

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

Division: Foreign Investment Division
Topic: AUSTRAC, AFP, Noncompliance, Risk-based approach and Assessment of foreign investment proposals against the national interest
Reference: Written

Question:

Additional screening under reduced threshold

On 29 March 2020, the Treasurer reduced to \$0 the monetary screening thresholds for all foreign investments under the Act. The following table provides information from the AFP and AUSTRAC on the number of requests each organisation has received with regard to foreign investment proposals—before and after the threshold reduction.

AUSTRAC

<i>Average per year</i> Approximate number of times Treasury requests information from AUSTRAC ¹	10
<i>Average per year</i> Approximate number times AUSTRAC proactively refers information on a matter of interest to Treasury ²	10
<i>January – June 2020</i> Number of inquiries received by AUSTRAC ³	40
<i>January – June 2020</i> Number of requests to provide assistance received by AUSTRAC ⁴	40

Australian Federal Police

1 July 2019–April 2020 ATO referrals to the Australian Federal Police ⁵	124
1 July 2019–April 2020 Treasury referrals to the Australian Federal Police ⁶	13
<i>July 2019 – March 2020</i> Requests for information from AFP ⁷	127
<i>April 2020 – June 2020</i> Requests for information from AFP* ⁸	89

* AFP stated almost all referrals relate to residential real estate.

Both AUSTRAC and the AFP indicate they have experienced an increase in requests for assistance since the reduction in the threshold to zero.

1. With regard to the screening of investment proposals:

a) What type of investments, that previously would have received no scrutiny because they fell below the thresholds, are now being investigated to the extent the AFP and AUSTRAC are being asked to provide information?

b) What information is generally being requested of AUSTRAC and AFP in relation to these investments?

2. With regard to cases that would previously have fallen below thresholds:

a) How many cases, that would previously have fallen below the thresholds, have been approved?

b) Of these cases, how many have had conditions attached?

c) What proportion are standard taxation and reporting conditions?

d) What proportion are non-standard?

3. How many cases, that would previously have fallen below the thresholds, have not been approved?

Noncompliance

During public hearings, Treasury officials have emphasised the risk-based approach to regulation and the preference to work with a foreign investor to achieve compliance. In some cases, a remediation plan might be required.

Ms Kelley stated where it is not appropriate for noncompliance to be addressed through a remediation plan, or the investor is unable to provide an acceptable remediation plan, other enforcement actions are considered. Treasury has taken no criminal or civil enforcement actions under the Foreign Acquisitions and Takeovers Act 1975 in the past three years.

Recently released draft legislation provides for a number of enhanced compliance, monitoring, and enforcement powers.

4. Why does Treasury judge there needs to be a strengthening of compliance and enforcement capabilities?

5. The Foreign Acquisitions and Takeovers Act already allows for the imposition of penalties, including imprisonment. Treasury can provide no record of these existing penalties being pursued. How will the new penalties introduced in the legislation increase compliance?

6. What instances of non-compliance have led to the introduction of these enhanced powers? For instance, what types of behaviours is Treasury observing that require the introduction of infringement notices, directions, and enforceable undertakings—that cannot be addressed through the current approach to 'encourage' compliance with conditions?

7. With regard to the new regulatory powers:

a. What cases and trends have led the government to recognise the Treasury requires 'the full suite of regulatory powers which are now recognised in the exposure draft of the legislation...so we [Treasury] can continue to monitor foreign investments effectively'?

b. Please provide an analysis of how Treasury's monitoring of compliance has been hampered by the absence of these regulatory powers.

c. What have been the identified gaps in Treasury's monitoring of compliance with conditions?

8. Please explain how non-compliance has been dealt with (absent the proposed new regulatory powers) in cases where it is not appropriate to address non-compliance through a remediation plan or where there has been no acceptable remediation plan, and no criminal or civil enforcement actions have been taken.

9. With regard to compliance culture:

a. Why does Treasury consider that it is necessary to 'encourage a stronger culture of compliance amongst foreign investors'?

b. What specific cases have led Treasury to reach this conclusion?

Risk-based approach and national interest considerations

The regulator performance framework requires the Treasury to take actions that are proportionate to the risks of noncompliance with conditions being managed.

The Foreign Acquisitions and Takeovers Act specifies a condition can only be imposed on an investment approval if 'the condition is required to ensure the investment is not contrary to Australia's national interest'.¹⁵ It can be assumed that to comply with the law, any and all conditions applied to an investment approval are required to protect Australia's national interest.

10. Please provide Treasury's approach to assessing the risks of non-compliance with conditions that can only be implemented if required to protect Australia's national interest.

