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Committee Secretariat
Senate Standing Committees on Economics
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Senate
Parliament House
Canberra ACT 2600

20 March 2020
By Upload

Dear Committee Secretariat

Committee enquiry into foreign investment proposals

We refer to the referral by the Senate on 4 December 2019 of an enquiry into foreign investment proposals to the Senate Economics References Committee.

In this submission, we limit ourselves to foreign investment proposals that involve, or may be a step in the process of, taking control of an Australian entity.

As a general comment, we believe the government's foreign investment framework works well and plays an important role in welcoming foreign investment into the Australian economy in appropriate cases, while protecting Australia's national interest. We offer a few submissions that we believe would improve the operation of that framework.

Herbert Smith Freehills may separately make submissions in relation to other aspects of Australia's foreign investment regime.

1 Responding promptly to notifications of foreign investment proposals

Under the *Foreign Acquisitions and Takeovers Act 1975 (Cth)* the Treasurer (on advice from the Foreign Investment Review Board or **FIRB**) has 30 days from the receipt of a notification from a person proposing a significant action and the payment of the requisite fee to make a decision and 10 days to communicate that decision. The 30 day period may be unilaterally extended by the Treasurer for up a further 90 days, and may also be suspended if the Treasurer exercises powers to require further information, or extended without limit with the consent of the notifier.

In recent times, we have found that timely resolution in relation to notifications has become much rarer than previously. Decisions on a foreign investment proposal involving control of an Australian entity tend in practice in many cases to take longer than the statutory 30 plus 10 days, and in some cases materially longer.

We acknowledge that FIRB itself generally deals promptly and professionally with notifications, to the extent within its power, and that the recent trend to much longer consideration periods is often due to delays with consultation agencies. However, we believe it is important to address this issue, to preserve Australia's attractiveness as a destination for foreign investment.



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In this regard, FIRB has a practice of consulting with a range of Commonwealth departments in relation to a foreign investment proposal. These include the Australian Taxation Office (ATO) and the Australian Competition and Consumer Commission (ACCC).

Some consultation agencies, particularly the ATO, sometimes ask 'standard form' questions right at the end of the 30 day statutory consideration period so as to necessitate extensions of time, in some cases for quite protracted periods. We submit that it is undesirable for Australia's regulators not to be seen as time-responsive generally, and that delays should ideally be limited to a small number of potentially difficult proposals.

We also submit that where the ACCC has issues with a foreign investment proposal, any examination and enforcement by it should be conducted separately through the framework of the *Competition and Consumer Act 2010 (Cth)*, and in particular that delays to the approval process for a foreign investment proposal that is not otherwise contrary to the national interest should not be used to effectively afford further powers of intervention to the ACCC.

Both of the above issues could be resolved by varying administrative procedures and do not need to be addressed through legislation. For example, administrative deadlines for consultation agencies could help alleviate delays arising from late questions, and simply altering FIRB's practice of not providing foreign investment clearance while the ACCC continued to deliberate (but rather, allowing that agency to 'make the running' in relation to competition issues by use of its own statutory powers) would address the issue referred to in the previous paragraph.

2 Preserving the flexibility of the national interest test

The key function of Australia's review process for foreign investment proposals is to allow blocking of foreign investment proposals that are contrary to the national interest, or to apply conditions to the way foreign investment proposals are implemented, to ensure those proposals are not contrary to the national interest.

National interest is not defined in the Foreign Acquisitions and Takeovers Act.

The Foreign Investment Policy document published by FIRB discusses the factors the Treasurer will take into consideration generally and in relation to specific sectors and specific foreign investors in deciding whether a proposal is contrary to the national interest.

This regime allows considerable flexibility for the consideration of foreign investment proposals to evolve as policy sensitivity in relation to certain Australian businesses or certain types of foreign investor develops.

We submit that maintaining that flexibility is vitally important to respond to changing circumstances such as developments in technology and changes in geopolitical circumstances. For example, we welcome in this regard recent statements from the FIRB chairman noting the growing sensitivity of the protection of the private or personal data of Australian citizens, and believe sensitivity issues also arise in relation to certain commercial data, particularly where such data relates to sensitive installations. Another example is the establishment of the critical infrastructure centre to monitor the risk to telecommunications, electricity, gas, water and port assets.



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Please contact us if you have any queries or require any further information or clarification in connection with this submission.

Yours faithfully

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