



**Australian Government**  
**Department of Foreign Affairs and Trade**



**Submission by DFAT**

**Inquiry into the Foreign Investment Reform  
(Protecting Australia's National Security) Bill  
2020 and Foreign Acquisitions and Takeovers  
Fees Imposition Amendment Bill 2020**

10 November 2020

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## INTRODUCTION

The Foreign Investment Reform (Protecting Australia's National Security) Bill 2020 (National Security Bill) and the Foreign Acquisitions and Takeovers Fees Imposition Amendment Bill 2020 (Fees Imposition Bill) (together, the Bills) update Australia's foreign investment framework by addressing national security risks, strengthening compliance measures, revising fees and streamlining investment in non-sensitive businesses. DFAT considers the proposed changes will enable the Government to better address national security risks, while further public guidance underway on the implementation of the measures will help ensure investor certainty and maximise investment flows.

## HELPING INVESTORS INVEST

Australia operates a foreign investment regime that is open and transparent. We continue to welcome foreign investment and recognise it is vital to our long-term economic success. Investment brings capital, skills and technologies to Australia, creates jobs (one in ten jobs are created by foreign businesses), and helps Australia achieve its economic potential including global success in many industries. Foreign investment will play an important role in supporting the growth of our economy following the COVID-19 pandemic.

To ensure Australia remains competitive in attracting foreign investment, it is important that changes to Australia's domestic regulation, including the proposed reforms to the foreign investment framework, maintain our reputation and credibility as an open and welcoming place to invest, balanced against the need to ensure Australia's national security. In this regard, DFAT endorses the reform package's aim to reduce the regulatory burden on foreign investors.

This includes the introduction of two new types of exemption certifications that will allow a foreign person to apply for an up-front approval for a program of investments without needing to seek separate approvals. The reforms will also streamline review processes for foreign investors who want to invest in non-sensitive businesses by exempting certain entities from being considered a foreign government investor where the investment is considered purely passive.

## ADDRESSING NATIONAL SECURITY RISKS

DFAT supports regulatory change to ensure Australia's foreign investment framework keeps pace with emerging risks and global developments including from rapid technological change. A robust review mechanism that enables the Government to address national security risks helps build community confidence in foreign investment.

Australia is not alone in adjusting its rules. Over recent years, many governments around the world have taken steps to introduce new, or modify existing, rules better to address national security risks with foreign investment. A number of countries responded to COVID-19 by tightening rules to ensure appropriate oversight of foreign investment during this time. Australia did likewise, with the Treasurer announcing on 29 March 2020 temporary measures to ensure the Government had appropriate oversight of foreign investment proposals during the COVID-19 pandemic crisis<sup>1</sup>.

The OECD recently reported to members of its Freedom of Investment Roundtable that there had been a 'very significant' expansion of investment policy-making activity to respond to 'growing concern about threats to essential security interests associated with foreign investment'. Among the 62 economies invited to participate in the Roundtable, 21 countries had made policy changes since September 2019. Just in the first ten months of 2020, the OECD counted 62 different screening policy changes. While some measures were expressly taken or 'fast-tracked' due to the pandemic, the OECD considered that COVID-19 served as an accelerator rather than being the underlying reason for these measures. Before and independent of the COVID-19 crisis, many countries already had mechanisms to protect their essential security interests against threats associated with acquisitions of certain sensitive assets. The proportion of foreign direct investment (FDI) potentially subject to cross-sector investment screening has doubled between 1990 and 2020<sup>ii</sup>.

Key features of the National Security Bill, such as the screening of all national security businesses regardless of value, help ensure the Australian Government has oversight of, and powers to address, national security risks associated with foreign investment. Drawing comparisons between different regimes is difficult, but reporting from DFAT missions overseas indicates a number of countries have, or are introducing, measures to address similar concerns.

## ENGAGING WITH AUSTRALIA'S INVESTMENT PARTNERS

While Treasury leads the stakeholder engagement process, DFAT has played a key role in the Government's engagement with foreign interlocutors on the reforms as one of DFAT's major inward investment policy responsibilities. DFAT's goals have been to communicate the proposed changes clearly, explain the implications for foreign investors, and to provide opportunities for input on the proposed reforms.

DFAT utilises its network of overseas missions to consult with foreign governments, investors and business groups to promote Australia as an investment destination and to better understand investors' strategies and concerns. Since June 2020, DFAT has been working with Treasury and Austrade to notify foreign interlocutors of the reforms, provide information, answer questions and deliver briefings to interested parties.

In our discussions with foreign governments, a majority said they understood the rationale for Australia's proposed changes and expressed appreciation for our open and transparent communication.

A common message DFAT received through outreach was the need to ensure there was clear public guidance on how the reforms would be implemented. Investors and their advisors wanted to know what would, and would not, be captured by the proposed reforms, including the scope of the definition of 'national security business' and its proposed link to the *Security of Critical Infrastructure Act (2018)*. DFAT understands that this feedback has been accepted by the Treasury, which will provide explanatory material to ensure the new rules are well understood. DFAT is committed to supporting the Treasury through this process.

Some foreign interlocutors expressed concern about the 'last resort power' in the National Security Bill that would enable the Treasurer to impose conditions, modify existing conditions, or as a last resort, order divestment, if a national security risk arose after an investment had been made. DFAT notes a number of important safeguards will apply before the last resort power may be exercised, including requiring reasonable steps to have been taken to negotiate an outcome with the investor to reduce or eliminate the national security risks, and the use of other regulatory mechanisms to address the risks where possible.

Some foreign interlocutors expressed concerns about possible delays to FIRB processing times for foreign investment applications. DFAT understands the Treasury has significantly increased its resources and is well-equipped to ensure timely processing of applications consistent with statutory timeframes.

In DFAT's discussions, some stakeholders asked questions about how the proposed reforms complied with Australia's international obligations. Australia carefully considered its international trade and investment obligations throughout this domestic regulatory reform process. The proposed reforms have been designed to be transparent and non-discriminatory.

Some stakeholders raised concerns with the Fees Imposition Bill and the increase to FIRB application fees for some investors. DFAT understands the revised fees will ensure foreign investors, not Australian taxpayers, bear the costs of administering the foreign investment framework.

DFAT values the feedback received from foreign interlocutors, including submissions made to the Treasury. DFAT is committed to continued engagement with interested stakeholders throughout the implementation phase of the proposed reforms.

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<sup>i</sup> The Hon Josh Frydenberg MP, Treasurer, [Changes to Foreign Investment Framework](#), 29 March 2020

<sup>ii</sup> OECD, *Freedom of Investment Project: Inventory of Investment Policy Developments*, DAF/INV/WD(2020)16