

Senate Standing Committee on Economics
ANSWERS TO QUESTIONS ON NOTICE
Treasury Portfolio
Inquiry into foreign investment proposals

Division: Foreign Investment Division
Topic: Consultation Details
Reference: Spoken

Question:

Mr Brake: As Mr Deitz said, we have undertaken a very large amount of consultation even prior to the exposure draft being released. I think Mr Deitz may have said we've met over 1,000 people. A lot of those were people we reached out to, and there were other people who reached out to us. The size of those groupings varied considerably, but some of them were quite large.

Senator O'NEILL: Thank you very much. If you could provide on notice some detail about that that would be very helpful. What are the biggest concerns and issues that have been raised so far in these consultations? Can I ask for the two periods, between the release of the draft—with the green cover page—and then post the release of the exposure draft?

Answer:

Since announcement of the Foreign Investment Reforms on 5 June 2020 until the release of the Exposure Draft of the legislation on 31 July 2020, Treasury undertook about 40 engagements across its network, with over 1000 stakeholders attending these sessions, including industry, Australian and foreign governments, peak bodies, multilateral institutions, investors and advisory groups more broadly. During these sessions, stakeholders were largely interested in discussing:

- the main objectives of the reforms;
- the temporary measures introduced due to the coronavirus pandemic and transitional arrangements on commencement of the reforms;
- the new national security powers, including the definition of a 'national security business'; and
- the operation of the streamlining measures including the exemption certificate pathway.

Where foreign governments have expressed interest in the reforms we have engaged with them through meetings facilitated by the Department of Foreign Affairs and Trade on an as-requested basis.

The exposure draft of the legislation was released on 31 July 2020, commencing the public consultation period. This is currently underway, with consultations consisting of targeted stakeholder sessions, in addition to public information sessions and a public submissions process. Key issues discussed since the release of the exposure draft include:

- the definition of a 'national security business';
- scope and application of the call-in power and national security last resort review power; and

- the design and consolidation of foreign investment registers and the intended regulatory capture of the register.

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Division: Foreign Investment Division
Topic: Acquisition of Bellamy's - Developments
Reference: Spoken

Question:

Senator WHISH-WILSON: We've talked a bit at previous hearings about the acquisition of Bellamy's. Has your division followed up on whether there have been any developments with the purchase of Bellamy's and, I suppose, the approval of licences to sell infant formula in China? Do you have a watching brief on whether the buyer has now been given licences to access the Chinese market?

Mr Brake: I'd have to take that on notice. As I'm sure you would recall, there were a number of conditions imposed on Bellamy's. From the perspective of a foreign investment division and regulator, we obviously have a focus on those conditions and whether they are being met. But licensing and all those sorts of matters are separate to that.

Answer:

As indicated in Treasury's response to IQ20-000037, no objection notifications imposing conditions include a requirement for regular compliance reporting by investors to enable Treasury to monitor compliance with investor conditions on an ongoing basis.

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Division: Foreign Investment Division
Topic: Legislation that can affect foreign legislation
Reference: Spoken

Question:

Senator PATRICK: Thank you for your help on this. Do you have a ready reckoner guide that says which areas this is trying to fill? Or it might be the other way—where other legislation can affect foreign acquisitions, you may have some information that helps us better understand the limits of the power that's been sought here.

Mr Deitz: We might need to take that on notice. The main pieces of legislation include the one that you've already referred to at the Commonwealth level. The others are what are known as the telecommunications sector security reforms to the Telecommunications Act, which are also powers of the Minister for Home Affairs. In terms of the broader question of 'What else is there, including at the state and territory level?' we would need to take that on notice.

Answer:

The last resort power is to be used only if no other Commonwealth, state or territory regulatory mechanism could be used to address the identified national security risk.

At the Commonwealth level, the two most relevant national security-related powers are the *Security of Critical Infrastructure Act 2018* (SOCIA), and the Telecommunications Sector Security Reforms (TSSR), which form Part 14 of the *Telecommunications Act 1997*. There are various licensing and regulatory regimes in place in state and territory jurisdictions.

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Division: Foreign Investment Division
Topic: FIMS3 reference document
Reference: Spoken

Question:

Ms Kelley: Yes, I think I may. I think there are a couple of factors. I will talk firstly about what our information system does enable us to do. I would also note that in some of our responses to the questions on notice we have outlined that it was about diversion of resources, because there are aspects of our system that require manual work. At this point in time, when we have a significant increase in case load, we actually need people focused on processing cases. That has been part of the issue. But let me just describe what our foreign investment management system does enable us to do and what we are currently doing to improve it. The system at the moment has a foreign investment application portal, which allows investors and their representatives to submit an application. It requires a range of mandatory information to be submitted. It also provides an estimate of the associated fee. The second part of the system is a case management and repository of foreign investment application data and approvals. We call the system FIMS3. It performs critical functions, but we acknowledge that it has some limitations in regard to our compliance work. The functions it does perform are case management and document storage and it is a Treasury source of data on foreign investment applications we've screened. We can extract the number and proportion of approvals, with or without conditions. However, as we've noted in our responses to you, it is a manual task for us to review each case to accurately identify the different types of conditions that are attached to the approval—for example, whether they are standard tax conditions, or conditions relating to the proximity of an asset to a defence establishment or conditions relating to the management of data.

