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Thank you for the opportunity to respond to the discussion paper on options to enhance Australia's foreign investment framework. The Tech Council of Australia (TCA) supports striking a policy balance between raising international capital while continuing to manage security priorities in a targeted and proportionate manner. Therefore, we welcome the opportunity to contribute to this important review.

About the Tech Council of Australia (TCA)

The TCA is Australia's peak industry body for the tech sector. The Australian tech sector is a pillar of the Australian economy, contributing $167 billion per annum, and employing 861,000 people. This makes the tech sector equivalent to Australia's third largest industry, behind mining and banking, and Australia's seventh largest employing sector.

The TCA represents a diverse cross-section of Australia's technology sector, including start-ups that require ongoing international capital to operate, venture capital funds that exist to attract global capital to the Australian tech sector, and online platforms and critical infrastructure entities at the core of national security safeguards.

This means the TCA has vital insight into the impact of foreign investment policy on confidence to invest in a strategically critical sector of Australia's economy. This also means the TCA has practical and balanced views on options to accelerate investment in Australia while continuing to protect the national interest.

Our submission sets out why action is needed, and recommends five areas for reform:

1. Improve clarity and controls around decision period extensions.
2. Offer local businesses risk-based 'advance notice' for decision periods.
3. Enhance transparency and accountability of FIRB decisions.
4. Adjust fee structures to improve incentives and accessibility.
5. Update governance to align regulation with wider policy goals.

Recent changes have hit the Australian tech sector, including business' ability to operate

Australia's tech sector hosts a wide range of start-ups, SMEs and venture capital firms that rely on raising capital through equity as the primary way to finance their business and to keep their doors open. These raises occur over multiple rounds, at key stages of a business's expansion. They fund their ability to hire more staff, to develop products, and to make business investments, such as expanding into other markets.

This means that unlike more mature sectors, foreign investment in tech is about more than exchanges of ownership or gathering extra resources for future expansion. As two thirds of

all start-up investment last year involved international capital,[1] a delayed foreign investment application related to a funding round is not an inconvenience: it is an existential issue. The risk of delay creates deep uncertainty about whether their financial lifeline will be confirmed in a timely manner.

While FIRB nominally sets a 30-day statutory period for decisions, this is rarely met with the average time taking 51 days for reviews and some reviews taking as long as 7 months. Permitting all reviews to take indefinite periods (up to 7 months in practice), with no upfront criteria or case-by-case commitments, has created deep uncertainty about how long decisions will take to approve investments in an individual business.

We note several Government positions, spanning the original evaluation of 2021's foreign investment reforms and Government's response, which claim current settings have no impact on Australia's ability to access foreign investment. Regularly mentioned views include:

- Foreign investment policy settings are not a material driver of economic outcomes for Australia compared with other factors, based on headline national figures.
- Uncertainty around processing times is not an issue given average wait times remain consistent and case officers do their best informally to meet commercial deadlines.
- Exemption certificates exist to provide ongoing certainty for specific investors.

These positions do not reflect realities in Australia's technology sector. Engagement with TCA members reveals that issues around foreign investment screening issues are a leading, if not the leading, regulatory issue for many tech businesses. Other markets have successfully balanced security and investment objectives while continuing to ensure the administration of foreign investment screening is transparent, predictable and responsive. Examples of these measures are discussed and underpin key recommendations below.

For a risk so critical, average timeframes are not useful for businesses, because an individual business has no way of ascertaining if that average will apply to them. When the risk to their business running out of financing is so high, it forces businesses to plan for a lengthy delay in the FIRB decision-making process.

International sources of capital are equally conscious of this uncertainty, and TCA members have cited numerous examples of investors expressing reluctance to take on the risk of delays when investing elsewhere could guarantee more immediate returns.

The costs of managing uncertain processing times are also substantial. Raising capital takes time and building in an extra half-year of buffer forces tech firms to rush capital raises far ahead of capital being required. This has forced TCA members to accept less favourable terms for investment than they would accept otherwise and incur additional administrative burden. In sum, uncertainty around FIRB processing times increases the cost of capital for Australian businesses that depend on access to foreign equity to operate.

For example:

- A start-up with $3 million of seed funding and 10 staff will incur around $125,000 in monthly costs, giving it 24 months before its funds reach zero.

[1] 67% per cent of investments by value involved foreign capital in 2021. Sourced from private data on start-up capital raises collected by TCA members.

