



9 November 2020

**Legislation Committee**

Senate Standing Committees on Economics  
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**Foreign Investment Reform (Protecting Australia's National Security) Bill 2020 and Foreign Acquisitions and Takeovers Fees Imposition Amendment Bill 2020 [Provisions]**

The Australian Financial Markets Association (**AFMA**) is a member-driven and policy-focussed industry body that represents participants in Australia's financial markets and providers of wholesale financial services. AFMA's membership reflects the spectrum of industry participants including banks, corporate advisers, stockbrokers, dealers, market makers, market infrastructure providers and treasury corporations.

AFMA is supportive of the need to protect the national interest from potential security threats and recognises the importance of the policy objectives behind these changes. However, it is also important that the Government achieves an appropriate balance between national security considerations and ensuring Australia remains an attractive location for foreign investment. We note that foreign investment will be key to both Australia's recovery from the severe economic impact of the COVID-19 pandemic and international competitiveness going forward.

**1. Improving the Integrity of the Foreign Investment Review Framework**

The Explanatory Memorandum to *Foreign Investment Reform (Protecting Australia's National Security) Bill 2020 (Bill)* states that the Government will narrow the scope of the moneylending exemption so that it does not apply where foreign money lenders are obtaining interests in a sensitive national security business or land under a moneylending agreement (6.261).

While this change to the moneylending exemption will be set out in the change to the *Foreign Acquisitions and Takeovers Regulation 2015 (FATR)*, AFMA seeks to highlight that a broadly drafted change to the exemption will have a constraining impact on economic activity.

The September 2020 Treasury Consultation proposed drafting changes to the section 27 moneylending exemption that would require foreign persons who are prospective lenders to seek approval from the Foreign Investment Review Board (**FIRB**) prior to taking security interests for the purposes of moneylending agreements, where the interest is related to national security business assets or land (or exploration tenements over national security land). Lenders (in many cases a security trustee of a syndicate comprising both foreign and non-foreign persons) would need approval prior to financing the acquisition by another person of a "national security business" on a secured basis, or where acquiring existing debt secured against assets of a sensitive national security business.

AFMA understands that the term "national security business" will be defined in the *FATR*. National security assets would cover all manner of key infrastructure commonly financed through project finance on a secured basis, including, for example, gas pipelines, ports, transmission lines and telecommunication infrastructure.

We note that the Explanatory Memorandum indicates an estimated increase of 2 applications received by FIRB as a result of changes to the exemption (Table 6.16), while the estimate of total applications likely to be made under the new national security test is estimated at 161 (6.143).

Given the expectation that a change to the moneylending exemption would have a very limited impact on the number of applications, it appears that changes to the exemption are not intended to require review of contingent interests, but instead would be restricted to covering situations where a lender's interests have crystallised and a lender or security holder is seeking to enforce their security interest. AFMA strongly supports this understanding of the proposed law.

As such, it is important that the change to the exemption is drafted accordingly, to only carve out s27(1)(a)(ii) of the *FATR* for notifiable national security actions, with the result being that only the actual acquisition of a national security related interest by way of enforcement of a security held solely for the purposes of a moneylending agreement is subject to FIRB approval.

Our submission to Treasury in September emphasised that requiring moneylenders to seek FIRB approval *prior* to being able to hold a security over an asset would cause significant problems for industry due to the complex and time critical arrangements that lenders operating in Australia enter into with one another and with borrowers in their ordinary course of business. The broad way in which the change to the moneylending exemption is currently drafted risks, if misapprehended by being applied to contingent interests, significantly impacting the liquidity of loan markets, reducing the flow of capital into Australia and stifling competition, which would be detrimental to Australia's economic recovery from the COVID-19 pandemic.

Accordingly, given the serious hindrance to efficient capital raising which might flow from a misapprehension by those administering the law or drafting the regulations, AFMA recommends that the Explanatory Memorandum to the Bill make clear that the requirement to seek prior approval is to apply only to crystallising actual interests in national security business assets, not contingent interests.

Please contact Natalie Thompson on (02) 9776 7979 or [nthompson@afma.com.au](mailto:nthompson@afma.com.au) if you would like further clarification on the above.

Yours sincerely

A handwritten signature in blue ink that reads "David Love". The signature is written in a cursive, flowing style.

**David Love**  
**General Counsel & International Adviser**