



FINANCIAL
SERVICES
INSTITUTE
of Australasia

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

Dear Committee Secretary

Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015

Finsia welcomes the opportunity to respond to the Economics Legislation Committee's inquiry into proposed reforms of the Foreign Acquisitions and Takeovers Act 1975 (Cth) (the FATA).

Finsia is Australasia's peak financial services body, with over 12,000 members employed in the capital markets, retail and business banking, funds and asset management, and financial advice sectors.

Our members take a keen interest in issues affecting cross-border trade in financial services, and deepening financial integration in the Asia-Pacific region. The regulation of foreign direct investment is central to these issues, and complements the recently concluded free trade agreements with China, Korea and Japan.

Following consultation with Finsia members, in February 2014 Finsia released its *Regulating Foreign Direct Investment in Australia*¹ discussion paper. This paper prosecuted the case for fundamental reform of Australia's regulatory regime that applies to foreign direct investment.

In setting out the case for reform, Finsia was concerned that Australia underperforms in attracting foreign direct investment. Relevantly, in the period 2008–12, by value and number, more cross-border mergers and acquisitions were withdrawn for regulatory reasons or political opposition in Australia than in any other country.²

The proposed modernisation of Australia's foreign investment laws address a number of the problems in the existing regime. Finsia is of the belief that enacting these reforms will, for the most part, do much to improve Australia's reputation internationally as a place to do business.

However, and by way of qualification, Finsia believes that there are areas of the current regulatory regime that have not been addressed by the proposed amendments that also require further public discussion and consultation.

In its submission, Finsia makes comment on the following elements of the reform package:

1. Preliminary provisions — 'foreign person' and 'substantial interest'

Crucially, the reforms broaden the definition of 'foreign person' to include foreign governments.

While Finsia affirms the importance of national security concerns, Finsia's discussion paper and member consultation has identified that automatically subjecting investments from state-owned enterprises (SOEs) to FIRB review may potentially be prohibitive of critical foreign investment.³

¹ Dr. Stephen Kirchner, 'Regulating Foreign Direct Investment in Australia: A Discussion Paper' (Finsia 2014).

² United Nations Conference on Trade and Development, 'World Investment Report 2013' (2013), 99.

³ Above n 2, pp 23-27

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To take an example, in the period 2006–2012, SOEs accounted for 94% of total inbound Chinese FDI in Australia (when measured by value).⁴ Additionally, the paper found that foreign SOEs are for the most part commercially driven, profit-seeking firms that compete with other SOEs and private firms, with no substantive evidence to indicate that SOEs engage in non-commercial or strategic behavior to advance the interests of their respective governments.⁵

This raises the prospect that public versus private ownership in itself may not be a useful criterion to regulate FDI, and that the community should be vigilant of unduly restricting SOE investment by default.

The paper also warns that the more intangible benefits of foreign investment are often difficult to observe or measure directly – the perceived costs of FDI in terms of a loss of national/cultural identity and notions of sovereignty can capture and exercise the public imagination far more readily than abstract notions of productivity spillovers, access to global managerial networks and supply chains and other economic benefits that foreign direct investment may bring about.

As SOEs increasingly become globally vast sources of FDI, Finsia submits that continued public discourse regarding the role and value of FDI to the wider economy be promoted, particularly with regards to FIRB's treatment of SOE investment.

2. Powers of the Treasurer in relation to acquisitions

Finsia supports the introduction of a new regime that revolves around the concepts of 'significant action' and 'notifiable action'. This importantly provides legislative backing for notification requirements, which Finsia believes will deliver clarity and certainty to foreign investors.

However, Finsia remains circumspect with regard to the role and application of the Treasurer's power to reject an acquisition on the basis that it is 'contrary to national interest' under the FATA generally, which the proposed amendments have not sought to address.

Finsia's 2014 discussion paper identified that, as 'national interest' has deliberately been left undefined by the FATA, a largely unbounded discretion is conferred upon the Treasurer that allows the politicisation of the approval of foreign investment transactions.

The paper moreover argues that the vague and open-ended considerations deemed relevant to the 'national interest' contained in the FIRB Policy have done little to address the situation.

The paper undertakes a review of the approaches adopted by successive Australian governments to the application of the national interest test, and reveals that the concept has been stretched into a laundry list of unlegislated policy considerations, some of which are genuinely protectionist in intent.⁶

This has the potential to send a strong signal to foreign investors that the Australian foreign investment regulatory regime is arbitrary and overly restrictive, while being driven by politically determined requirements as opposed to the rule of law. Indeed, the OECD regards Australia as having a more restrictive foreign investment regulatory regime relative to the OECD average, as well as comparable economies including the United States and the United Kingdom.⁷

In light of these findings and the importance of FDI to the Australian economy generally, Finsia submits that continued debate about the role and application of foreign investment be encouraged.

⁴ KPMG–University of Sydney China Studies Centre, 'Demystifying Chinese Investment in Australia' (2013) <<http://www.kpmg.com/au/en/issuesandinsights/articlespublications/china-insights/pages/demystifying-chinese-investment-in-australia-march-2013.aspx>>.

⁵ Above n 2, pp 24-25; Margaret Cornish, 'Behaviour of Chinese SOEs: Implications for Investment and Cooperation in Canada' (Canadian International Council and Canadian Council of Chief Executives, 2012).

⁶ Above n 2, pp 17-20.

⁷ OECD, FDI Regulatory Restrictiveness Index <www.oecd.org/investment/fdiindex.htm> accessed 3 June 2013.

3. Register of Foreign Ownership of Agricultural Land Bill 2015

Finsia supports the Register of Foreign Ownership of Agricultural Land Bill 2015 (Register Bill), which forms part of the package of reforms contemplated by the committee. Finsia believes that a national register of foreign ownership of agricultural land is an initiative that could serve to dispel common misconceptions about foreign direct investment.

Australia crucially needs investment in agriculture, with one study finding that the sector will require \$600 billion by 2050 to upgrade food supply chains and a further \$400 billion to facilitate entry into and exit from the agricultural sector.⁸

Finsia submits that regular reporting of this data could be used to encourage genuine debate about how foreign investment can benefit Australia in the coming decades.

Finsia is grateful for this opportunity to respond to this Inquiry. If you have any further questions please do not hesitate to contact [REDACTED]

Yours sincerely,

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CEO and Managing Director

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⁸ ANZ Bank, 'Greener Pastures: The Global Soft Commodity for Australia and New Zealand' (ANZ Insight, Issue Four, 2012).