1 September 2021

Manager
Policy Framework Unit, Foreign Investment Division
The Treasury
Langton Crescent
PARKES ACT 2600
Via: FIRBStakeholders@treasury.gov.au

Dear Sir/Madam

Response to evaluation of the 2021 foreign investment reforms

The Clean Energy Council is pleased to provide a submission in response to the Treasury's evaluation of the 2021 foreign investment reforms.

The Clean Energy Council (**CEC**) is the peak body for the clean energy industry in Australia. We represent and work with over 900 of the leading businesses operating in renewable energy, energy storage and renewable hydrogen. We are committed to accelerating Australia's clean energy transformation.

Over $30 billion has been invested into a diversified and cleaner electricity sector over the past five years, as Australia seeks to decarbonise its energy sector, lower the costs of electricity for consumers and businesses and install more modern, efficient and flexible generating capacity to replace our ageing fleet of coal-fired power stations. Foreign investment has been and will continue to be essential to this transformation, and the ease of that investment will be crucial for lowering the cost of capital for new projects.

The CEC acknowledges that ease of foreign investment must be balanced with protecting Australia's national security interests, and we have been working collaboratively with the Department of Home Affairs for the past 12 months in relation to the strengthening of the *Security of Critical Infrastructure Act*. However, several of the new reforms under the *Foreign Investment Reform (Protecting Australia's National Security) Act 2020* and the *Foreign Acquisitions and Takeovers Fees Imposition Amendment Act 2020* (**the Reform Acts**), as well as some of the features of the Foreign Investment Review Board (**FIRB**) framework generally, do not strike the right balance between investment attractiveness and national security, and are increasing investment hesitancy within the renewable energy sector.

Implementation

The CEC submits that the recent reforms have increased the complexity, uncertainty and time required for foreign investors to engage with the FIRB process. While the Guidance Notes provide some clarification as to how the legislation is to be applied, there is a lack of substantive, practical information meaning that proponents must resort to engaging external FIRB legal specialists to provide advice, particularly where there are multiple notifiable actions or timing considerations involved. The engagement of external lawyers significantly increases the costs associated with the foreign investment review process.

One specific area which we consider requires clarification from the Treasury is around 'national security land'. Foreign investors are required to notify FIRB if they propose to acquire 'national security land' and

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conditions may be applied to land acquired in 'close proximity to sensitive land or facilities'.[1] The term 'national security land' is defined to include 'defence premises' within the meaning of s71A of the *Defence Act 1903* (Cth), which includes all land owned or occupied by the defence force. 'National security land' also includes land in which an agency in the national intelligence community has an interest that is publicly known or could be known upon the making of reasonable inquiries. The CEC submits that this new regime has created significant uncertainty for the following reasons:

(a) it is difficult for proponents to be aware that they may be seeking to acquire national security land, or develop a project in a location that is 'proximate to sensitive land', if the location of defence premises are not always publicly available. Many proponents may be (unwittingly) seeking to develop projects on land proximate to defence assets (e.g. within 50km of a communications tower or defence base) which the proponent cannot possibly discern through publicly available information. When the proponent submits an application to FIRB to acquire that land, they may unexpectedly receive either a FIRB rejection or onerous conditions regarding the use of that land, despite having already invested considerable capital and resources in developing the site;

(b) there is no clarification around what is considered 'close proximity to sensitive land', so even if national security land were known to the proponents, the physical development 'buffer' required so as to avoid associated conditions is unclear; and

(c) there is uncertainty regarding the potential overlap of State-based Renewable Energy Zones (**REZs**) and 'national security land', resulting in foreign investors potentially being excluded from participating in a REZ and thereby significantly limiting the effectiveness of those REZs in driving up renewable energy penetration and investment within the REZ.

Another opportunity for further clarification from FIRB that could assist foreign investors with their applications is specificity around conditions that may be imposed. Although FIRB does provide guidance on its guiding principles for developing and imposing conditions,[2] the CEC suggests that a list of typical conditions that may be imposed for certain acquisitions would allow investors to manage expectations and prepare for the conditions (including factoring in the costs of compliance). Currently, proponents are having to seek external legal advice about what sort of conditions to expect and such advice is entirely speculative (based on the subjective judgment of external legal advisers), rather than reliable up-to-date information from FIRB itself.

