



European Australian Business Council

EABC SUBMISSION

REFORMS TO THE FOREIGN INVESTMENT FRAMEWORK

Introduction

The European Australian Business Council (EABC) welcomes the opportunity to participate in the consultation on the Major Reforms to the Foreign Investment Framework.

The submission below is the result of consultations led by the European Australian Business Council (EABC) with a wide range of member companies, individual business leaders, industry associations, and others. **The submission summarises the views expressed through internal stakeholder consultations but should not be considered the position of any specific individual, corporate, or other member of the EABC.**

About the European Australian Business Council (EABC)

The EABC is a peak member-based association which promotes the trade and investment relationship between Australia and Europe as a whole. The European market of over 500 million consumers presents extensive opportunities for Australian exporters and investors, whilst for European companies Australia's strong economy and strategic location in the Asia Pacific region offers opportunities for goods, services and investment.

As an independent, private sector-led initiative, the EABC works with Australian and European governments, diplomatic missions and business promotion agencies, bilateral chambers of commerce and industry associations, to promote business opportunities in both directions. The EABC has long-championed, and welcomed the launch of FTA negotiations between Australia and the European Union (EU), and with the United Kingdom, to establish new and ambitious frameworks for stimulating increased trade and investment flows.

Supporting and promoting a more efficient, transparent and predictable framework

The COVID-19 pandemic has greatly compounded the negative effect of slower global flows of goods, services and investment arising from increased geopolitical tensions in recent years. The Australian Government has continued to champion mechanisms to strengthen and reform the global rules-based trading system together with like-minded partners in the EU and the UK.

The Australian Government is also confronting the challenge of maintaining favourable conditions for business, whilst also navigating changed global circumstances and emerging risks which require the strengthening of regulatory regimes and national interest protections.

In this context our stakeholders recognise and support the announced reforms to upgrade Australia's foreign investment framework, whilst at the same time preserving the underlying principle of openness to foreign investors. Foreign investment will continue to play a critical role in the success and sustainability of the Australian economy, and particularly so during post-COVID recovery.

The EABC supports an efficient, transparent and predictable framework that is conducive to attracting and facilitating high-quality foreign investment from trusted global partners.

Australia has extensive and long-standing relationships with European partners, based on mutual trust and shared values. Europe continues to be a major investor in Australia, with the UK and the EU in Australia's top three investment relationships, and individually nine European countries among Australia's top 20 foreign investors. Together the UK and the EU represent a \$A2 trillion two-way bilateral investment relationship with Australia, having grown threefold over the last fifteen years.

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European companies are very significant contributors to Australia's economic prosperity, world-class infrastructure and quality of life. European investments are generally fully transparent and reflect business strategies that align with and contribute to Australia's national interest. Europe's strong legal and regulatory frameworks, and business culture, also contribute to lowering risks for Australia as a recipient of investment from the region.

The EABC welcomes the opportunity to comment on the draft legislation and to share the following recommendations from the European and Australian business stakeholders:

- ▶ As changes to the framework have significantly increased case loads, a commensurate **upgrade in resource allocation** (technology and human) from collected application fees will be essential to ensure prompt and timely consideration of new applications, in particular to allow decisions to be made within the 30-day deadline. Delays resulting from unnecessarily prolonged decision-making can be material in terms of holding costs and other factors for potential investors (see recommendations n°1, n°2 and n°3).
- ▶ The application process should provide **guidance and feedback to investors** throughout the process, from information on changes to the framework and their implications (n°4), detailed explanations for decisions, as part of ex-post controls and compliance audits (n°5), as well as in the event of a rejection. Rejected applications should transparently set out the reasons for refusal in detail, and where possible provide guidance to applicants to revise or adapt to remove offending elements of their proposal(s) (n°6).
- ▶ Initiatives should be considered to **further facilitate and streamline investment from trusted partners**, in particular through the implementation of a "Trusted Partner Certificate" (n°7) based on the current exemption certificate regime, and a "Fast-Track" (n°8) for applications where delays could cause significant economic harm. Other situations could benefit from adjustments to avoid potentially deterring foreign investment, including the 'last resort' power (n°9), the exemption of routine, non-sensitive transactions (n°10), and to new measures related to share buy backs (n°11).

List of Recommendations

Recommendation n°1 (Resources): Resources (technology and human) should be adequately allocated to fully reflect the higher number of applications and ensure a prompt and timely consideration of new applications within the 30-day deadline (and avoid situations where the decision deadline would be extended due to a lack of resources). Increased resourcing could draw upon the considerable surplus revenue generated from FIRB applications (almost \$100 million in 2017-18, as reported by the Productivity Commission), noting the Government's commitment to a user-pays model. Given the significance and maturity of the investment relationship with Europe, a dedicated desk/staff for European applications would assist to expedite investment from the region.

