

MEMO# 32807

October 5, 2020

ICI Global Letter on Proposed Changes to the Australian Foreign Investment Review Framework

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October 5, 2020 TO: ICI Global Members SUBJECTS: International/Global RE: ICI Global Letter on Proposed Changes to the Australian Foreign Investment Review Framework

In June 2020, the Australian Government released a paper outlining comprehensive reforms to Australia's foreign investment review framework.^[1] The reforms include measures to strengthen the existing foreign investment review framework with enhanced national security review of sensitive acquisitions, extra powers and resources to ensure foreign investors comply with the terms of their approval, and amendments to streamline investment in non-sensitive areas. The Government is seeking to make these changes so that it is better able to address emerging national security risks that arise from foreign ownership, such as powers to screen any direct investment^[2] on national security grounds regardless of value. The proposed changes also include measures to reduce the regulatory burden for certain investments that do not pose national security risks, and provide greater clarity on the scope and application of the *Foreign Acquisitions and Takeovers Act 1975 (FATA)*.

Under the proposed reforms, the Government will, among other things, introduce a new national security test which will:

- enable the Treasurer to impose conditions or block any investment by a foreign person on national security grounds regardless of the value of investment;
- require mandatory notifications of any proposed investment acquisition of a direct interest by a person in a sensitive national security business;
- require mandatory notification where a business or entity owned by a foreign person starts to carry on the activities of a sensitive national security business;
- allow any investment that would not ordinarily require notification to be "called in" for screening on national security grounds;
- allow investors to voluntarily notify to receive investor certainty from "call in" for a particular investment or apply for an investor-specific exemption certificate; and
- allow the Treasurer to impose conditions, vary existing conditions, or, as a last resort, require the divestment of any realized investment which was approved under the FATA where national security risks emerge.

The proposed exemption certificates will enable foreign persons to apply for a time-limited investor-specific exemption that permits them to make eligible acquisitions without case-by-case screening. Such certificates will be granted where the foreign investor has been assessed as not posing a risk to national security; once approved, the investor will no longer face the time, cost, and regulatory burden of separate applications.

At the end of July and mid-September, the Government released two consultations on the proposed reforms, which included the exposure draft of the *Foreign Investment Reform (Protecting Australia's National Security) Bill 2020* and amendments to the *Foreign Acquisitions and Takeover Regulation 2015 (Regulation)*.^[3] The September consultation sought feedback on certain proposed changes to the Regulation, including two sections specifying that a foreign person may apply for an exemption certificate, one for actions that would otherwise be notifiable national security actions, and one for actions that would otherwise be reviewable national security actions. Critically important details regarding the operation of the certificates, however, was not provided, making it impossible for industry participants to evaluate whether the exemption certificate process will be practically workable and provide the relief for certain investors that we believe the Government intends to provide. On October 2, we submitted the attached comment letter requesting that the Australian Government issue a consultation on any proposed guidance note and/or form of exemption certificate specifying the details of the exemption certificate process so that interested parties could provide constructive feedback.

In our letter, we also requested changes to the proposed new Register of Foreign Ownership that will (1) require a foreign person to register certain events, including an event relating to an exemption certificate, and (2) require notification, within 30 days, when a foreign person changes its interest upon holding five percent or more interest. First, we recommend that foreign persons that are subject to existing reporting and disclosure requirements of substantial shareholding of companies under the Corporations Act be exempt from registering those foreign interests in the register because this would, in effect, be duplicative and unnecessary. Second, we requested that the 30-day time period provided for a foreign person to register an interest or provide notice of a change of interest be revised so that foreign persons can report such transactions on a net basis, such as at the end of a financial reporting period.

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[Attachment](#)

endnotes

[1]
<https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/major-reforms-australias-foreign-investment-framework>.

[2] A direct interest in an entity or business is defined in section 16 of the *Foreign Acquisitions and Takeovers Regulation 2015*.

[3] The July consultation documents are available at

<https://treasury.gov.au/consultation/c2020-99761> and the September consultation documents are available at <https://treasury.gov.au/consultation/c2020-113460>.

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