Thresholds for foreign ownership

The CEC submits that some Australian investment vehicles are unfairly subject to FIRB approval despite the lack of any influence by a foreign investor, due to the low thresholds to be considered a 'foreign person' under section 18(1) of the *Foreign Acquisitions and Takeovers Regulation 2015* (**the Regulation**). Not having to participate in the FIRB process is a competitive advantage for Australian investors. However, due to the low threshold (20 per cent) in an interest in a limited partnership to trigger the 'foreign person' categorisation under section 18 of the Regulation, some Australian investors are compelled to comply with FIRB processes, even where the foreign investors have only made passive investments and have no control or use of the funds. This is particularly problematic for institutional investors where it is not unusual to have a mix of domestic and foreign investors in the same vehicle. The CEC recommends that the thresholds for foreign ownership under section 18(b)(i) and (ii) are raised to 50 per cent where the foreign-owned interest is passive, to ensure that Australian companies are not unnecessarily disadvantaged.

[1] Australian Government, Foreign Investment Review Board GN 11, page 6.
[2] Australian Government, Foreign Investment Review Board GN 11.

National security businesses and critical infrastructure assets

The CEC remains concerned about entities owning renewable energy assets being considered a 'national security business' due to the Department of Home Affair's proposal to include renewable energy assets with a nameplate capacity of at least 30MW as 'critical electricity assets'. The CEC is concerned that this classification, particularly for smaller generators, will create time-consuming requirements and investment uncertainty which will dissuade investors. This poses a risk of having a chilling effect on investment in the renewable energy sector and will decrease the number of funding participants. In circumstances where investors are not dissuaded, the proposed changes will at the very least create further delay in the investment process and add complexity to an already challenging and highly complex regulatory environment.

It is the CEC's position that generally a standalone, average large-scale renewable energy generator (typically below 300 MW) is not independently critical to the security or stability of the electricity network. A breach, outage or failure of such a generator would not materially compromise supply to consumers, nor would there be any impact to Australia's social and economic wellbeing, defence or national security. Accordingly, smaller generators should not be included as 'critical electricity assets' or 'critical infrastructure' under the Reform Acts and that the threshold should be at least 300MW (if not higher).

We understand that in recent times FIRB and its consulting agencies have applied significantly greater scrutiny (and conditions) on very small operating assets (e.g. 30MW in size) because of the expected changes to the 'critical electricity asset' threshold. Some of our members report the imposition of conditions which are not technically appropriate for the size of the asset or proportionate to the risk at hand, which will no doubt increase regulatory and compliance burdens on small operators, as well as expose businesses to potential penalties and enforcement action for non-compliance for very small assets.

Conditions and compliance

Investors are very conscious of complying with conditions to ensure that their compliance history is strong. However, the CEC suggests that new reporting conditions and associated deadlines are administratively onerous and at times, arbitrary. For example, conditions requiring notification to FIRB within two weeks of a change of 5 per cent foreign share ownership are overly stringent. A longer timeframe that allows for the notification of multiple changes over that period of time, particularly at a time such as an acquisition or takeover, would be more efficient for both the foreign investor and FIRB.

Moreover, conditional FIRB approvals have become more common since the reforms. Some of our industry members have found that the conditions imposed by FIRB do not accord with the guiding principles set out on page three of Guidance Note 11 in that the conditions are not proportionate to the risk, are discriminatory and are not workable. Some examples of these impractical conditions include:

- unrealistic requirements for the composition of nationalities of the board, which are difficult to comply with considering the investor is a foreign-owned company;
- conditions around personnel who may enter the site, which is again problematic as the projects are large and involve several contractors and sub-contractors;
- cyber security conditions which are not appropriate or workable for very small assets that have been operational for many years;
- conditions which are frequently inconsistent: too many investors have multiple approvals with different conditions and reporting requirements that add substantially to the administrative burden and cost of investment; and
- other conditions which are cumbersome and poorly drafted, leading to the risk of inadvertent technical breaches in future years.

Further, the CEC submits that FIRB's recent update of Guidance Note 4 to provide for the standard land development conditions to be imposed on acquisitions of agricultural land and vacant commercial land for wind and solar farms is extremely problematic and incompatible with accepted market practices for structuring, financing and developing renewable energy projects. For example, there are a number of specialist development firms within the sector who secure landholder and regulatory

approvals for a site, before seeking long-term investors/owners and operators for the asset. The condition that the land is not 'sold, transferred, or otherwise disposed of, prior to the development being completed'[3] is inconsistent with this common industry practice and will be detrimental to the efficient development of new electricity generation capacity.