- Raising capital requires 6 months of buffer and can take 1-2 months. Even before considering FIRB, the start-up must go to market after no more than 16 months.
- Once considering the risk of FIRB delays, especially if related to a critical technology, the firm needs to start fundraising just 10 months after opening their doors.
- Raising capital earlier hits start-ups' cost of capital through lower valuations, with local businesses losing more ownership for the same amount of investment.
- Equity costs are exacerbated further as a result of competing for capital with investments that offer faster and more certain returns.

TCA members have raised specific cases where capital raises have been complicated by uncertainty regarding foreign investment review. These include cases where:

- Capital raises needed to be divided into multiple stages to separate domestic and foreign capital - multiplying the administrative costs;
- Tech start-ups incurring between $10,000 and $15,000 in legal fees to navigate FIRB processes, imposing significant costs on small Australian businesses; and
- Start-ups received conflicting legal advice on whether they were captured by mandatory notification rules, causing delays, costs and uncertainty.

While we recognise informal assurances of best efforts to meet commercial timeframes by Treasury officials are well-meant, they do not have any status in serious financial investment decisions, because when investors and the companies are engaging in multi-million funding rounds, they need investment certainty.

The TCA recognises that the foreign investment review process can be complex and require the involvement of security agencies to assess risks related to an investment target, how an investment impacts access or control, and the investor themselves.

However, equal regard needs to be had to the need to enable financing and investment, especially where risks are low. This is the balance struck by sensitive sector review models in other jurisdictions, including Five Eyes nations, through precision and clarity. This submission suggests a number of practical improvements to the current process, modelled on comparable jurisdictions, which could help improve precision and proportionality further.

Imprecise foreign investment restrictiveness hurts our security and resilience interests

Australia's economic, security and social priorities are increasingly intertwined and can no longer be pursued in isolation. The tech sector is a key case example of this reality, and this is already recognised by multiple Government agencies and priorities.

For instance, the Department of Home Affairs' Critical Technology Supply Chain Principles highlight security by design, transparency, and autonomy and integrity as key to ensuring security within technology supply chains. These objectives would inevitably also inform critical infrastructure entities' risk management programs, should proposed legislation pass Parliament. At odds with these goals, Government recognises that limited options, cyber threats and dependence of critical assets on tech inputs are key drivers of security risk.

A thriving selection of trusted sovereign technology sources mitigates Australia's exposure to these security risks and bolsters our resilience to disruptions in critical supply chains. This is recognised in Government's recently released Blueprint for Critical Technologies, which notes that promoting Australia as an investment partner ensures that the technologies we depend on are reliable, accessible, resilient and secure. The vitality of

foreign investment for our resilience goals is also recognised through initiatives including the Office of Supply Chain Resilience, Critical Minerals Facilitation Office and Supply Chain Resilience Initiative.

Australia can no longer afford to isolate its foreign investment framework from these equally critical policy priorities. If a technology and industry is genuinely critical to our national interest, we must aspire for it to be competitive and sustainable, as this also ensures it is secure. This requires us to put our foreign investment settings on the table and consider how we can manage security risks appropriately while making ourselves attractive to global capital. This includes considering how Australia's foreign investment review framework – which publicly limits discussion of acquirer risk to general notions of 'investor character' – can align more explicitly with wider Government efforts to attract capital from our key allies.

Attracting foreign capital is also vital for Australia's social and economic priorities. Government research translation initiatives recognise shortfalls in private capital for locally developed, socially valuable technologies. Further, Australia's Global Business and Talent Attraction Taskforce recognises the importance of "attracting established businesses in priority industry sectors that will partner and co-invest with Australian enterprises and help them expand into global markets". Strong appetite for reform would support these efforts.

We can also no longer afford to dismiss the impact or urgency of foreign investment policy reform simply because current local macroeconomic data is inconclusive. As key partners in achieving Government's wider strategic goals, it is vital that the lived experiences of Australian businesses are taken in good faith.

Global data shows foreign investment policy matters — and Australia's continues to tighten

Further, analysis of global data over 20 years demonstrates a clear negative relationship between the restrictiveness of foreign investment systems and inward direct investment. OECD analysis of global data from 1997 to 2016 found that a 10 per cent increase in foreign investment restrictiveness results in a 2.1 per cent decrease in FDI stocks.

