Joseph Lee
Barrister (ACT); Advocate & Solicitor (Malaysia)
LLB (Hons)(Tas) LLM by Research (Tas)
PhD Candidate (ANU)

Room 5.3.7, Building 5
ANU College of Law,
Fellows Road, Acton
ACT 2601

Manager
Policy Framework Unit
Treasury
Langton Cres
Parkes ACT 2600

1 October 2020

Dear Ms/Sir,

Major Reforms to the Foreign Investment Review Framework – September 2020

Thank you for the opportunity to participate in the discussion on the proposed reform to Australia's Foreign Investment Review (FIR) framework.

I am a PhD candidate at the ANU College of Law. My thesis analyses Chinese corporate investment in Australian critical infrastructure in order to provide recommendations on how the federal legislature can best secure Australia's national security through the regulation of the investment. The thesis analyses, among other legislation, Australia's FIR framework, the *Security of Critical Infrastructure Act 2018* (Cth) (SOCI Act), and the *Telecommunications Act 1997* (Cth) (Telecommunications Act).

In this submission, I will only address the proposed 'call in' power under the Exposure Draft Regulations (Protecting Australia's National Security). My analysis focuses on two issues: 1). Is the power necessary? 2). If yes, is the proposed 10-year period during which the Treasurer can exercise the power appropriate? While acknowledging that the present consultation relates to the second issue, I will nonetheless take this opportunity to contribute to the first matter.

Is the 'Call in' Power Defensible?

The short answer is no, because it would duplicate mechanisms that already exist in the SOCI Act, most notably the declaratory power of the Federal Home Affairs Minister. Section 51(1) of the SOCI Act, read in conjunction with s 9(1) of the same legislation, allows the Federal Home Affairs Minister to privately declare a particular asset in a 'relevant industry' as a 'critical infrastructure asset', provided that the minister is satisfied that the asset affects Australia's national security. In its current form, the phrase 'relevant industry' refers to water, gas, electricity, and port. The Australian Government is seeking to amend the SOCI Act by adding nine more sectors to the 'relevant industry': banking and finance; communications; data and the cloud; defence; education, research and innovation; food and grocery; health; and space. This amendment would cover most, if not all, 'reviewable national security actions'. While Canada, New Zealand, and the United Kingdom have also implemented the 'call in' power in

their respective FIR frameworks, the declaratory power and the proposed security obligations in the SOCI Act would be unique to Australia. Equally important is the need to bring Australia's FIR framework in congruence with the SOCI Act; the latter applies to foreign investment into critical infrastructure currently operating within Australia.

The main advantage of resorting to the private declaratory power is that it would not create significant surprise to foreign investors as they would have been aware of the consequences of being subject to the SOCI Act, in particular the reporting requirements, the proposed security obligations, or both. This is in stark contrast to the exercise of the 'call in' power which may give rise to imposition of conditions, and at its worst, a divestment order, both of which may be beyond the expectations of foreign investors. The only limitation of this option is that there might be situations in which the declaratory power could not apply due to legal technicality. That said, the invocation of the declaratory power of the Federal Home Affairs Minister in the SOCI Act allows the government to make good use of the existing regulatory framework. If necessary, the government should seek to address any gaps in the declaratory power so that it could operate more effectively with Australia's FIR.

Is the proposed 10-year period appropriate?
If the Australian Government concludes that the 'call in' power should be implemented, there is no need to impose any fixed period within which the Federal Treasurer can exercise the authority. In the Explanatory Material to the Proposed Foreign Investment Reform (Protecting Australia's National Security) Regulations 2020, the Australian Government noted that the Federal Treasurer will not assess the 'reviewable national security actions' in the eleventh year or later even if there is clear evidence suggesting the operations of the asset in question constitute a national security threat. The government provides no solution to this issue. Instead, it views the stipulation of a definite period as an incentive for foreign investors, most notably to provide certainty. This problem, if left unaddressed, could potentially be exploited by foreign investors seeking to harm Australian interests.

Under the proposed reform, foreign investors may choose to voluntarily notify the Federal Treasurer of 'reviewable national security actions' at any time to avoid future exercise of the 'call in' power. But allowing foreign investors to dictate the timing of notification is problematic from the national security perspective. This is because they may lodge notification at a time that best suits their interests. On the other hand, mandatory notification would not only add regulatory burden to foreign investors, but also unnecessarily exhaust the resources of the Foreign Investment Review Board. In a similar vein, categorising instances that require mandatory notification and those that do not would be practically impossible. Even if this option was feasible, the list would need to be reviewed and amended constantly to take consideration of the changing national security environment.

Striking a good balance between the availability of the 'call in' power indefinitely and protecting the interests of foreign investors is the way to move forward. A large number of stakeholders have objected to the introduction of the 'call in' power on the basis that its implementation would lead to uncertainty and unpredictability. To address these problems, the Australian Government should introduce three statutory mechanisms. First, give foreign investors an assurance that no divestment order will be issued in the case of a negative assessment by the federal Treasurer. Second, the decisions of the federal Treasurer must be

supported by a negative national security assessment issued by ASIO. This will prevent the Federal Treasurer from abusing the statutory authority. Third, foreign investors ought to be given the right to challenge not only the negative security, but also the ultimate decision of the Federal Treasurer, both at the Administrative Appeal Tribunal. Implementing these safeguards and protection would make Australia's FIR fairer and more transparent, and truly reflect the Australian Government's commitment to attracting foreign investment.

Yours sincerely,
Joseph Lee