



**WATER SERVICES**  
ASSOCIATION OF AUSTRALIA



# **WSAA Submission**

*Exposure draft of the Foreign  
Investment Reform (Protecting  
Australia's National Security) Bill 2020.*

Public Consultation





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**SUBMISSION: Exposure draft of the Foreign Investment Reform (Protecting Australia's National Security) Bill 2020**

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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 strengthening Australia's national security and welcomes the opportunity to provide a submission on the Foreign Investment Reform Bill 2020

## The Foreign Investment Reform (Protecting Australia's National Security) Bill 2020

The Australian Federal Government is seeking stakeholder views on the exposure draft of the Foreign Investment Reform (Protecting Australia's National Security) Bill 2020. The exposure draft Bill gives effect to major reforms to the Foreign Acquisitions and Takeovers Act 1975. The reforms update Australia's foreign investment review framework in three broad ways: addressing national security risks, strengthening compliance and streamlining investment in non-sensitive businesses. WSAA and the Australian Water Industry broadly support the proposed amendments to the Bill.

However, we would like to raise a concern with regards to the following aspects of the Bill:

- The broad definition of "national security land" gives the Federal Treasurer significant flexibility via legislative instrument to declare any land as 'national security land'.
- The Call In power that is proposed in the Draft Bill. It is our understanding that the existing Act applies to entities who have a significant agreement (1) in relation to leasing, letting or hire to use the assets of a State owned water business. The "Call in" power enables the Treasurer to undertake 'reviewable national security actions' on a retrospective basis in relation to these significant agreements.

## WSAA's submission

State owned water businesses typically use third parties to provide asset management services that could be affected by the proposed legislative changes. 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. In particular agreements with these service entities can be over several years and be in the order of tens of millions of dollars per individual contract.

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<sup>1</sup> A significant agreement as defined by the Foreign Acquisitions and Takeovers Act 1975 is:

**significant agreement** with an Australian business is an agreement relating to:

- (a) the leasing of, the letting on hire of, or the granting of other rights to use, assets of the business; or
- (b) the participation by a person in the profits or central management and control of the business.

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. Noting that these most likely can be dealt with through changes in contracting practices with some short term cost implications.
- 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.

To avoid the above costs, minimise uncertainty and ensure a proportionate response by government it is recommended that the following are clarified in the Bill or underpinning regulation:

- In terms of “significant agreements” that will create a national security risk. The current wording of the exposure draft does not clearly define a level of oversight and regulation that is proportionate to the risk for the Call In powers. It is understood that the intent of the exposure draft 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 legislation should explicitly state that either the terms ‘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 or business is excluded from the Call In power. Alternatively, the Call In power should be restricted to circumstances where the agreement or sale gives 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

- If the above options are not possible then the legislation must allow a Critical Infrastructure owner the ability to seek compensation should the Treasurer make a prohibition or disposal order.
- The definition of ‘national security land’ creates significant business risk and uncertainty. It is recommended that further details are required on this definition, particularly in relation to the types of national security risks which might result in the Treasurer making a declaration that land is ‘national security land’. A clear right of appeal for any such classification is also required.

Given the uncertainty and potential impacts in these aspects, WSAA strongly encourages the Australian Government to start an ongoing dialogue with the urban water industry following this consultation period.

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