

QUESTION ON NOTICE

Inquiry into foreign investment proposals – 7 August 2020

Topic: foreign investment

Question submitted by the Committee

Question 4

The committee is seeking a response on whether, under existing international trade obligations, Australia could undertake any of the following:

- a) introduce a positive national interest test into the Foreign Acquisitions and Takeovers Act (the Act) that would require prospective foreign investors to demonstrate how their investment would benefit Australia;
- b) introduce a provision in the Act that would define the 'national interest';
- c) make enforceable any 'voluntary undertakings' detailed by an applicant when an application is lodged (for instance, to invest a certain amount of money, undertake research and development, create a certain number of jobs etc.).

Answer

As set out in the response to question 3 of the Committee's written questions on notice of 16 September 2020, determining whether a particular proposed change to Australia's foreign investment screening regime would be consistent with Australia's international trade and investment obligations would involve the provision of legal advice. It has been the general practice of successive governments not to provide legal advice to Parliamentary committees.

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Question 5

Recent foreign investment legislation changes announced by the government propose the introduction of a national security test. It would seem this national security test will be applied to all investments that meet certain thresholds/criteria and is not reliant on individual provisions in various trade agreements, or subject to being applied differently on the basis of individual trade agreement clauses/annexes.

a) On what grounds has the government been able to propose the introduction of the national security test across all foreign investment proposals in Australia without contravening Australian trade obligations?

Answer

We understand that Treasury has previously indicated to the Committee (ref: IQ20-000223) that it sought legal advice from the Office of International Law at the Attorney-General's Department and the Department of Foreign Affairs and Trade in the lead up to and throughout the development of the proposed reforms. It has been the general practice of successive governments not to disclose legal advice provided to government.