



Law Council
OF AUSTRALIA

Business Law Section

18 March 2020

Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

By email: economics.sen@aph.gov.au

Dear Sir/Madam,

Inquiry into foreign investment proposals

Introduction

1. The Foreign Investment Committee of the Business Law Section of the Law Council of Australia (the **Committee**) appreciates the opportunity to provide a written submission to the Senate Economics References Committee inquiry into foreign investment proposals (**Inquiry**).
2. This submission acknowledges that the current foreign investment system works well, is effective and allows investment that is consistent with Australia's national interest. It also welcomes the Government's ongoing interest in engaging with the private sector on points of reform.
3. The intention of this submission is to outline potential areas for improvement in Australia's foreign investment approval regime with respect to each of the Inquiry's terms of reference. Central to this submission is a desire to further the national interest by maintaining the regulatory process surrounding inbound investment without the construction of disincentives to investment.
4. This submission will deal with each of the Inquiry's terms of reference.

The protection of Australia's market-based system from manipulation that would benefit proposed foreign investment

5. The implementation of the regulatory scheme under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**) and the *Foreign Acquisitions and Takeovers Regulation 2015* (**FATR**) by the Treasurer, through the Foreign Investment Review Board (**FIRB**), is effective in reviewing significant foreign investments in Australia and ensuring they do not contravene the national interest test.
6. Engagement by foreign investors and their agents with FIRB gives rise to a thorough and comprehensive process that involves the input of key agencies, including the Australian Competition and Consumer Commission, Australian Security Intelligence Organisation, Austrade, Australian Federal Police, Australian Taxation Office and Australian Securities and Investments Commission. This across-the-board analysis of

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the impact of any proposed foreign investment means that it is highly unlikely that any attempted manipulation would go unnoticed, given the number of government agencies involved in the review.

7. Further, the review often allows the consult agencies to go beyond their jurisdictional limits when considering whether a proposal is contrary to the national interest. While this is a source of frustration for many investors in that they perceive they are not operating on a level playing field, it does protect the market-based system from manipulation.
8. However, the fact that FIRB scrutiny only occurs in relation to foreign investment transactions that meet the high notification thresholds leaves open the possibility of market manipulation occurring by investors who are not required to receive a no objection notification (commonly referred to as “**FIRB approval**”) in relation to their investment.
9. It is also highly unlikely that a foreign investor seeking to manipulate the market would voluntarily submit a notification to FIRB in respect of the proposal.
10. Therefore the Committee submits that no significant revisions need to be made to the current FIRB process, which is well adept in ensuring national interest considerations are applied to each foreign investment action. Indeed, the FIRB process is robust but is only effective if the foreign investor submits to the process – something a person intent on manipulation would be unlikely to do.

The assessment of the impact of proposed foreign investment on market concentration and competition

11. Foreign investment may enhance market competition and reduce market concentration. More foreign investment can aid in reducing market concentration in any one sector.
12. On the issue of a FIRB approval by the Treasurer, foreign investors will have completed an extensive process designed to ensure their intentions align with the national interest. Part of this process involves consideration of whether a proposed investment would adversely affect market concentration and competition.
13. However, as mentioned above foreign investors must go through the FIRB process for this analysis to be conducted. If a proposal is below the notification thresholds, then FIRB will not be called upon to review the proposal and consider whether it hinders competition or not.

The imposition of conditions on foreign investors

14. The ability to implement conditions on FIRB approvals issued by the Treasurer is an important mechanism used to protect the national interest and allow investment rather than prohibit it.
15. Australia remains an attractive destination for foreign investors, with the rule of law, sovereign risk generally and the maintenance of confidentiality not being concerns. However, through FIRB’s imposition of some conditions on FIRB approvals and a

perception of imprecise policy changes that occurred from 2007, foreign investors may form the view that the Department of the Treasury has been sending very mixed, and at times complicated, signals in respect of foreign investment.

16. Further, policies driving some conditions are not always transparent and are apt to alter significantly over often quite short periods of time. Given the lead time for identifying required conditions and obtaining clearance, this can be an impediment to foreign participation in transactions. The clearance process would benefit from more settled and explicit policy settings agreed with bipartisan support and consistency in conditions that reflect those settings, together with publicly available guidance.
17. The result of vagueness and uncertainty is that investors may question whether Australian investments are worthwhile given the regulatory burden imposed by FIRB which often may disregard the practicalities of business operations. It is critical that approvals contribute to, and do not hinder, investment flows to prevent a diversion of investment away from Australia. It is an unsafe assumption to think that Australia will always be viewed as an attractive destination for investment.
18. To promote Australia as an attractive target for foreign investment, FIRB should ensure the practicality of conditions imposed on FIRB approvals is considered within the business context to which they relate.

The extent to which the risk that foreign investment proposals are being used for money laundering

19. It is highly unlikely that any foreign investor seeking to launder money (a serious criminal offence), would seek FIRB approval in relation to an investment.
20. The review of FIRB approvals by a range of financial and law enforcement agencies ensures that such nefarious intent should be identified.

The role of the Foreign Investment Review Board

21. FIRB should be viewed as a channel through which foreign investment is both encouraged and regulated. Rather than being viewed as an obstacle to inbound investment, FIRB should be marketed as an enabler of foreign investment. For this to occur, FIRB must endeavour to improve the user experience.
22. A crucial part of this is improving FIRB's perception in the market and in the eyes of overseas investors that it lacks understanding of the business environment in which applicants operate and ensuring that conditions which are imposed on FIRB approvals are realistic within that context.
23. Further, engagement with FIRB would be ameliorated by an improved adherence to the 30-day statutory deadlines that are imposed on FIRB applications. Investors understand that decisions will not always issue within this deadline. However, numerous short-term extensions frequently lead to frustration and create deal uncertainty for investors. The fact there is no statutory deadline applying to variations or exemption certificates means these applications do not always receive the priority they require.

24. By improving the FIRB experience, investors are less likely to view the FIRB process as burdensome and are more likely to engage with the system.
25. In line with improving the FIRB experience, there would also be merit in FIRB assessing whether the administration of the FATA can be simplified. One example of a simplification would be removal of the distinction between notifiable and significant actions, which causes a lot of confusion to foreign investors.
26. Further, a substantial simplification may occur by FIRB enabling foreign investors to include a FIRB condition in contracts that reflects the completion of a transaction (rather than contract formation).

Recommendations

1. Conditions

To promote Australia as an attractive target for foreign investment, FIRB should review the practicality of conditions imposed on FIRB applications within the business context to which they relate.

Better public guidance should be provided of typical conditions or relevant policy settings applicable to certain sectors.

2. Maintain Australia as an attractive investment destination

Ensure that the Rule of Law applies not only to the legislation but also policy settings.

Maintain the confidentiality of the process.

Maintain the regulatory process surrounding inbound investment without the construction of disincentives to investment.

Simplify the administration of the system.

Thank you for the opportunity to provide a submission on these matters.

Please contact Malcolm Brennan, Chair of the Foreign Investment Committee (+61 2 6217 6054 or malcolm.brennan@au.kwm.com) in the first instance, if you require further information or clarification.

Yours faithfully,



Greg Rodgers
Chair, Business Law Section