[...]

Senator O'NEILL: Thank you for the fulsome answer. I might ask you to provide on notice what you were reading from. It will be helpful, I'm sure.

Answer:

- The systems Treasury uses to support its administration of the foreign investment framework include both:
 - A foreign investment application Portal (the Portal) which allows investors and their representatives to submit an application (requiring a range of mandatory information) and which provides an estimate of the associated fee
 - A case management system and repository of foreign investment application data and approvals: Treasury's Foreign Investment Management System 3 (FIMS3).
- FIMS3 performs critical functions but has limitations for compliance work.
 - FIMS3 fulfils a range of functions including: case management, document storage, and as Treasury's source of data on foreign investment applications we have screened.

- But in its present form, it is not possible to easily extract information on certain issues. For example:
 - : We can extract the number and proportion of approvals with or without conditions.
 - : However, it is a manual task to review each case to accurately identify the different types of conditions attached to the approval – for example, standard tax conditions, or conditions relating to the proximity of an asset from a Defence establishment, or conditions relating to the management of data.
- Treasury is currently undertaking work to enhance systems and business processes – to ensure they are fit for purpose and can support the proposed policy reforms.
- System enhancements that have been implemented or are proposed to be implemented include:
 - Fields to help identify the nature of conditions attached to a particular approval. This will provide Treasury with the capability to better report on conditions attached to cases in the future;
 - Improvements to case tracking to allow better internal tracking of the progress and status of a case;
 - Capture of a range of new data points to allow improved case reporting and analysis, including for cases captured under the temporary changes;
 - Improvements to the Portal to reduce the incidence of incorrect information being submitted by investors.
- There will also be a range of changes to the Portal and FIMS3 as a result of the policy reforms, for instance:
 - To facilitate notifications that are made under the new national security test;
 - To support enhanced compliance and enforcement powers.
- There are also complementary process improvements (implemented or proposed to be implemented) including:
 - A risk-based triaging methodology has been implemented to ensure appropriate and timely assessment and processing of all foreign investment applications;
 - Data entry and case closure procedures have been implemented to improve the consistency and quality of data capture and improve record keeping; and
 - Process re-design requirements have been identified and prioritised to ensure Treasury is able to meet regulatory reforms requirements.

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Division: Foreign Investment Division
Topic: Foreign investor contravention of conditions
Reference: Spoken

Question:

Senator O'NEILL: I'll just go to a couple of examples of where foreign investors have contravened conditions. CRA, now Rio Tinto, appears to never have reached the threshold for naturalising status, which is 50 per cent Australian ownership. That was one of the conditions. Nevertheless, they were granted that status and subsequently purchased mining and biotech companies. Is that correct?

Mr Brake: CRA? We'd have to take that on notice. I'm not familiar with the conditions which were imposed, or undertakings. I think it was some time ago.

Senator O'NEILL: As it was conveyed to us this morning, the longstanding cultural practice—which is of concern to me—is 'We'll get the money in; we'll put some conditions on it, but no-one's watching closely,' and you can get away with what you want. For example, Western Mining Corporation, according to the evidence that I have, did not meet its requirements for 70 per cent Australian equity and Australian control, yet it was granted ownership permission for the Yeelirrie uranium mining management. Do you have any oversight of that?

Mr Brake: We'd have to take that on notice, but I would say that for the Department of the Treasury over the last few years, as Ms Kelley mentioned, there's been a recognition that we needed to put more resources and attention into our compliance work and we've been working hard to build that up. As Ms Kelley said, we've now introduced a whole compliance branch to take this to another level.

Answer:

Naturalising requirements for foreign investors were incrementally amended from the late 1970s through to the 1990s in line with the increasing liberalisation of Australia's Foreign Investment Policy by successive Australian Governments and are no longer part of that policy. Notwithstanding the absence of naturalising requirements, a corporation with more than prescribed levels of foreign ownership is a 'foreign person' under the *Foreign Acquisitions and Takeovers Act 1975* and its actions are subject to that Act.

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Division: Foreign Investment Division
Topic: Legal advice on consistency with international obligations
Reference: Spoken

Question:

Mr Brake: I will make one broad point, which is that, obviously, in preparing the legislation, we went through all the appropriate checks, as you would expect, to ensure that we are consistent with our international obligations.

Senator O'NEILL: And did you take legal advice about the eligibility of what you proposed?

Mr Deitz: I'd need to take that on notice. With respect to which part is your question, Senator?

Senator O'NEILL: I'm coming out of the robodebt inquiry and concerned that the government takes legal advice to make sure that whatever it proposes is legal.

Mr Deitz: We did seek advice.

Senator O'NEILL: Would you be able to provide details of that advice—the date on which it was sought and from whom, and, if possible, give us the advice? That would be very interesting.

Answer:

Treasury has engaged closely with the Office of International Law within the Attorney-General's Department (OIL) and the Department of Foreign Affairs and Trade (DFAT) in the lead up to and throughout the development of the reform package. Legal advice was sought from OIL and/or DFAT on multiple occasions: in February 2018; April 2018; December 2018; September 2019; and February 2020.

Legal advice on matters addressed by the reform package has also been sought from the Australian Government Solicitor at various times, including throughout the development of the reform package.