In 2020, the Productivity Commission (PC) used the OECD's analysis to model the impact of Australia tightening its foreign investment screening to match the restrictiveness of New Zealand. The PC found that in its central scenario, such a tightening would reduce inbound direct investment to Australia by 2.6 per cent, and GDP by 0.26 per cent.[2]

Based on 2019 data, this would have cut annual inbound investment by over US$1 billion[3], and annual economic growth by over AU$5.2 billion.[4] While the OECD's FDI Regulatory Restrictiveness Index is not yet updated for 2021, its methodology makes clear that Australia's policy changes will push us in the wrong direction.[5]

Also missed in these national aggregates are the concentrated impacts on sectors and opportunities that bear the brunt of policy change. The tech sector has been one of several key targets of recent reforms and, as flagged above, is particularly vulnerable to these changes through its reliance on equity capital to operate.

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[2] Foreign Investment in Australia - Productivity Commission
[3] UNCTAD data on FDI inflows, available here.
[4] ABS National Accounts data for 2019 (GDP, chain volume, seasonally adjusted), available here.
[5] OECD methodology available here: http://dx.doi.org/10.1787/5km91p02zj7g-en

COVID-19 has vastly accelerated global investment in tech firms as the pandemic has increased demand for tech sector products and services. McKinsey has tracked the market valuations of 31 industry sectors globally since the COVID-19 pandemic began in February 2020. It finds that high-tech and advanced electronics are the second and third top industries for growth in valuation in that period. High-tech firm valuation increased from 8.4 trillion to 12.9 trillion, a growth of 55.82 percent in shareholder returns. Advanced electronics increased from 4.9 trillion to 7.7 trillion, a 56.2 percent increase in shareholder returns.

In practice, this means Australia should have witnessed a significant uplift in investment in private and public tech sector companies from February 2020 simply to keep pace with the rest of the world. This has not been the case and as economic aggregates inevitably rebound thanks to a global post-pandemic recovery, the cost of foreign investment restrictiveness must be viewed through the lens of opportunities foregone. Restrictiveness is a bottleneck on investment, even if global capital markets continue to grow.

This is reflected in global investment trends that suggest Australia is not punching above our weight. In fact, we are lagging behind. In the decade to 2019, local FDI across developed nations grew by 7% each year. FDI in Australia grew by just 4% annually in the same period. Of particular note, we are lagging behind our two key allies that each have less restrictive foreign investment screening systems than Australia. In the United States, annual inbound FDI grew by 12% from 2010 to 2019. In the United Kingdom, inbound FDI kept pace with overall trends in the developed world, growing by 7% annually.[6] In sum, global data shows we are not a uniquely attractive investment destination, and we cannot afford to be complacent.

Moreover, any further evaluation of 2021 data will downplay the impacts of policy changes as Australia's foreign investment screening system is continuing to tighten. Specifically, the expanded definition of 'critical infrastructure' resulting from recent 'Critical Infrastructure and Systems of National Significance' reforms has expanded mandatory notification requirements across the Australian economy significantly. This is because recent foreign investment reforms mandate notifications for investments related to all 'national security businesses', which includes those involved in or connected with critical infrastructure.

These wider changes also expose a wide range of businesses to unexpected 'call in' powers after investments have already been concluded. This risks further undermining confidence to raise capital for local investors, and confidence to invest in Australia for global capital holders. As a result, even the inconclusive Treasury evaluation from 2021 now understates the regulatory burden and uncertainty resulting from ever more businesses, many in the tech sector, falling within the scope of Australia's foreign investment regime.

Foreign investment reform is a 'no regrets' opportunity to boost sovereign capability

The TCA has a direct interest in effective foreign investment screening policy, as it supports security and confidence in Australian tech products locally and in export markets. Australia's foreign investment review process is one of several key safeguards against malign foreign control or compromise of the nation's critical entities and assets. Further, since its creation, the Foreign Investment Review Board has helped to bolster public confidence that openness to investment serves the national interest.

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[6] Calculations of CAGR (2010-2019) of FDI stocks based on UNCTAD data, available here.

For this reason, the actions we propose uphold the current risk-based approach but achieve it in a more targeted and clear manner that supports investor confidence. Best practice regulatory design and ongoing refinement are essential to ensure foreign investment screening serves its intended goals while minimising unintended consequences.

The actions we propose are also consistent with wider Government policy goals. Multiple strategic priorities recognise lowering trade and regulatory barriers, including investment barriers, as 'no regrets' action that supports our resilience and economic outcomes together. Examples include Government's Blueprint for Critical Technologies, Framework for Identifying and Mitigating Critical Supply Chain Risks and Treasury's Resilience Framework.

