

31 August 2021

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

Email: FIRBStakeholders@treasury.gov.au

Evaluation of the 2021 foreign investment reforms consultation

Dear Sir/Madam,

The Australian Investment Council (**the Council**) is pleased to provide a submission to Treasury in response to the "Evaluation of the 2021 foreign investment reforms: consultation paper" dated 27 July 2021 (**2021 FIRB measures**).

As the industry association for private capital in Australia, the Council is supportive of policy initiatives and reforms that help ensure our economy is competitive, innovative and able to support Australia now and into the future.

Private capital investment has played a central role in the growth and expansion of thousands of businesses and represents a multi-billion-dollar contribution to the Australian economy each year. Our members are the standard-bearers of professional investment and include private equity (**PE**), venture capital (**VC**) and private credit (**PC**) funds, alongside family offices and institutional investors such as superannuation and sovereign wealth funds, as well as leading financial, legal and operational advisers. Our members include both Australian domestic and offshore-based firms.

Private capital fund managers invest billions of dollars into Australian companies every year. Australian-based PE and VC funds under management reached \$37 billion in 2020, which represents a growth in available capital to support investment into businesses across every industry sector of the economy. The industry now has a combined total of around \$14 billion in equity capital available to be invested in the short-term.

Investments made by private capital firms into Australian businesses directly result in the creation of new jobs and support growth in economic output across all sectors of the market. These investments represent 2.6 per cent of Australia's GDP output each year and are responsible for creating around 1 in 9 new Australian jobs according to independent analysis by Deloitte Access Economics.¹

Given the impact of the COVID pandemic and the uncertain times that lay ahead, and as a net importer of capital, Australia's economy relies on a dependable and steady flow of foreign capital to drive economic growth and job creation. At this critical juncture, it is vitally important for our economic recovery, and Australian jobs, that businesses are able to quickly and efficiently access capital from domestic as well as offshore investors. Any real or perceived concerns around the operation of Australia's foreign investment review regime must be made with the current state and future economic needs of our economy as a central guiding principle.

Consistent with our extensive involvement in foreign investment policy and regulatory reforms over recent years, the Australian Investment Council remains supportive of a comprehensive clear, predictable and efficient foreign investment review framework. Although the measures in effect from 1 January 2021 are still relatively new, we believe that consistent themes and issues are emerging from the experiences of investors and advisors. As

¹ [Private Equity Growth and Innovation](#), Deloitte 2018



highlighted in our previous submissions, these uncertainties have the potential to dampen foreign investment into Australian businesses, deter overseas financiers from participation in Australian debt markets and increase funding costs, at a time when investment capital and debt finance is of critical importance to the nation's economy.

The Council welcomes this timely consultation on the 2021 FIRB Measures and we set out our submission below.

- 1) **Development of Guidance Notes** – we understand that there is typically a very limited and select consultation on any new Guidance Notes prior to their implementation, with many participants only becoming aware of a change in guidance or new guidance after publication. The Council encourages Treasury to continue to expand the scope of consultation on changes to guidance notes as they are being developed. There are recent examples of how specific consultation processes with the Council have – in our opinion – assisted FIRB in delivering guidance that has a positive effect on market certainty for investors and legal advisers to those investors.
- 2) **Macroeconomic issues** – the 2021 FIRB Measures have had different impacts on different investors. Some investment funds have needed to reconsider their investment structures and to be more selective with specific investors when raising funds or when making an investment. We understand that arises because of the potential for certain investors (typically passive investors which are nonetheless classified as “foreign government investors”) to either opt-out of investments themselves for confidentiality reasons or because the investment fund believes that participation of that passive foreign government investor will impede future market processes or timetables. This has the potential to create market distortions as it may impact on the ability of the investor to actually make the investment, and if it does, it may impact on the mechanism and instruments used to make that investment. Given the desire to attract productive foreign investment into Australia, the Council recommends that Treasury consider a different approval approach where the only participation of a foreign government investor is in a passive limited partner role with no role in investment decision making (which we expect to be the situation in nearly all cases) and the fund is managed in, or takes advice from, Australian investment managers.
- 3) **General observations on Exemption Certificates (ECs)** – the Council supports the use of ECs, as a matter of principle, in providing investors with certainty. However, many investors have noted that the conditionality and exclusions imposed in these certificates (especially around national security – see point 5 below) requires them to reapply on a transaction-by-transaction basis, thereby reducing their overall utility. The Council recommends that Government give further and ongoing consideration to the establishment of a more comprehensive pre-approvals process being made available to specific investors, particularly for those investors who have a long and demonstrated track record of managing assets based in Australia, and who have a demonstrable track-record of complying with all conditions and national security obligations established under the policy objectives of the new regime.
- 4) **New passive foreign government Exemption Certificate** – although this Exemption Certificate has only recently been introduced, there remain some areas of uncertainty and practical market experience still to be established around precisely which entity should be paying for these certificates. The Council recommends that further and ongoing consultation with the private capital investment industry takes place, and that consideration be given to a low (or different) fee structure for this type of EC going forward.
- 5) **National security matters (approvals and conditions)** – the potential application of the new types of action – being the notifiable national security action (NNSA) and the reviewable national security



