THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: BLC:JvdPlb100322

10 March 2022

Manager
Policy Framework Unit, Foreign Investment Division
The Treasury
Langton Crescent
Parkes ACT 2600

By email: FIRBStakeholders@treasury.gov.au

Dear Sir/Madam,

Enhancing Australia's foreign investment framework

The Law Society of NSW appreciates the opportunity to participate in this consultation to assist in informing the Government's consideration of further foreign investment reform options. The Law Society's Business Law Committee contributed to this submission.

Our comments are general in nature rather than specific responses to the questions set out in the consultation paper '*Enhancing Australia's foreign investment framework reforms*' (Consultation Paper).

General Comments

We welcome the ongoing reform process to enhance the foreign investment framework. The Consultation Paper builds on the earlier consultations that sought feedback on the operation of the foreign investment reforms which came into effect in 2021.

We note that several matters raised in the Law Society's submission to the earlier consultation (attached) appear not to have been addressed. The proposed foreign investment reforms considered in the Consultation Paper raise similar concerns to those we have previously expressed, in relation to the recent changes to national security legislation. In particular:

- the significantly increased scope of activities, assets and interests that are covered by the definition of critical infrastructure assets and related definitions;
- the extent of ministerial discretion to declare assets, activities or interests to be (or not to be) covered by those definitions; and
- the lack of transparency around such decisions.

These factors make investing in Australia less predictable, and therefore more risky and potentially less attractive as a destination for foreign investment. Significantly increased ministerial discretion has been a feature of the foreign investment reforms since 2020, with limited to no transparency arguably compromising the Government's position of promoting foreign investment.

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney
ACN 000 000 699 ABN 98 696 304 966
lawsociety.com.au
T +61 2 9926 0333 F +61 2 9231 5809
E lawsociety@lawsociety.com.au
Law Council OF AUSTRALIA
CONSTITUENT BODY

Areas to reduce regulatory burden

We consider that less sensitive transactions, such as 'top hatting' or other corporate reorganisations where the ultimate ownership structure of a corporate group does not change, should be exempted from the requirement to seek a no objection notification from the Foreign Investment Review Board (FIRB). A narrow and targeted corporate reorganisation exemption under the *Foreign Acquisitions and Takeovers Regulations 2015* (Cth) could provide the flexibility to facilitate corporate reorganisations, while ensuring that individual members of a corporate group are not provided an exemption for other purposes.

Investment requiring greater scrutiny

The policy rationale for excluding water entitlements from the foreign investment regime is not clear. We consider that the omission of water entitlements from the foreign investment regime, and particularly from the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (Act) should be remedied. There does not seem to be a sound policy rationale for excluding these interests from the framework.

Exemption certificates

Consistent with the intention of reducing the regulatory burden imposed by the foreign investment regime, we would be supportive of increasing the scope, timeframes, and financial limits of exemption certificates. Exemption certificates have been an effective mechanism under the Act for many regular investors. However, to ensure that the foreign investment regime continues to promote a favourable investment environment, the scope of exemption certificates should be expanded, where doing so would not be contrary to the national interest.

If the scope for issuing exemption certificates were to be expanded, the criteria for granting an exemption certificate should be transparent and consistently applied. Adding a clearly articulated criteria for any expanded exemption certificate regime to the FIRB Exemption Certificate Guidance Note would be a welcome measure.

Compliance and enforcement

We query whether some of the options for additional enforcement tools canvassed may be more efficiently administered through a stand-alone statutory agency, rather than with the Treasurer under Part 3 of the Act.

Refund of fees

We suggest that consideration is given to allowing a refund or partial refund of fees payable by bidders who are unsuccessful in a competitive bid process. While there is a current practice of FIRB crediting fees to applicants where they have not been successful in acquiring an asset, we would recommend that the option also be provided for applicants to receive a refund in full.

If you have any questions about this submission, please contact Liza Booth, Principal Policy Lawyer, at liza.booth@lawsociety.com.au or on (02) 9926 0202.

Yours faithfully,

Joanne van der Plaat
President

Encl.

