the Treasury under the voluntary notification framework, creating unmanageable workloads for the Foreign Investment Review Board and uncertainty for investors.

Draft Provision: *Foreign Investment Reform (Protecting Australia's National Security) Bill 2020, Item 39, section 73A of the FATA*

Proposed Division 3 establishes the basis for the Treasurer of 'Last Resort' powers. As the title suggests these are powers that the Treasurer would be entitled to exercise when security risks arise after an earlier assessment of the proposed foreign investment had occurred, and alternative means of resolving the concern were not available to the Treasurer.



AWS considers foreign investors would benefit from the Treasury providing, in the EM, guidance as to its expectation of materiality for the purposes of sections 73A (1) (b) (ii) and (iii). At present, the EM provides no specific guidance. As the substantive Act presently references concepts of 'significant' and 'substantial' but not 'material', it would be helpful for investors to have some guidance from the Treasury.