Senate Economics References Committee:
Inquiry into foreign investment proposals

The Department of Foreign Affairs and Trade (DFAT) and the Attorney-General's Department (AGD) note our previous communications with the Committee, namely the joint written responses to questions on notice provided on 28 September and 15 October 2020 in which we sought to assist the Committee.

Given the Committee's invitation to provide further information or clarification, we have endeavoured to do so here, within the constraints identified in our earlier responses.

Current reform package

Like other countries, Australia has had cause to re-examine the effectiveness of its foreign investment screening regime in response to a rapidly evolving foreign direct investment environment, including increases in ownership-related national security risks.

We note that Treasury is the agency with policy responsibility for Australia's foreign investment screening regime, and that it has previously provided the Committee (ref: IQ20-000223) with details of when it sought legal advice from AGD and/or DFAT in relation to the *Foreign Acquisitions and Takeovers Act 1975* (the Act) reform package recently passed by the Australian Parliament.

We can reassure the Committee that the Government has carefully considered its international trade and investment obligations in developing the reform package.

Hypothetical proposals

In determining whether a particular proposal is 'permitted' under Australia's international trade and investment obligations it is necessary to understand the precise nature of what is being proposed. In this regard, we note that the Committee's request for further information/clarification referred in broad terms to three hypothetical proposals:

- "introduce a positive national interest test into the *Foreign Acquisitions and Takeovers Act* that would require prospective foreign investors to demonstrate how their investment would benefit Australia;
- introduce a provision in the Act that would define the 'national interest'; or
- make enforceable any 'voluntary undertakings' detailed by an applicant when an application is lodged."

Further detail of these proposals would be necessary in order to undertake a case-by-case analysis of all the relevant facts and circumstances regarding each proposal.

For example, amongst other things, it would be important to know in relation to:

- *a positive national interest test*: whether this would be defined in legislation or guidance material; the content of any such definition; and how prospective foreign investors would be required to demonstrate that their proposed investments would benefit Australia

- *defining national interest*: the content of the proposed definition; whether it would be an inclusive or an exhaustive definition; and the level of discretion available to the decision maker; and
- *making voluntary undertakings enforceable*: whether this would apply retrospectively; the types of undertakings that may be sought from prospective investors; and the available enforcement options.

Key steps in legal analysis

Only with greater clarity about the nature and content of the proposals would it be possible to step through the legal analysis to determine whether each of the three hypothetical proposals was 'permitted' under Australia's international trade and investment obligations. Some of the key steps that would need to be considered as part of this analysis are set out sequentially below.

i. What are the sources of relevant international trade and investment obligations?

Australia's international trade and investment obligations are derived from various sources, including our free trade agreements (**FTAs**), bilateral investment treaties (**BITs**) and the World Trade Organization (**WTO**) agreements.

Australia currently has 15 FTAs in force (listed with the entry-into-force date):

- Australia-New Zealand (ANZCERTA or CER) – 1 January 1983
- Singapore-Australia (SAFTA) – 28 July 2003
- Australia-United States (AUSFTA) – 1 January 2005
- Thailand-Australia (TAFTA) – 1 January 2005
- Australia-Chile (ACl-FTA) – 6 March 2009
- ASEAN-Australia-New Zealand (AANZFTA) – 1 January 2010 for eight countries: Australia, New Zealand, Brunei, Burma, Malaysia, the Philippines, Singapore and Vietnam. For Thailand: 12 March 2010. For Laos: 1 January 2011. For Cambodia: 4 January 2011. For Indonesia: 10 January 2012
- Malaysia-Australia (MAFTA) – 1 January 2013
- Korea-Australia (KAFTA) – 12 December 2014
- Japan-Australia (JAEPA) – 15 January 2015
- China-Australia (ChAFTA) – 20 December 2015
- Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) – 30 December 2018
- Australia-Hong Kong (A-HKFTA) – 17 January 2020
- Peru-Australia (PAFTA) — 11 February 2020
- Indonesia- Australia Comprehensive Economic Partnership Agreement (IA-CEPA) – 5 July 2020
- Pacific Agreement on Closer Economic Relations (PACER) Plus - 13 December 2020.

Australia also currently has 15 BITs in place with the following countries (listed with year of entry into force): Argentina (1997), China (1988), Czech Republic (1994), Egypt (2002), Hungary (1992), Laos (1995), Lithuania (2002), Pakistan (1998), PNG (1991), Philippines (1995), Poland (1992), Romania (1994), Sri Lanka (2007), Turkey (2009) and Uruguay (2002).

Further, of the various WTO agreements, the most relevant in the present context are the *Agreement on Trade-Related Investment Measures* and the *General Agreement on Trade in Services.*

The obligations contained in Australia's FTAs and BITs, as well as in WTO agreements, vary and the drafting of particular obligations may differ between agreements. Accordingly, when conducting legal analysis it is necessary to consider the specific provisions in each relevant agreement.

ii. Is a proposed measure covered by a relevant agreement?

In determining whether a proposed measure is covered by a particular agreement it is necessary to consider threshold provisions, such as those dealing with definitions, scope, and relation to other chapters.

iii. Is there a prima facie breach of an obligation?

Assuming a proposed measure is covered by a relevant agreement, the next question to ask is whether it is likely to breach any relevant obligations in that agreement. Many obligations contain safeguards, which are built into rules to narrow the scope of obligations and protect legitimate government regulation.

One of Australia's core trade and investment obligations is national treatment, which is focused on non-discrimination. It essentially requires Australia to accord protected investors/investments treatment no less favourable than it accords to national investors/investments in like circumstances.

iv. Is a reservation, exception or carve-out available?

Assuming a proposed measure is prima facie in breach of an obligation, the next question to ask is whether there are any relevant reservations, exceptions or carve-outs which may justify this breach. It is important to consider the range of reservations, exceptions and carve-outs in a particular agreement holistically.

Again, the reservations, exceptions and carve-outs contained in Australia's FTAs and BITs, as well as in the WTO agreements, vary and the drafting of particular reservations, exceptions and carve-outs may differ between agreements. Accordingly, it is necessary to consider the specific provisions in each relevant agreement.

The reservations, exceptions and carve-outs in our FTAs include non-conforming measures, general exceptions and security exceptions.