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: BLC:JWlb310821

31 August 2021

Manager
Policy Framework Unit, Foreign Investment Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: FIRBStakeholders@treasury.gov.au

Dear Sir/Madam,

Evaluation of the 2021 foreign investment reforms

The Law Society of NSW appreciates the opportunity to participate in this consultation to evaluate the 2021 foreign investment reforms. The Law Society's Business Law Committee contributed to this submission.

Our comments are general in nature rather than specific responses to the questions set out in the Consultation Paper "Evaluation of the 2021 foreign investment reforms".

One concern expressed by multiple stakeholders at the recent roundtables is that, notwithstanding the Foreign Investment Review Board's (FIRB) latest report, the processing times for certain applications are increasing in length. While we note that the FIRB Annual Report of 2019-2020 notes the Treasury median processing time has extended from 41 days in 2018-19 to 48 days in 2019-20 (average period), our members are aware of instances where processing periods have substantially exceeded the average period. Anecdotally, we understand that there is a strong perception that extended processing periods for foreign investment applications are jeopardising foreign investment in Australia and the attractiveness of Australia as a destination for foreign direct investment. This development is contrary to the expressed intention of the FIRB in facilitating investment.

We also note that there are potential legislative changes arising from current consultations that are likely to have a significant impact on the legislative reforms that were introduced from 1 January 2021. These include proposed changes to the definition of "national security business".

Under the new "national security test", proposed investments concerning a "national security business" or "national security land" are subject to mandatory notification to the FIRB. A "national security business" is one carried on wholly or partly in Australia that concerns a critical infrastructure asset, telecommunications, or goods, services, or information for military or intelligence use. "Critical infrastructure asset" has the meaning given in the *Security of Critical Infrastructure Act 2018* (Cth) (**SOCI Act**) – currently defined to cover critical assets in electricity, gas, water and port sectors.

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney
ACN 000 000 699 ABN 98 696 304 966
lawsociety.com.au
T +61 2 9926 0333 F +61 2 9231 5809
E lawsociety@lawsociety.com.au
Law Council OF AUSTRALIA
CONSTITUENT BODY

As you will be aware, the Security Legislation Amendment (Critical Infrastructure) Bill 2020, amending the SOCI Act, proposes to substantially broaden the categories of critical infrastructure to include new classes of assets in 11 industry sectors (including data storage and processing, financial services, food and grocery, transport and communications sectors). If the Bill, which is currently under consideration by the Parliamentary Joint Committee on Intelligence and Security, passes the Parliament, it could have significant implications for what would constitute a national security business under the *Foreign Takeovers and Acquisitions Act 1975* (Cth). We note that this consultation also coincides with the work of the Department of Home Affairs on potential options for regulatory reforms and voluntary incentives to strengthen the cyber security of Australia's digital economy.[1] This work may also impact on the "national security business" definition.

Appreciating the foreign investment regulatory regime involves a balance between facilitating foreign investment, while protecting Australia's national interest, there are concerns that the growing complexity of the foreign investment legislative regime is undermining previous legislative efforts to simplify Australia's foreign investment regulation. The *Foreign Acquisitions and Takeovers Legislation Amendment Act 2015* (Cth) (Amending Act) essentially repealed the *Foreign Acquisitions and Takeovers Act 1975* (Cth) in favour of a simplified and modernised legislative framework. There was a recognition at the time by the FIRB and the Parliament that the *Foreign Acquisitions and Takeovers Act 1975* (Cth) had become too complex. That 2015 reform to bring greater simplicity to Australia's foreign investment regulation is likely to be compromised with these further proposed amendments.

Arguably there should be a further evaluation of the foreign investment reforms to gauge the effect of these related critical infrastructure reforms, if implemented. Part of such an evaluation should, in our view, involve consideration as to whether the foreign investment regulatory regime can be simplified, notwithstanding the significant reforms that have been introduced over the last 12 months and are likely to be introduced in the short term.

If you have any questions about this submission, please contact Liza Booth, Principal Policy Lawyer, at liza.booth@lawsociety.com.au or on (02) 9926 0202.

Yours sincerely,

Juliana Warner
President

[1] Australian Government, Department of Home Affairs, '*Strengthening Australia's cyber security regulations and incentives*" July 2021 accessed at https://www.homeaffairs.gov.au/reports-and-publications/submissions-and-discussion-papers/cyber-security-regulations-incentives