There is great scope to provide more certainty for international investors, particularly as so much international investment in Australia comes from key allies and strategic partners. Over half of all foreign investment stock in Australia is from the USA, UK, New Zealand, Canada or Japan. Further, many investment instruments — including in the tech sector — do not afford investors additional opportunities to access, control or compromise local assets, regardless of an investors' capabilities or intentions.

The tech sector is a clear case where the unintended impacts of regulation risk ultimately undermining Australia's broader economic and strategic goals. Building a stronger sovereign technology sector means attracting low-risk capital as actively as possible. Australia can do more to encourage investment where investors are trusted, or where a planned capital raise would not impact investors' access or control meaningfully.

Facilitating low-risk investments requires Australia to bolster global investors' confidence to invest in Australia's technology sector. Bolstering confidence requires actions that make our foreign investment policy settings more competitive, consistent, and clear. The recommendations below would help to deliver foreign investment reform that is further:

- **Informed and coordinated**, through close industry and expert collaboration.
- **Proportionate and targeted**, by targeting risks as efficiently as possible.
- **Practical and interoperable**, through alignment with global norms.
- **Integrated and holistic**, by recognising a thriving local tech sector as a key priority that also helps Australia to achieve our risk and resilience goals.
- **Future focussed**, by accounting for longer-term and indirect impacts at the outset.

Recent reforms by the UK and USA provide useful models of actions to enhance security of foreign investment, while minimising burden and uncertainty for low-risk investments. In particular, the UK's *National Security Act 2021* (which took effect on 4 January 2022) includes key measures that ensure security screening processes are transparent and targeted where risks are greatest. Many proposed actions below draw from these models.

Recommendation 1: Improve clarity and controls around decision period extensions

Tightening of the foreign investment framework in 2021 significantly expanded the Government's power to extend the decision period for applications unilaterally. The changes in 2021 effectively removed the 'cap' on unilateral interim orders, which allow Government to extend the decision period by up to 90 days.

Where previously this extension could only occur once, legislation now allows the Treasurer to extend the decision period an unlimited number of times. There are presently no controls on these extensions, except that the Treasurer must advise applicants of the reasons for the decision. This change alone created significant new uncertainty for investors and local technology businesses planning to raise capital.

Action 1.1: Develop clear and public risk-based criteria for extending decision periods beyond the statutory timeframe.

Recent UK reforms to enhance foreign investment security screening treat mandatory notification requirements and full assessments as two distinct steps. While Australia and the UK have broadly similar mandatory notification requirements, this does not necessitate a full assessment in the UK system. Once an investor has provided notification, the UK Government has 30 days to decide whether it will 'call-in' an application for full review. If no action is taken, the investment is automatically permitted to proceed after 30 days.

Critically, the UK also has clear and public criteria for 'calling in' an application for full assessment. Translating to an Australian context, this means the UK Government must have positive risk-based reasons to extend any application process beyond a 30-day period. These three criteria are (further details available here):

1. Target risk: risks related to an investee. Assessed based on what the target entity or asset does, is used for, or could be used for, and whether that gives rise to - or may give rise to - a risk to national security;
2. Acquirer risk: risks related to an investor. National security risk is based on factors including the acquirer's: (i) activities; (ii) capabilities; and (iii) links to entities which may seek to harm the national interest; and
3. Control risk: risks related to the investment instrument. Assessed based on whether the level of control gives rise to — or may give rise to — a risk to national security, with higher levels of control potentially increasing the likelihood of such a risk.

The TCA recommends adopting these criteria for any decision to extend the decision period for foreign investment applications beyond the statutory 30-day period. Adopting these criteria would build confidence that extensions are used strictly where case officers find clear and compelling evidence of risks that warrant further investigation.

In considering target and control risk, the TCA recommends embedding a strong practice of case-by-case analysis that examines the precise vectors of risk.

- Not all investment targets will pose equal risk simply because they fall within a category of critical technology or infrastructure. Current FIRB guidance recognises this in notification requirements for critical technologies, but this does not extend to processing times and no equivalent exists for critical infrastructure (see Action 3.3).
- Further, not all increases in ownership will lead to practical increases in control or access. Rather than using general metrics of ownership share ('aggregation'), we recommend assessing the impact of new investments on a case-by-case basis.

Action 1.2: Establish 'excepted' or 'expedited foreign states' rules for trusted investment sources, modelled on rules implemented by the United States.