The increasing volume and complexity of the investment review process risks creating an excessively bureaucratic framework, in contrast to an historically 'commercial and responsive' approach by FIRB. The qualifications, experience and roles of additional human resources should therefore be thoughtfully chosen to ensure speed and quality of judgement. Relevant security agencies involved in application processes should also have dedicated units able to respond to referred applications in a similarly timely process.

Recommendation n°2 (Deadlines and Extensions): While fully appreciating the need to provide for possible extensions of up to 90 days for complex or sensitive decisions, explanations on the reasons for extensions should be provided to investors to the best extent possible. Costs incurred during a decision-making process can be material to investment projects going ahead. It is preferable for adequate resources to support the process through application fees, than for economic loss to be borne by potential investors as a result of unnecessary delays.

Recommendation n°3 (Fees): In line with ongoing efforts to implement a fairer and simpler framework for application fees, the reforms should also limit costs for foreign investors, particularly for small business. A waiver or reduction of fees could be considered in specific circumstances, for example for transactions involving small amounts (but are subject to 0% or small percentage thresholds); where applications only arise as a direct result of these reforms; or in the event of a future adjustment to applicable thresholds.

Recommendation n°4 (Guidance Material): Clear and detailed guidance should be available to foreign investors to define and clarify the scope of "national security business" and to limit the risk of, to the best extent possible, unintentional non-compliance (in particular for small business).

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Awareness should be raised among stakeholders of the proposed enhanced regulatory framework for critical infrastructure, and the potential extended scope of this framework for businesses not previously covered.

Recommendation n°5 (Controls, Compliance Audits & Penalties): Ex-post controls and compliance audits should be based on transparent, interactive and efficient mechanisms, in particular when prior FIRB approval was granted or when notification was not previously required (in line with the 'call in' mechanism). The framework should also take into account situations where minor unintended breaches may arise which were not identified previously through reasonable enquiries. Some businesses are by nature widespread and it may not be practicable to identify supply to specific defence or intelligence facilities; or as a minor transaction within the scope of overall business activity. To ensure confidence and compliance, the penalty system should be transparent and nonarbitrary.

Recommendations n°6 (Rejections & Appeal Mechanism): Full transparency and detailed information should be provided to foreign entities where an investment proposal is rejected. The appeal mechanism should be underpinned by a fair and constructive approach, whereby investors could revise and adapt their proposals to meet concerns resulting in rejection.

Recommendation n°7 (Trusted Partner Certificate): the development of a "Trusted Partner Certificate" should be considered and facilitated through the existing exemption certificate regime. A "Trusted Partner Certificate" would enable investors with a track record of successful and transparent investments to benefit from an expedited pathway and case managed process through FIRB. Modalities of the Trusted Partner Certificate could be designed in collaboration with relevant stakeholders and industry bodies.

Recommendation n°8 ('Fast-Track' Pathway): access to an 'Fast Track' pathway should be facilitated for applications where it is demonstrated that delays in considering the application would cause significant economic harm, either in terms of insolvency risk or loss of jobs, especially where substantial time and effort have already been expended towards completion of investments in expectation that FIRB approval would not be required.

Recommendation n°9 ('Last Resort' Power): The power to re-examine a previously approved transaction may lead to significant investment uncertainty for investors and their financiers as these triggers can relate to matters that may not be within their control, and reduce the incentive for comprehensive assessment during the screening process. If implemented in its current form without additional protections for foreign investors, the last resort powers may deter foreign investment, despite the stated intention for these powers to be exercised sparingly. A perception of sovereign risk may have a dampening effect for potential investors.

Recommendation n°10 (Exemptions for Routine Transactions): Certain non-sensitive transactions can be removed entirely from the regime, including for example:

- Internal corporate restructures of foreign persons where the ultimate beneficial ownership remains unchanged. Any tax concerns arising from internal restructures for foreign entities should be regulated through the usual tax system on a non-discriminatory basis with domestic entities, rather than through the foreign investment system; and
- Initial or further capitalisation of wholly-owned subsidiaries by foreign persons where there is no new acquisition or new business created and the foreign person is simply contributing further working capital to an existing business owned through a wholly-owned subsidiary; and
- A foreign lender that acquires an interest in a national security business in its ordinary course of business, where the lender is unable to directly or indirectly influence or control the business.

Recommendation n°11 (Integrity Measures): The proposed new section 15A relating to share buy backs may create unnecessary confusion and burden on foreign investors when they do not participate in a share buy-back or capital reduction. Further clarity will be needed as to when this obligation is enlivened and how foreign investors will be in a position to know whether they are under an obligation to seek FIRB approval with access to all relevant information.

Recommendation n°12 (Awareness & Investment Attraction): Engagement with international investment partners should be undertaken to raise awareness of the scope and benefits of a streamlined investment review framework, and to counter any negative perception of Australia as a more complex and less welcoming destination for foreign investors. This engagement should coincide with renewed proactive investment promotion of strategic sectors in the Australian economy.

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