11. Please provide the policy guidance for the allocation of risk-levels to non-compliance with conditions.

Alinta Energy has been given more than three years to comply with data storage and access requirements. Until such time as this occurs, it could reasonably be assumed that customer data is not sufficiently secure and access to this data is not sufficiently limited to satisfy the requirement that Australia's national interest is protected.

12. Please provide Treasury's assessment, using the risk-based approach, that it was appropriate to provide Alinta Energy with more than three years to ensure all customer data is stored in Australia and to ensure systems are in place to limit access to customer data.

13. Please provide Treasury's assessment of the risk and potential consequences that customer data might be accessed improperly during this time.

Assessment of foreign investment proposals against the national interest

Treasury officials have confirmed a variety of elements can be considered in the assessment of a foreign investment proposal, including the contribution of a foreign investment to: domestic innovation, supporting higher-valued add sectors, research and development, advanced manufacturing, and energy efficiency. For instance, research, further investment, greenfields work, introduction of new technology 'are all, absolutely, taken into account'.

14. If these elements are considered as an integral part of the assessment of a foreign investment proposal not being contrary to the national interest, on what basis does Treasury not monitor the extent to which these actions or undertakings are actually carried out or these contributions occur?

15. If Treasury does not monitor the extent to which such actions are carried out, how does it ensure accuracy in the information provided in foreign investment proposals upon which it makes its decisions that a foreign investment would not be contrary to the national interest?

Answer:

1. a) & b) AUSTRAC and the AFP provide advice and comment on applications received – including those received under the zero dollar threshold screening framework as follows:
- where another consultation partner has raised possible concerns that are relevant to the crime agencies' interests or issues are identified by Treasury
 - where the applicant is an individual, or where a small number of individuals are able to exert significant influence over the applicant entity
 - where the applicant and vendor are associates or related to one another
 - retrospective applications
 - transactions relating to the gambling industry.

They are also consulted if adverse open sourced reporting exists on the applicant or a close associate of the applicant. When AUSTRAC is consulted, its holdings of financial transaction data are searched in relation to identified relevant entities associated with applications.

2. This data is yet to go through the standard quality assurance processes, which are required to provide an accurate breakdown.

3. No cases that would have previously fallen below the investment screening thresholds have been rejected as of 14 September 2020.

4. Reasons for strengthening compliance and enforcement capabilities are set out in the Exposure Draft Explanatory Memorandum for the Foreign Investment Reform (Protecting Australia's National Security) Bill (paragraphs 3.4 and 3.5, at page 53) published on the Treasury Website at https://treasury.gov.au/sites/default/files/2020-07/c2020-99761-explanatory_memorandum.pdf)

5. Refer to the Exposure Draft Explanatory Memorandum for the Foreign Investment Reform (Protecting Australia's National Security) Bill, Chapter 3, Pages 53-84 published on the Treasury website at https://treasury.gov.au/sites/default/files/2020-07/c2020-99761-explanatory_memorandum.pdf

6. See response to IQ20-000038.

7. a) A key trend has been the increasing imposition of conditions on proposals to preserve the national interest.

b) & c) The absence of the standard suite of regulatory powers has limited Treasury's capacity to gather or verify information, in particular through site visits, or to respond proportionately to identify actual or potential non-compliance. See also the response to IQ20-000049.

8. See response to IQ20-000038.

9. a) While our work indicates that, in general, foreign investors meet their obligations, there have been instances of failure to provide the required compliance reporting.

b) Treasury does not publicly comment on specific cases due to protected information provisions under the *Foreign Acquisitions and Takeovers Act*.

10. See response to IQ20-000051.

Information on Treasury's compliance approach, including a Compliance Framework Policy Statement, is available on the FIRB website (<https://firb.gov.au/guidance-resources/compliance-approach>).

11. See response to IQ20-000054.

12. In assessing Alinta's compliance status and in the development of the remediation plan following the submission of Alinta's 2018 compliance report, Treasury engaged closely with consult partner agencies, including agencies with responsibilities for national security issues, that had recommended conditions relevant to customer data storage. The period of three years (ending December 2020) was considered a reasonable timeframe for Alinta to become compliant after weighing up the time needed for software acquisition, identification of third party contracts for data storage and access, and renegotiation of those contracts where necessary, against a range of risk mitigating factors, including the operation of other domestic laws such as the *Privacy Act 1988*.

13. See response to Question 12.

14. Treasury undertakes a wide range of activities to ensure that foreign investors are meeting their compliance obligations. This includes but is not limited to conducting an active Treasury-led audit program (on conditions of approval), monitoring and scrutinising reports provided by investors and third-parties, and reviewing independent audits.

15. See response to Question 14.