Through its investor character test, Australia's foreign investment review process clearly considers 'acquirer risk' a key factor when assessing the potential risks of an application. Despite this, Australia has stopped short of recognising investment from key allies as involving fewer risks explicitly.

Despite Government policy objectives seeking out trusted investment in strategic sectors, a lack of explicit acknowledgment imposes significant uncertainty on investors from these countries. Over half of all foreign investors in tech start-ups were from the United States in the last four years,[7] and Five Eyes partners alone account for almost half of all foreign investment in Australia.[8] Action targeting low-risk investment sources would reduce uncertainty for a significant part of Australia's investor base.

In the same way that different monetary thresholds apply for private investors from certain FTA partners, expedited approvals could be used for investments from countries with which Australia have security partnerships.

The experiences of the tech sector highlight that such a move would deliver practical benefit. TCA members have reported cases where investors from allied countries have faced significant delays, and where potential investments have been held back due to uncertainty around Australia's investment review process.

Australia's international obligations do not limit this action. As FIRB has previously noted, "Australia's Investment Promotion and Protection Agreements apply post-establishment, that is, Australia's sovereign right to admit investments is unaffected". The WTO confirms this, noting post-establishment commitments mean most-favoured-nation and national treatment obligations do not apply to pre-investment screening.[9]

The United States' *Foreign Investment Risk Review Modernization Act* (FIRRMA) of 2018 has led to its Committee on Foreign Investment in the United States (CFIUS) explicitly acknowledging Australia, and other Five Eyes partners, as trusted sources of investment. It has achieved this by designating Australia as an 'excepted foreign state', which exempts Australian investors from mandatory notification requirements.

The United States' system includes strict controls to ensure investments from excepted foreign states are low risk. These include requiring an entity's principal place of business to be based in an excepted state, at least 75 per cent of board members or observers being citizens of an excepted state (or the US), and that any person holding at least 10 per cent (or otherwise holds control) must also be excepted state citizens.

The TCA recommends that Australia develop an 'expedited foreign states' list. Such a model would provide a commitment to a 30-day decision period for investments from these states, unless evidence is found of 'ultimate beneficial owners' in third countries that would make

[7] 52% of foreign investors, 2018-21. Sourced from private data on start-up capital raises collected by TCA members.
[8] ABS 5352.0 (International Investment Position), 2021 data.
[9] https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx

applicants ineligible. An 'expedited foreign states' model would complement the risk-based model for decision period extensions outlined at Action 1.1.

The TCA also recommends that Australia develop a direct counterpart to the United States' 'Excepted Foreign States' list, which would exempt a short, positive list of trusted allies and partners from mandatory notification requirements. This would also involve safeguards to ensure the 'ultimate beneficial owner' of an investment is recognised.

Action 1.3: Require applicant agreement for repeated extensions to decision periods.

As noted earlier, one key change in 2021 was to remove the 'cap' on interim orders. In practice, this means that Government no longer needs to seek an applicant's consent to extend a decision period multiple times, and potentially indefinitely. This power to extend applications without consent greatly exceeds those of our key international partners.

- The UK allows only one unilateral 45-day extension if a transaction is 'called-in' for full assessment (which otherwise must be completed in 30 days). Including the initial call-in, this totals 75 days of extensions after the initial 30-day notification period.
- The USA also allows only one unilateral 45-day extension if a full assessment (a 'Joint Voluntary Notification') is required. Including the initial 45-day JVN period, this totals 90 days of unilateral extensions after the initial 30-day notification period.
- By comparison, Australia allows unlimited 90-day extensions for all foreign investment applications. The only controls against this are that decision periods can only be extended up to 90 days at a time, and that applicants must be told why.

Australian Government advice on the 2021 reforms noted that allowing for unlimited extensions was needed as its powers to prohibit a transaction or impose conditions would expire once the statutory deadline is reached. However, it is unclear how or why these limitations are unique compared to the UK or USA. In the absence of meaningful differences, it risks appearing that Australia is simply more willing to accept investor uncertainty in favour of flexibility for public servants.

The TCA recommends once again requiring consent from applicants for second and subsequent extensions to decision periods. This is unlikely to have a substantive impact as applicants have historically been advised that declining an extension risks rejection. However, this change would incentivise officials to have a strong evidence base and engage more closely with applicants if looking to extend decision periods multiple times.

