

The Federal Relations Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600

Email: FederalRelationsSecretariat@treasury.gov.au

Dear Secretariat

Thank you for the opportunity to review the first tranche of the exposure draft of the *Foreign Investment Reform (Protecting Australia's National Security) Bill 2020*, outlining proposed changes to the Foreign Investment Review Framework.

Please find attached a response provided on behalf of the Queensland Government, outlining key issues requiring further consideration or clarification, as identified by relevant Queensland Government agencies. A range of these issues relate to the proposed introduction of a new National Security Test, including:

- The need for greater clarity in defining a reviewable national security action, and whether increased 'call in' powers could create uncertainty for investors.
- Potential disincentives for investors in the broader national security business category as a result of increased compliance requirements.

More broadly, the proposed changes to compliance and enforcement powers, and any increase in the volume of foreign investment proposals being assessed and referred to the Queensland Government for review, may have resourcing implications that will need to be considered.

The Australian Government's feedback and clarification on the matters raised in the Queensland Government's response would be appreciated.

I also note that consultation on a second tranche of reforms is scheduled for September 2020, including further detail on the timeframes associated with the proposed 'call in' powers for the Commonwealth Treasurer. The Queensland Government welcomes the opportunity to consider these additional details as they become available.

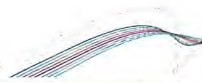
If you require any further information, please contact Mr Stuart McLaughlin, Director, Economic Strategy, Queensland Treasury, on (07) 3035 1450 or stuart.mclaughlin@treasury.qld.gov.au, who will be pleased to assist.

Yours sincerely



Graham Fraine
Acting Under Treasurer

21/9/2020



Reform measures in the Summary Booklet

Queensland Government Response

Protecting Australia's national security

1. The Government will introduce a new national security test which will:

a. enable the Treasurer to impose conditions or block any investment by a foreign person on national security grounds regardless of the value of investment;

Seeking clarification

- The definition of a reviewable national security action is vague in places. While most elements of the action are defined, it is unclear what constitutes a 'significant' agreement with an Australian business – clarity is sought on whether it depends on the monetary value or are there other thresholds?

General comments

- The proposed changes will enable the Treasurer to impose conditions on approvals. The Australian Productivity Commission notes that the growing use of conditional approvals means there is an ongoing need for compliance monitoring to ensure these conditions have been met. The Foreign Investment Review Board (FIRB) will need to be cognisant of the potential impacts of imposing additional conditions on individual proposals, and the need for increased compliance monitoring by the Australian Government.
- Of particular interest is the scope and impact on investment in electricity. The definition of 'national security business' is critical but left to being defined in the regulation. The proposed definition in the draft regulations seem to pick up entities that are direct interest holders in relation to a 'critical infrastructure asset', which in turn seems to include:
 - a network, system, or interconnector, for the transmission or distribution of electricity to ultimately service at least 100,000 customers; or
 - an electricity generation station that is critical to ensuring the security and reliability of electricity networks or electricity systems in a State or Territory.
- To this end, we note the amendments increase the capacity of the Commonwealth Treasurer to 'call in' individual proposals which could create uncertainty. In the current climate of dampened renewable infrastructure investment, the added requirement may be unhelpful.

b. require mandatory notification of any proposed investment by a foreign person in a sensitive national security business;

Seeking clarification

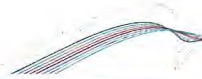
- It is noted that, for significant foreign investment applications, FIRB currently consults with Australian Government departments, state and territory government departments, national security agencies and relevant authorities.
- It is unclear how the new changes will impact this process – clarity is sought as to whether all investment proposals in sensitive national security businesses will be considered significant and therefore be shared with relevant State and Territory departments? Or will other thresholds (i.e. monetary) still apply?

General comments

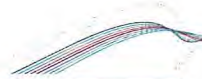
- The sensitive national security business category is broader in scope compared to the existing sensitive businesses listed under the current legislation. The added compliance requirements associated with investment that may not have triggered consideration under previous settings may act as a disincentive for some prospective investors.
- Small (and medium sized) businesses are most likely to be negatively impacted by this change, for example a small defence



