HOLDING REDLICH

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Dear Sir/Madam

Submission on draft Foreign Investment Reform (Protecting Australia's National Security) Bill 2020 and draft Regulation Foreign Investment Reform (Protecting Australia's National Security) (National Security Business) Regulations 2020

Introduction

1. Holding Redlich is a large national law firm with offices in Melbourne, Sydney, Brisbane and Cairns. We provide a complete range of legal services for clients of all sizes including many large public and private companies as well as all levels of government.

2. We are pleased to provide this submission in response to the Government's proposed reforms to Australia's foreign investment review framework under the *Foreign Investment Reform (Protecting Australia's National Security) Bill 2020* (**Draft Bill**) and *Foreign Investment Reform (Protecting Australia's National Security) (National Security Business) Regulations 2020* (**Draft Regulations**) (collectively, **Proposed Legislation**).

3. Our submission proposes further technical and integrity amendments of the *Foreign Acquisitions and* Takeovers *Act 1975* (**Act**) and *Foreign Acquisitions and Takeovers Regulation 2015* (**Regulation**) (collectively, **Current Legislation**).

Current Legislation - Foreign government investor starting an Australian business as a significant action and notifiable action

4. Section 56(1)(b) of the Regulation provides that an action is a significant action and notifiable action, if the action is a foreign government investor starting an Australian business.

5. The meaning of "starts an Australian business" and "foreign government investor" are defined in sections 10 and 17 of the Regulation respectively.

Unintended consequence – change in the nature of a foreign person from non-foreign government investor to foreign government investor

6. While we fully appreciate the policy consideration behind this provision, we are concerned that the provision (and other relevant provisions in the Act and Regulation), in its current form, fails to

recognise the scenario where there is a change in the nature of a foreign person's character from a non-foreign government investor to a foreign government investor after it has started an Australian business as a non-foreign government investor.

7. Consider, for example, a situation where a foreign person was a non-foreign government investor when it first started an Australian business but subsequently became a foreign government investor. This could occur where there is a subsequent change in the shareholding structure of the foreign person (at any level), which results in the foreign person becoming a foreign government investor. For example, if the ultimate holding entity of an Australian subsidiary becomes a foreign government investor due to a change in shareholding at the ultimate holding company level, the Australian subsidiary will also become a foreign government investor by application of the tracing rule. In our experience, this type of scenario is quite common where the ultimate holding entity is an entity which is listed on a foreign stock exchange.

8. One may strictly interpret the Current Legislation and conclude that the foreign person will have breached section 81(1) of the Act as soon as it becomes a foreign government investor, even where such conversion is caused by a change in the shareholding of its ultimate holding entity.

9. We consider that this is unlikely to have been the intention of the legislators in respect of the Current Legislation. Further, such an interpretation of the Current Legislation would be unfairly onerous to foreign investors. We consider that the operation of the Current Legislation should be amended in order clarify the position that the "foreign government investor" (which could, as described above, be an Australian incorporated entity) needs to satisfy in such circumstances.

Recommendation

10. We note that neither the Draft Bill nor Draft Regulation has made a reference to the above-stated scenario.

11. As such, we recommend further technical amendments be incorporated in the Proposed Legislation so that, in summary:

    (a) for the purpose of section 56(1)(b) of the Regulation, a foreign person would only be deemed to be a "foreign government investor" after a reasonable period of time (e.g. 30 days) (**Transition Period**) following its conversion into a "foreign government investor" from a "non-foreign government investor".

    (b) Before the end of the Transition Period, the foreign person (which has converted into a "foreign government investor") must notify the Treasurer of the Australian business it has undertaken since the time when it started an Australian business as a "non-foreign government investor".

    (c) During the Transition Period, the foreign person would not be deemed to have breached section 81(1) of the Act.

    (d) During the Transition Period and the statutory decision period, the foreign person would be able to continue with its Australian business without being in breach of the Act or the Regulation.

    (e) The Treasurer may exercise its powers under Division 2 of the Act in regard to the significant action.

We trust that our above-stated recommendation may be helpful in rectifying any unintended consequences of the Current Legislation described above and in improving the integrity of the legislative framework.

We thank the Government for the opportunity to put forward our recommendation in this letter and look forward to discussing any of the matters described above if required.

Yours sincerely

Holding Redlich