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Manager
Policy Framework Unit
Treasury
Langton Cres
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Via email: FIRBStakeholders@treasury.gov.au

Dear Sir/Madam

CPA Australia's submission on the exposure draft of the Foreign Investment Reform (Protecting Australia's National Security) Bill 2020

CPA Australia represents the diverse interests of more than 166,000 members working in over a 100 countries and regions around the world, including nearly 50,000 members working outside of Australia, many of whom are advising businesses on a range of matters, including investment decisions. We make this submission on behalf of our members and in the broader public interest.

We acknowledge that the intent of the reforms is to strike a balance between the benefits of foreign investment and emerging national security concerns. Whether the Bill achieves that balance will be determined by how the proposed law is implemented.

Investors, advisers and financiers will be playing close attention to how these proposed broad powers are implemented and will be factoring that into their future investment decisions.

Feedback from our members working in Asia indicates that the policy announcement and Bill has created the impression that Australia is potentially no longer as welcoming to foreign investment. Whether or not this perception is justified, its existence suggests that the Federal Government will need to consider how it might aim to counter it, if it does not want to see capital inflows impacted.

The Bill proposes to grant the Treasurer broad powers to review foreign investments on national security grounds, with no monetary threshold. This will potentially create investor uncertainty (and uncertainty for their financiers), and may lead to reduced capital inflows, at least in the short to medium-term until it is clearer how the powers will be applied in practice.

Given the wide definition of a 'national security business' and the fact that the Bill proposes to give the Treasurer the power to issue a no objection notification to a 'notifiable national security action', it is possible that many proposed foreign investors will make voluntary notifications to the Treasurer to seek such a no objection notification, even where the investment clearly has no national security implications. Arguably, it is likely that the receipt of such a notification will become a condition precedent to many investments, as it removes the risk that the Treasurer's 'last resort' power will be exercised post the completion of an investment transaction.

If this was to transpire, the resources of Foreign Investment Review Board (FIRB) will need to be increased so that such notifications can be handled expeditiously. This will assist Australia maintain its reputation as a country welcoming to foreign investment.

The Treasurer's 'last resort' power to order the foreign investor to undo the whole, or part, of their investment or to require the foreign investor to divest within a specified time, is likely to impact foreign investor and financier confidence. While we note that the Explanatory Memorandum (EM) states that the Government expects that the overwhelming majority of investments will not be called in for review, it is unclear what level of comfort foreign investors, their advisers and financiers can take from that statement – they will instead focus on how the power is applied in practice.

It will be worth noting the impact the last resort power may have on foreign investment in tech start-ups. We envisage that there may be scenarios where a foreign investor provides seed capital to an Australian start-up to, for example, develop a highly speculative communications technology. If the start-up succeeds developing such a technology, what is not clear is if it creates a national security concern given the foreign ownership, and hence, will the Treasurer use his or her last resort power to potentially require the investor to divest themselves from the start-up? Such uncertainty could reduce foreign investor appetite for Australian start-ups, and deprive that sector of critical expertise that often comes with such investments. Conversely, the foreign investor may require the Australian start-up to move the development of such technology to their home jurisdiction or another jurisdiction more friendly to them. In either case, it may jeopardise the further development of Australia's high-tech sectors.

There appears to be many questions, already in the public domain and which we will not repeat here, around the application of the proposed law, especially from business and investment advisers. We recommend that the EM be expanded to include responses to some of those issues and that the FIRB be given additional resources to quickly develop guidance on these questions.

While we recognise it is not the intention of the government to issue a 'negative list' of industries not open to foreign investment, some of our members have suggested the government consider the benefits of issuing a 'positive list' of industries into which the government is actively seeking foreign investment. While this may skew foreign investment decisions, our members in Asia indicated that this may send a message that Australia is seeking foreign investment and will help to counter some of the negative reactions to these proposed reforms.

If you have any queries on this submission, please do not hesitate to contact Gavan Ord, Manager Business and Investment Policy on 0419 547 782 or gavan.ord@cpaaustralia.com.au.

Yours sincerely

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