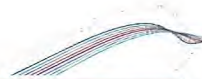
Reform measures in the Summary Booklet	Queensland Government Response
	<p>equipment manufacturer, which would not have triggered assessment under the current legislation.</p> <ul style="list-style-type: none"> For significant foreign investment applications, FIRB consults with Australian Government departments, state and territory government departments, national security agencies and relevant authorities. The proposal seems to create extra steps that an investor will need to undertake (which previously tended to apply only up to a certain investment threshold). This may impact the achievement of specific policy objectives that are reliant on investment either now or in the future, including investment in key areas such as renewable energy. Mandatory notification with reduced investment thresholds may have resourcing implications for Queensland Government agencies.
<p>c. require mandatory notification where a business or entity owned by a foreign person starts to carry on the activities of a sensitive national security business;</p>	
<p>d. allow any investment that would not ordinarily require notification to be 'called in' for screening on national security grounds;</p>	<ul style="list-style-type: none"> It should be noted there are time limits by which the Treasurer must 'call-in' the review, although the detail of this will be released in the second tranche of the exposure legislation. The Queensland Government will review these details once the second tranche is released.
<p>e. allow investors to voluntarily notify to receive investor certainty from 'call in' for a particular investment or apply for an investor-specific exemption certificate;</p>	<ul style="list-style-type: none"> Precautionary notifications from investors may have resourcing implications for Queensland Government agencies. The FIRB could consider undertaking screening of applications prior to circulating to jurisdictions for consultation.
<p>f. allow the Treasurer to impose conditions, vary existing conditions, or, as a last resort, require the divestment of any realised investment which was approved under the FATA where national security risks emerge.</p>	
<p>Streamline less sensitive investments</p>	
<p>2. The Government will exempt certain investments made by entities which are currently classified as 'Foreign Government Investors'. This exemption will be non-discriminatory and apply only where no foreign government investor has or could be perceived to have influence or control over the investment or operational decisions of the entity or any of its underlying assets.</p>	<ul style="list-style-type: none"> This issue will be subject to a further consultation request from the Australian Government expected in September. The Queensland Government welcomes the opportunity to consider these additional legislative details as they become available.
<p>Stronger penalties, compliance and enforcement powers</p>	
<p>3. The Government will have standard monitoring and investigative powers (in line with those of other business regulators), including access to premises with consent or by warrant to gather information. This measure will improve regulators' capability to monitor investor compliance and/or investigate potential non-compliance.</p>	<p>Seeking Clarification</p> <ul style="list-style-type: none"> The Queensland Government notes that the Bill will make a judge of a court of State an issuing officer, and a court of a State that has jurisdiction in relation to matters arising under the <i>Foreign Acquisitions and Takeovers Act 1975</i> a relevant court, for the purposes of certain functions under the Parts 2 (monitoring) and 3 (investigation) of the <i>Regulatory Powers Act (Standard Provisions) Act 2014</i>. Expansion of the jurisdiction of Queensland judges/courts in relation to the new monitoring and investigation powers would



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	<p>have resourcing implications for Queensland courts, and further consultation with the Queensland Government is required on this aspect of the proposals.</p> <p><u>General comments</u></p> <ul style="list-style-type: none"> Queensland Health has indicated this may have a positive impact on potential breaches by health-related entities not complying with medical or patient data privacy requirements.
<p>4. The Government will have powers to give directions to investors in order to prevent or address suspected breaches of conditions or of the foreign investment laws.</p>	
<p>5. The Government will increase civil and criminal penalties under the FATA to ensure these penalties act as an effective deterrent.</p>	
<p>6. The Government will expand the infringement notices regime to cover all types of foreign investments and introduce a third tier to allow for a more graduated and proportional approach to enforcement.</p>	
<p>7. The Government will have powers to remedy situations where foreign persons are given a no objection notification or an exemption certificate based on a foreign investment application that makes an incorrect statement or omits an important piece of information.</p>	
<p>8. The Government will have powers with respect to an investment that was originally made in breach of the FATA where the interest has subsequently been transferred to another foreign person by will or devolution by operation of law.</p>	
<p>9. The Government will have the power to accept enforceable undertakings from foreign persons to manage non-compliance or to give weight to commitments a foreign person made at the time of applying for a no objection notification or an exemption certificate.</p>	<p><u>Seeking clarification</u></p> <ul style="list-style-type: none"> The Queensland Government notes that the Bill will make a court of a State that has jurisdiction in relation to matters arising under the <i>Foreign Acquisitions and Takeovers Act 1975</i> a relevant court for the purposes of certain functions under the Part 6 (enforceable undertakings) of the <i>Regulatory Powers Act (Standard Provisions) Act 2014</i>. Expansion of the jurisdiction of Queensland courts in relation to the new functions related to enforceable undertakings would have resourcing implications for Queensland courts, and further consultation with the Queensland Government is required in relation to this aspect of the proposals.
<p>10. Foreign persons who have been issued a no objection notification for a proposed action or an exemption certificate will be required to notify the Government of certain events, including that the action has occurred or did not occur.</p>	