Recommendation 2: Offer local businesses 'advance notice' for decision periods

One welcome measure to offset impact on investor confidence in the 2021 package of reforms was the creation of 'exemption certificates'. These certificates seek to reduce the regulatory costs for repeat investors. However, due to solely targeting the source of capital, exemption certificates do not support local businesses that raise capital regularly from diverse sources. This greatly limits the benefits of exemption certificates for the tech sector, where local businesses rely on global capital raises to operate.

Naturally, the potential for diverse sources must also be considered when devising any solution. The TCA recognises that simply creating a mirrored 'exception certificate' that waives any form of assessment for investment in local businesses is not feasible. A solution

targeting local capital destinations must allow for foreign investment screening to consider investor character.

The TCA proposes 'advance notices' for local businesses looking to raise capital as a safe and practical means of supporting investor and investee confidence. Rather than exempt investments from assessment, these advance notices would offer investors in Australian business case-by-case conditional commitment to a 30-day decision period.

This model is practical as, referring once again to the UK's three risk assessment criteria, both target risk and control risk are assessable in advance. By considering the target entity ('target risk') and the nature of a proposed investment instrument ('control risk') in advance, Government has the requisite information to determine the upper bound on risk that 'acquirer risk' may entail, and/or the complexity that will be involved in assessing it.

In the Australian context, 'acquirer risk' is considered primarily under the banner of 'investor character'. Naturally, this cannot be assessed until an investment application is lodged. It also has wider implications for final assessments of impacts on national security, competition, other Government policies (including tax) and the economy and community. In the technology sector context, national security is inevitably a key factor to consider.

However, armed with early information on an investment target and the terms upon which an investment will occur, it is possible to assess the upper bound on risks to, or complexity in assessing, these wider factors, irrespective of the acquirer. Drawing on the UK's three criteria, the upper limits of 'target risk' and 'control risk' can be assessed in an investor-agnostic manner and refined further once information on investor(s) is known.

Doing so through an advance notice system would allow for faster and more certain processing times. This extends to national security: while the UK's three criteria are applicable generally, they were developed for national security reasons.

Australia's current policy notes that security risk is assessed as "the extent to which the investment will affect Australia's ability to protect its strategic and security interests". Building on Action 1.1, there is merit in updating this policy to recognise the key subsets of risk-based assessment. Doing so would clarify how an advance finding process would be practically implemented (i.e., assess worst-case target and control risk first), and build confidence that assessments recognise the specific technical circumstances of each case.

An advance notice could provide local business applicants with one of three findings:

1. Low risk or complexity ('green light'): Commitment to a 30-day decision period, regardless of the acquirer. This finding would likely be only given in cases where investor character cannot be a material factor, or in simpler cases where the impact of investor character can be determined quickly.
2. Acquirer-contingent risk or complexity ('yellow light'): Upfront commitment to a maximum (30-day) decision period, conditional on acquirer activities, capabilities or intent not being positively identified as issues during this assessment period. An 'expedited foreign states' rule (see Action 1.2) would complement this finding.
3. High risk or complexity ('red light'): No upfront assurance on timeframe. This finding would likely apply in exceptional cases where the upper limit of target and control risk is high, and there is reason that final assessment will be complex even for acquirers with low-risk activities, capabilities, or links to other entities.

Recommendation 3: Enhance transparency and accountability of FIRB decisions

Transparency and accountability are vital foundations for all forms of business confidence, including global confidence to invest in Australia. However, publicly available reporting on FIRB timeframes, outcomes and processes is opaque. The TCA considers information asymmetry to be a driver of differences in perspective between businesses that lack certainty and confidence, and officials that see FIRB processes as consistent and reliable.

Further, Australia effectively lacks any channel for independent review of foreign investment decisions, except on procedural grounds. This limits public accountability for the advice provided or the decisions taken.

Action 3.1: Deliver regular, detailed and sector-specific reporting on FIRB decision timeframes, approvals, rejections, and withdrawals.

There is significant scope for improved reporting on FIRB processes and outcomes. At present, virtually all information provided in annual reporting is aggregated across all sectors of the economy. Further, FIRB only reports the median processing time for foreign investment applications.

These data points provide no insight into the variability of processing times, how processing times, approval rates and withdrawal rates vary across sectors, or why applicants withdraw. As noted at the start of this submission, tech sector businesses cannot afford to make decisions based on the most likely outcome — like all forms of critical risk management, they must plan for the realistically possible.

The TCA recommends that the Government commit to quarterly, sector-level reporting on:

- The number and proportion of applications for which the Treasurer extended decision periods past 30 days (including how many times applications were extended),
- The number and proportion of applications in each decile of decision-making timeframes, and
- The number and proportion of applications that are approved, approved with conditions, rejected and withdrawn (with categorised reasons for withdrawal).

