

Dr Yongqiang Li  
Senior Lecturer in Law  
College of Law and Justice  
Victoria University

20 March 2020  
Mr Mark Fitt  
Committee Secretary  
Senate Economics Legislation Committee  
Department of the Senate  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600  
AUSTRALIA  
Phone: (02) 6277 3540  
Email: [economics.sen@aph.gov.au](mailto:economics.sen@aph.gov.au)

Dear Mr Fitt,

Re: Inquiry into Foreign Investment Proposals

*Thank you very much for your invitation to make a submission to the following brief inquiry:*

The inquiry will review foreign investment proposals against the national interest test, with particular reference to:

- a) the protection of Australia's market-based system from manipulation that would benefit proposed foreign investment;
- b) the assessment of the impact of proposed foreign investment on market concentration and competition;
- c) the imposition of conditions on foreign investors;
- d) the extent to which the risk that foreign investment proposals are being used for money laundering is examined;
- e) the role of the Foreign Investment Review Board; and
- f) any other related matters.

I submit that the following issues need to be considered in a systematic way in designing new laws or consolidating existing laws and regulations:<sup>1</sup>

1. Identifying the key stakeholders and their unmet needs relating to foreign investment proposals

The key stakeholders concerning foreign investment proposals include but are limited to foreign investors, target local businesses (where investment goes to), local competitors, regulators and gatekeepers for national securities. The following questions need to be asked:

- i. Whose interests count the most? In the era of eruption of COVID-19 coupled with a foreseeable economy slowdown, more weights should be given to groups of significant unmet needs, such as the local businesses, which are struggling to obtain extra funds, and the local market either fails or refuse to fill in the gap. One critical concern, which happens to all decisions relating to 'aliens' is that the foreign investors normally do not have a say in the process.
- ii. Regulators should disclose more statistics and details of the application and approval of proposals within the parameters of confidentiality and privacy laws.

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<sup>1</sup> The submission does not reflect any organisation that the author is associated with.

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The lack of transparency seem to be a major barrier to identify what is the problem facing the legislative reform at the moment before one provides a quick fix. Certain regulators provide no more details than annual reports which speaks which little about the profiles of businesses.

- iii. Asking the right question is more important than finding a quick solution to a wrong question. Which foreign jurisdictions where the foreign investment proposals come from are of particular concern? Which industries are of the concern to the public security?
- iv. In terms of the current administrations of the foreign investment proposals, again this process seem to be a 'black-box'. Is there a rationing system which categorise all the proposals into different categories? For matters which are of little or no risk to the national security, should they be exempted from the assessment or treated lightly so that the regulatory resources can be better utilised for more complex applications?

## 2. Gathering relevant evidence and understanding the status quo

Is the current system sufficient to deal with the foreign investment applications? Are there any problems or concerns that merits systematic treatment by introduction of a new law. If nothing is wrong, there is no need to fix anything.

If it is a routine check, then the review should be done in a structured way so that the review is thorough and rigid. An example of relevance is the foreign investment proposal review undertaken by the EU which looked at the following principles:<sup>2</sup>

- a. Procedures and rules, including time frames, must be transparent;
- b. Relevant rules must set out the conditions for initiating a FDI review, the grounds for screening and the applicable procedural rules on a non-discriminatory manner between third countries;
- d. foreign investors must be able to have recourse to judicial review of the authorities' decisions;
- e. any confidential information must be protected in the review;
- f. to provide for measures allowing the identification and prevention of circumvention of applicable screening mechanism and decision.

## 3. Identifying the reform options

What are the reform options adopted by other jurisdictions for foreign investment proposals?

What are the good practices and lessons learned from the interventions?

What are the lessons learned from the regulatory reforms?

Is there any evidence which supports particular reform option?

## 4. Clarifying the rationales for regulation and stablishing the assessment criteria

It is crucial to identify the rationales for regulation. Whose interest counts in the existing and future regulations? Maintaining the integrity of the market-based system in Australia is critical; however, such actions must take into account the industry structures of the respective industries in Australia, whether the world is competing for foreign investment in strategic but less risky

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<sup>2</sup> Article 3 of the EU Framework Regulation.

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industries, globalisation and digitalisation. New measures should also be introduced to curb racism and discrimination so that Australia retains to be a democratic and fair country.

Assessment criteria which may apply include efficiency, effectiveness, accessibility, equity and political and practical feasibility.

Article 3 of the EU Framework Regulation outlined the factors of an FDI on the areas of:

- a. Critical infrastructure, physical or virtual (such as energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, sensitive facilities, as well as land and real estate crucial for the use of such infrastructure);
- b. Critical technologies and dual-use items (such as artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy, storage, quantum and nuclear technologies, nanotechnologies and biotechnologies);
- c. Supply of critical inputs (such as energy, raw materials or food security);
- d. Access to sensitive information (such as personal data or the ability to control such information);
- e. Freedom and pluralism of media;
- f. Ownership of foreign country government through ownership or significant funding;
- g. Whether the foreign investor has been involved in activities affecting security or public order; and
- h. There is a serious risk that the foreign investors engages in illegal or criminal activities.

5. Predicting the potential impacts of each reform options

The regulatory impact analysis should be strictly adhered to. Close monitoring and disclosure of the regulatory compliance and enforcement should be strengthened. Transparency will be a key requirement for the regulatory authorities.

6. Engaging the relevant stakeholders for feedback and make a final decision on the most appropriate reform option whilst keeping the options open for further reforms

The reforms options identified should be evaluated and details of implementations thoroughly consulted with the key stakeholders. There should be zero tolerance to criminal and illegal activities before, at and after the application of the foreign investment proposals. The regulatory authorities must monitor the behaviour and actions of the foreign investors proactively on a regular basis. At the same time, national security grounds used by MPs should be contained to only critical matters which menace the stakes of the state. In other words, the MPs should not be burdened with making decisions on any individual foreign investment proposals.

Yours sincerely,  
Dr Yongqiang Li