actions (RNSA) – has resulted in a significant burden being placed on investors to understand whether they may be potentially impacted by the measures. Given the significant consequences of a failure by the investor to seek such approval, many investors are preferring to apply given the informational asymmetry which may exist between investors and Government. This has resulted in increased costs and delayed transaction timetables having the potential to create market distortions. We also understand that there is a perception that investors are not all treated similarly given the nature of the separate processes and the conditions which may be imposed on them. The Council recommends FIRB provide clearer guidance on investments of concern, as well as a direct and early opportunity to engage with any agency raising questions or concerns around the proposed transaction, and proposed conditions of approval. We also recommend that a more transparent approach be communicated to the market around which matters are of importance and the types of conditions likely to be imposed.

- 6) **Delays in decision-making** – we understand that many, if not most, investors are experiencing significant delays in obtaining relevant approvals of up to three to five months (and longer in some cases), well in excess of statutory and expected timeframes. These delays give rise to the creation of market distortions between participants (for example between those who don't require approval and those who do, as well as between participants who need approval depending on how advanced they are with the approval process). The Council fully appreciates the challenges that Treasury has been required to manage over the past 18 months or so in the context of the new regime, and that it will take time for the newly added resources to become more proficient in the application of the new regime to specific types of market transactions. Consistent with the Council prior recommendations to Government, we suggest that additional resourcing be made available for Treasury to the extent possible. The adoption of various recommendations included in this submission will also provide an opportunity for greater efficiency in FIRB review processes to be embedded over time.
- 7) **Fees** – many investors have raised concerns around the fee structure where significant and globally uncompetitive fees are levied. Many investors have also raised the concern that they may be left paying fees in “auction like” situations, with minimal engagement with FIRB up to the point of their withdrawal from a sales process, and where the bulk of the work is in fact undertaken with the successful bidder. As a result, we understand that some investors are deferring their engagement with FIRB until such time as they are more likely to be successful. We also understand that this has the potential to “crowd-out” many smaller investors. The Council recommends that consideration be given to a full or partial fee rebate for unsuccessful bidders in such processes, in order to reflect the actual cost of engaging with the relevant underbidding party. In addition, for successful bidders, the fees are often very significant when compared to many comparable jurisdictions (such as Canada which does not charge a fee and New Zealand which charges a low fixed fee), and are often also borne in subsequent bolt-on or downstream acquisitions. We recommend that a separate review of FIRB fee structures be initiated in the near future to assess the extent to which current fees remain globally competitive with comparable jurisdictions; it is vitally important that investment into Australia be as competitive as possible on every level, including in the area of fees and costs of doing business here.
- 8) **Subsequent reorganisations and capital transactions** – some investors have advised that they are spending significant time and money on transactions after an acquisition has occurred such as internal reorganisations, internal fund transfers and capital returns. The Council recommends that investors should only be obliged to notify – as opposed to seeking separate approvals for such transactions – especially where they do not involve foreign government investors and do not involve national security businesses.



The Council provides this submission for consideration by the Treasury and looks forward to participating in any future discussion around these matters.

If you have any questions about specific points made in our submission, please do not hesitate to contact me or our policy team via email at policy@aic.co.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Yasser El-Ansary', with a horizontal line underneath.

Yasser El-Ansary
Chief Executive