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Integrity of the foreign investment review framework	
<p>11. The Government will clarify that foreign persons are required to seek further foreign investment approval for any increase in actual or proportional holdings above what has been previously approved, including as a result of creep acquisitions and proportional increases through share buybacks and selective capital reductions.</p>	
<p>12. The Government will narrow the scope of the moneylending exemption so that it does not apply where foreign money lenders are obtaining interests in a sensitive national security business under a moneylending agreement.</p>	<ul style="list-style-type: none"> This issue will be subject to a further consultation request from the Australian Government expected in September. The Queensland Government welcomes the opportunity to consider these additional legislative details as they become available.
<p>13. The Government will require foreign persons to seek foreign investment approval for acquisitions of interests from the Commonwealth, state or territory governments or local government bodies to perform Government services or functions associated with privatisation programs that may raise national security risks.</p>	<p><u>Seeking clarification</u></p> <ul style="list-style-type: none"> In its explanatory memorandum, the Australian Government advises of additional consultation on this matter. This would be of interest if in the future there are proposed transactions or arrangements involving foreign owned entities (e.g. joint-venture arrangements). <p><u>General comments</u></p> <ul style="list-style-type: none"> This may have a positive impact for Queensland Health. Foreign investment applications related to government service provision or functions will be required to clearly identify government relationships.
<p>14. The FATA will be amended so that the tracing rules can be similarly applied to unincorporated limited partnerships as they are to corporations and trusts, so that beneficial interests can be traced.</p>	<ul style="list-style-type: none"> Benefits from the proposed changes would be strengthened if jurisdictions are provided with access to the tracing information.
<p>15. A foreign person, who is a parent or spouse of an Australian resident, will need to seek foreign investment approval prior to the purchase of Australian land where they provide money to their Australian family member for the purchase, other than by way of a gift.</p>	<ul style="list-style-type: none"> Proposed changes may have resourcing implications for Queensland Government agencies. Consideration should be given to requiring that the measure only applies where the foreign person is obtaining an ownership interest or security interest in the Australian land.
More coordinated information gathering and sharing	
<p>16. The Government is considering a new Register of Foreign Ownership that will merge and expand the existing agricultural land, water and residential registers, in order to increase the Government's visibility of foreign investments made in Australia.</p>	<p><u>Seeking clarification</u></p> <ul style="list-style-type: none"> It would be beneficial if this register was made available to the Queensland Government. The Queensland Government currently holds registers that includes information on foreign investment projects. Access to this information may help reduce some administrative costs relating to collecting and maintaining this information.
<p>17. The Government will increase the scope of the information sharing provisions under the FATA and the <i>Tax Administration Act 1953</i> (the TAA) to allow greater sharing of foreign investment information across government agencies to simplify the administration of the foreign investment framework.</p>	<p><u>Seeking clarification:</u></p> <ul style="list-style-type: none"> Further information is requested regarding the process for finalisation of these information sharing arrangements under agreement or Memorandum of Understanding, including protections for confidential information. Please make this information available to the Queensland Government.



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<p>18. The Government will introduce new information sharing provisions to allow sharing of protected information with international counterparts where national security considerations are present.</p>	
<p>A fairer and simpler framework for foreign investment fees</p>	
<p>19. The foreign investment fees framework ensures that foreign investors, not Australian taxpayers, bear the costs of administering the foreign investment system. Consistent with this principle, fees will be reviewed to ensure they continue to cover the costs of administering the system. In doing so, the Government is committed to reforming the fees framework to make it fairer and simpler for investors.</p>	<p><u>Seeking clarification:</u></p> <ul style="list-style-type: none"> Clarity is sought as to whether a share of Commonwealth funding will be provided to State agencies in relation to administration costs incurred when undertaking FIRB application reviews. For example, the increase in the volume of FIRB application reviews required over the years and as a result of these changes has to-date been absorbed by the State.
<p>A timely, consistent and reliable investor experience</p>	
<p>20. The Government is committed to delivering a timely and efficient foreign investment regime which recognises commercial deadlines and does not unnecessarily impede the operation of foreign investors or markets. The Government will continue to work with stakeholders in identifying ways to streamline and enhance the investor experience.</p> <p><i>[Note: The provision giving effect to this measure in the Primary law is extending the decision period to 90 days.]</i></p>	<p><u>Seeking clarification</u></p> <ul style="list-style-type: none"> In public facing information, please provide reference and links to state investment agencies that can provide facilitation assistance in coordination with the Australian Government. <p><u>General comments</u></p> <ul style="list-style-type: none"> This may have a positive impact for the State of Queensland with regards to finalising commercial transactions in a timely manner. Consider a registration of investment interest process that enables state and territory investment agencies to respond/offer opportunities for investment.
<p>Other amendments</p>	
<p>21. The Government will introduce amendments to the foreign investment review framework to improve readability of existing provisions, rectify inconsistencies and unintended consequences, and address feedback from investors seeking greater certainty.</p>	<ul style="list-style-type: none"> This issue will be subject to a further consultation request from the Australian Government expected in September. The Queensland Government welcomes the opportunity to consider these additional legislative details as they become available.