We also recommend that the reporting is broken down as a distribution rather than reported as an average, as an average can mask significant variation and therefore is less meaningful as a metric in providing certainty.

These figures would provide investors and local businesses across all sectors further certainty around potential timeframes and issues.

Action 3.2: Provide FIRB applicants with a channel for judicial review or independent audit.

At present, neither investors nor local businesses have any right to request a review of decisions to extend decision periods, or of final decisions, except on procedural grounds. This deviates from the United Kingdom’s model, which even after recent security reforms retains the right to channels of judicial review within 28 days of a decision.

It is common knowledge that this lack of independent oversight shifts power dynamics and incentives within the foreign investment application process. A lack of independent review

has empowered officials to threaten rejection should applicants not consent to assessment extensions, even if it is not clear if evidence warranting rejection exists.

Further, no right of review has led to the proliferation of opaque de-facto 'rejections', where applicants are informally advised to withdraw applications. A lack of review mechanism means applicants have little reason to continue with their bid once they know officials have formed an inclination, regardless of how well-founded that inclination may be.

The TCA recommends considering how to implement independent review of decisions to extend or reject foreign investment applications. Even a post-facto audit model would enhance transparency and encourage officials to consider their evidence base in detail when recommending extensions or adverse findings.

Action 3.3: Provide clear advice on how entities covered by recent critical infrastructure reforms are affected.

As noted earlier in this submission, recent changes to Australia's *Security of Critical Infrastructure Act 2018* have significant implications for the scope of Australia's foreign investment review framework. In particular, recent reforms have significantly expanded the definition of critical infrastructure assets.

This change has created significant uncertainty for Australia's tech sector, particularly regarding which businesses are captured by mandatory notification requirements. As noted in FIRB guidance, a 'national security business' is any 'responsible entity', within the meaning of the *Security of Critical Infrastructure Act.* Further, recent critical infrastructure reforms led to the de-facto creation of multiple 'tiers' of critical infrastructure (through 'on-switch' Positive Security Obligations and the new 'System of National Significance' designation).

The creation of critical infrastructure 'tiers' creates an avenue for a more targeted definition of a 'national security business'. Further, the significant expansion in what is considered critical infrastructure raises questions over whether every relevant entity is equally critical to national security. For instance, it is not apparent that every business that stores private sector data is critical to national security.

The TCA recommends updating the definition of a 'national security business' to target only entities for whom a Positive Security Obligation has been 'switched on' or operates a System of National Significance. This targeted approach would follow the precedent of 'critical technologies', where FIRB guidance notes that only technologies intended for military or intelligence use are subject to mandatory notification obligations.

Recommendation 4: Adjust fee structures to improve incentives and accessibility

The TCA recognises the intent of foreign investment application fees: to ensure that foreign businesses, not taxpayers, front the bill for making investments in Australia. However, this principle is one that blurs quickly in practice.

Much like tariffs for imported goods, TCA members note that administrative costs for investors are ultimately passed on to local businesses. Where tariffs hit consumer prices, foreign investment fees hit the cost of capital for local businesses either through subtractions from headline levels of investment, or higher levels of equity being expected by investors in return.

Given fees ultimately impact local businesses, the TCA recommends considering a cost sharing model that encourages collaboration to ensure foreign investment screening is as targeted and efficient as possible. Passing on all screening costs to the private sector risks masking escalating financial and regulatory costs on local businesses that expanded investment screening can create. A cost-sharing model would encourage collaboration to identify ways regulators can screen for risks as precisely and cost-effectively as possible.

Australia is also an outlier in our approach to fees compared to our international partners, particularly for smaller investments. The United States charges no fees for transactions worth less than US$500,000, and just US$750 for transactions up to US$5 million. The United Kingdom charges no fees for applications at all, and nor does Canada or Japan. NZ is a noteworthy exception; however, NZ also hosts the world's third-most restrictive foreign investment review system after Russia and India.[10]

Action 4.1: Remove or reduce base fees for low-value investment transactions

Australia's current foreign investment application fee structure imposes a price floor of $2,000 on all transactions valued at less than $75,000. This fee increases to over $6,000 once the $75,000 threshold is reached and increases every $50 million of consideration thereafter.

