

Inquiry into foreign investment proposals Submission to the Senate Economics References Committee

Yun Jiang, China Policy Centre

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About us

China Policy Centre is an independent, non-profit research organisation based in Canberra. We aim to inform and promote public discussion and policy debate on China issues. The author of this submission is a former federal public servant who has worked on a variety of economic issues, including in the Foreign Investment Division of Treasury, where she assessed foreign investment applications.

Recommendations

1. The Foreign Investment Review Board, along with partner agencies such as the Critical Infrastructure Centre and the Australian Competition and Consumer Commission, should invest in improving understanding of China's political economy, including the role of the Chinese Communist Party, and its influence and interaction with businesses.
2. Foreign investment screening should not be used as an instrument to address tax, competition, data storage and other issues and risks that are faced by both domestic and foreign companies. Instead, strengthening regulatory frameworks on these specific issues is a better approach.
3. Foreign investment assessment should be focused on acquisitions with

national security implications. Commercial land and agricultural land should not be subject to screening. This will free up resources to investigate more sensitive cases.

4. The foreign investment framework should better articulate the meaning of national interest to provide more certainty to the investors.
5. Definition of Australian media business in the Foreign Acquisitions and Takeovers Regulation should be broadened to include online media.
6. More transparent reporting on application rejections.

Understanding China

Foreign investments in Australia, especially big deals and investments in “sensitive businesses”, are increasingly coming from China. China (including Hong Kong) is the fifth biggest investor in Australia as at the end of 2018, after the United States, the United Kingdom, Belgium, and Japan.

Increasing Chinese investment in Australia is generally a positive development for Australia for three key reasons. First, it provides capital for businesses in Australia to grow, contributing to Australian prosperity. Second, for certain transactions, Chinese investment is coupled with better access to technology, expertise, or markets. Third, rising Chinese investments in Australia gives China an added stake in Australia’s economic prosperity.

Despite the benefits of Chinese investment, some of these investments are challenging to assess for Australian regulators such as the Foreign Investment Review Board. This is because China has a complex system of governance and political economy that is unfamiliar to most Australians. Examples include how state-owned enterprises are governed and controlled, and the functions of party cells and party-controlled labour organisations in private enterprises.

Currently, most Australian regulators are under-equipped to assess risks of Chinese investments, including the character of the investors. To effectively assess investments from China, it is crucial to have a good understanding of China’s political economy, and legal and regulatory environment, including how business and politics interact, and the role the ruling Chinese Communist Party in the economy.

The Foreign Investment Review Board, along with partner assessing agencies, such as the Critical Infrastructure Centre, the Department of Defence, the Australian Competition and Consumer Commission, intelligence agencies, and law enforcement agencies, should invest more in improving the understanding of China's political economy. This can take the form of regular specialised training for analysts working on Chinese investment or hiring more China literate policy analysts.

The Australian Government should also set up a network of China specialists to draw on for help and advice on China-related issues. This network can include government officials, think tank analysts, academics and other experts. This will contribute to an improved China literacy in government.

Foreign investment and regulation

Foreign investment screening should only be used to deal with risks associated with foreign ownership. But there has been a trend of using foreign investment screening as a tool to enforce other regulations or promote certain business behaviours, such as in the areas of tax and data storage.

This is undesirable for two reasons. First, the risks around tax or data storage do not just apply to foreign investors, but to all businesses. To illustrate, businesses can use tax avoidance strategies without making a transaction that triggers foreign investment screening. On data storage, businesses that are not owned by foreign investors can also send sensitive personal data (including medical, financial and travel data) offshore to be processed.

Second, foreign investment screening can only deal with risks at one point in time, but cannot be used to deal with any emerging risks or risks that are unknown at the time of screening. For example, most governments only realised recently the importance and challenges associated with big data. But previous foreign investments did not take these challenges into account.

The usage of foreign investment screening to deal with other policy issues and risks has led to a longer time for consideration of applications. This increases the time necessary to close investment deals, creating frustrations and added cost for both sellers and buyers. For transactions with multiple bidders, it can also disadvantage certain investors, as sellers may not wish to wait months for foreign investment approval to come through.

A better approach is strengthening regulatory frameworks for select policy issues, such as tax and data storage, that captures all businesses at all times, not just foreign investors and not just at one point in time.

Sensitive and significant cases

More effort should be devoted to sensitive, significant, and complex cases that have national security implications.

As such, the purchases of commercial land, including vacant and developed commercial land, as well as agricultural land, should not require foreign investment screening. Indeed, it is a huge waste of resources to assess all purchases of vacant commercial land by foreign investors, which is supposed to address the challenges associated with the practice of accumulating parcels of land for future sale or development (land banking).

But these challenges should be addressed through other measures so that both Australian and foreign investors are discouraged from this practice.

If there is a national security case for preventing a foreign investor from accessing a piece of land, then the Australian Government should secure that piece of land. Rejecting the sale of the land to a foreign investor would not adequately address national security risks as Australian ownership would not necessarily prevent foreigners from accessing or using it.

National interest test

Australia's foreign investment review framework gives the Treasurer the power to decide whether a foreign investment proposal is contrary to the national interest, yet the framework does not define the "national interest".

As a result, the foreign investment approval regime is not a transparent process. This lack of transparency creates uncertainty for the investors as to whether an investment would be considered by the Australian Government to be in the national interest or not. Further, the discretionary power held by the Treasurer can provide opportunities for corruption or leads to the perception of corruption among the public and investors.

A clear and full articulation of what constitutes “national interest” under the foreign investment review framework would help to address these problems.

Media

All foreign persons are required to receive approval if they want to make an investment of 5 per cent or more in the media sector, regardless of the value of the investment. This special provision highlights the importance of the media to Australia’s democracy.

The definition of media business only covers daily newspapers, broadcasting television, and radio. But increasingly Australians are accessing media content online, rather than through traditional media channels. The media regulatory framework in Australia is outdated in that it only captures traditional media. For example, the great majority of Chinese-Australians only access Chinese language media through online platforms, which is not captured by the current definition.

The definition of Australian media business should be broadened to include new forms of media.

More transparent reporting

For many foreign investment applications, the investors choose to withdraw when they are informed during the “natural justice period” that the Treasurer’s “preliminary” view is considering rejecting the application. For a variety of reasons, investors often withdraw their investment proposals so that they do not end up receiving an official order prohibiting the investment.

Being informed of the “preliminary” view is a welcoming step for investors. However, this practice skews statistics, with rejections hidden as withdrawals. This makes Australia’s foreign investment regime appear more welcoming than it really is. It also means many preliminary foreign investment decisions by the government are not publicised as they would have if an official decision was made.

More transparent reporting should be implemented. Withdrawals as a result of likely rejections should be noted in published data.