Costs of capital have the greatest impact on tech sector start-ups and SMEs that depend solely on equity capital to operate and expand. These businesses are already at a cost-of-capital disadvantage through their inability to access debt (and deduct interest payments from their tax liabilities. Foreign investment fees compound this challenge further.

The TCA recommends removing foreign investment fees for all business and entity transactions in the lowest tier of consideration (currently $75,000) and removing the $2,000 flat fee to start an Australian business. The TCA would also strongly support raising the upper limit on this lowest tier to align more closely with the United States' model — i.e., $500,000 — to better support Australian tech start-ups and venture capital firms.

Action 4.2: Adjust cost-recovery settings to encourage efficient application processing.

As discussed above, while the TCA acknowledges the principle behind cost-recovery arrangements for FIRB applications, this deviates from its practical impact. Not only do these costs impact the cost of capital for local tech sector businesses, but they also blunt public sector incentives to deliver services efficiently.

The TCA recommends adjusting the objective of Australia's foreign investment fees to target 80 per cent cost recovery, with budget allocation for FIRB to cover the remainder. Giving the public service 20 per cent of 'skin in the game' would create a direct incentive for public officials to target their efforts as efficiently as possible. Such a model would also create a channel for feedback to decision-makers should the costs of administering foreign investment applications increase in the future.

To strengthen this incentive further, the TCA recommends separately considering the merits of partial fee refunds for applications that experience extensions to their decision period.

[10] http://goingdigital.oecd.org/en/indicator/74

Such a model would provide further impetus for officials to manage applications efficiently and compensate for the confidence impacts of extended review times for global investors.

Recommendation 5: Update governance to align regulation with wider policy goals

As noted above, holistic and future-focussed design are some of the TCA's core principles for best practice regulatory policy design. Any regulatory system must recognise that it is one part of a broader policy context, where the indirect impacts of regulation can impact on other national interest outcomes and Government priorities.

Foreign investment is a key example of this as it exists at the nexus of Australia's economic, security and social policy priorities. Given the complexity and importance of foreign investment to Australia, it is vital that foreign investment policy is both designed and implemented holistically.

Behind this, it is vital that Government has access to economic, security, social and operational perspectives on Australia's foreign investment regime. FIRB is an outlier in the Commonwealth as it exists not as its own statutory entity (like the ATO, ASIC or ABF), but within a security-oriented and operational division of Government's preeminent economic agency.

Action 5.1: Create an 'investor charter' for FIRB, modelled on the ATO's taxpayer charter

While FIRB notes the importance of foreign investment in business sector engagements, its practical focus is to identify and mitigate risks to national security and social cohesion. For all intents and purposes, it is an economic regulator with an operational goal that must be considered in the context of the wider national interest.

FIRB is not alone in this regard. For example, the Australian Tax Office (ATO) plays an essential role in enforcing and maintaining the integrity of Australia's tax and superannuation systems. However, through its Taxpayer's Charter, the ATO also recognises that these compliance and enforcement objectives must be balanced with ensuring that these systems and processes are accessible and transparent, and that impacts of enforcement on taxpayers are recognised.

The TCA recommends that the Treasury develop an 'Investor Charter', co-designed with industry, which sets out operational commitments on how investment applications will be handled. Such a charter would both demonstrate that Government recognises how the foreign investment system affects investors and local businesses and provide clear and reliable undertakings that improve confidence to invest in Australia.

Action 5.2: Establish FIRB as a statutory agency within the Treasury portfolio.

As noted above, FIRB is a rare case of a regulator that exists not as its own entity, but effectively within a Department of State. While the Board itself is a separate non statutory body, all relevant policy and operational staff are housed within the Commonwealth Treasury's Corporate and Foreign Investment Group.

The result of this is that unlike the ATO — where the Treasury hosts an independent policy function with its own distinct perspective — the regulator of foreign investment is also responsible for all policy advice on foreign investment within the Treasury portfolio. This has had a particularly pronounced effect as on all other issues at the intersection of economics

and security, the Treasury is responsible for providing a distinct economic perspective to Government.

The TCA recommends following the ATO model for FIRB by converting the case, performance and compliance branches of Treasury's Foreign Investment Division into a standalone statutory agency within the Treasury portfolio. While FIRB (like other statutory agencies) would continue to provide its distinct perspective on policy, the Treasury would then be positioned to provide a distinct viewpoint on foreign investment issues that reconciles this viewpoint with wider economic concerns.

We appreciate the opportunity to contribute feedback to the ideas proposed and look forward to ongoing dialogue.

Yours sincerely,

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