Streamlining and exemption certificates

The CEC submits that the validity for agricultural land exemption certificates is not practical for the renewable energy industry. The period of 12 months is too short, as certain agreements typically take time to negotiate and execute. We recommend that a validity period of two years – FIRB's previous position – was more reasonable and realistic with industry timeframes.

Furthermore, the requirement that the total value of an exemption certificate for agricultural land is limited to $100 million, with a maximum value of individual transactions of $10 million is unfeasible with the total cost of long-term wind or solar farm leases. The value of leases for a renewable energy project can easily exceed $10 million, particularly when taking into consideration the current market rate payable per megawatt to landholders, as well as options to renew, which could take the lease to 50 years. The CEC recommends that the maximum value of individual transactions be adjusted to $15 million, particularly as the maximum value has now been set at $10 million for several years, and allowance should be made for inflation. Otherwise, the exemption certificate regime runs the risk of being so small in scale that it has little utility or attractiveness to foreign investors, particularly when the expected benefits of an exemption certificate are weighed against the significant reporting liabilities and extremely time-consuming application process.

Accordingly, given that leases for renewable energy projects support the delivery of essential services to Australian households and businesses, the CEC strongly recommends that the electricity sector should be exempt from monetary restrictions for leases where the purpose of the land use is for generating or storing electricity.

Finally, the CEC takes issue with the FIRB's attempt to streamline the process by combining discrete applications that may have been submitted by the same entity. This is an unhelpful, problematic and has the potential to cause unnecessary delays to multiple applications where there is a discrete issue in one application.

Fees

The fee changes which were introduced on 1 January 2021 are considered unjustifiably high by industry. In particular, the CEC is concerned that the increase in fees for agricultural land may inadvertently impact investment in the renewable energy industry, as rural land is commonly used to host renewable energy projects. The agricultural property industry appears unfairly targeted with both high fees and red tape. For example, $503,000 for an $80 million property is considered excessive and a significant deterrent for developing renewables projects in regional Australia. In contrast, an $80 million business has a $12,700 fee and the $503,000 fee only applies from $2 billion.

We are aware of the higher fees leading to hesitancy from certain bidders and even dissuading bidders completely. This is undermining competition and has the potential to decrease the value of Australian renewable energy assets. It is also becoming more common for bidders to delay applications to FIRB until there is more certainty that they will be the successful bidder, as the sunk cost is otherwise too high.

The CEC proposes that both application costs and administrative burden on FIRB could be reduced by instigating a process where a select number of bidders are able to lodge FIRB applications with a shared case number and a case officer. The fees are therefore reduced as the FIRB process is more

[3] Australian Government, Foreign Investment Review Board GN04, page 10.

streamlined, and then the application fee could be either shared amongst the bidders, or alternatively, paid solely by the successful bidder.

Additionally, the CEC recommends that option agreements to purchase or to lease land should not be considered 'an acquired interest' for the purposes of section 15(1) of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) and therefore subject to FIRB approval and corresponding fees. The current situation means that foreign investors are subject to the increased fees even though the acquisition or lease may never occur or, as Guidance Note 2 acknowledges, 'legal processes mean that the actual legal title to the asset will not be acquired until some future time'.[4] The money lending exemption does not mitigate this issue given the majority of foreign investors tend to be industry participants rather than pure play financial lenders.

The CEC submits that this a sunk cost for investors who ultimately do not exercise the option. It is also an inefficient use of FIRB's resources as the option may never be exercised or the foreign investor's circumstances may have changed during the period between the signing of the option agreement and the exercising of the option.

In addition, fee waivers or refunds appear extremely difficult to obtain. We understand that FIRB's justification is that the fees are needed in order to fund internal resources for assessing applications. However, since the new fee schedule commenced in January 2021, several of our members respectfully submit that they have not seen any return for the increased cost, as application deadlines continue to be routinely extended by FIRB and are not processed with the requisite degree of commercial urgency.

A lengthy and uncertain process

Overall, the renewable energy sector has found that the FIRB application process is frustratingly lengthy, with FIRB rarely meeting the required timeframes. The uncertainty around completion creates risk for a project, with some investors choosing not to engage in the process at all due to some applications taking much longer than predicted, sometimes almost a year. Where FIRB approvals take too long, landholders may walk away from a potential renewable energy project, Government or industry funding may evaporate, and foreign investors with valuable capital may simply become too much of a deal execution risk to be considered in a competitive bid. These issues both significantly lessen competition in the electricity market in Australia and hinder Australia's transition to a clean energy future more broadly.

The CEC recommends that there should be an established process whereby FIRB engages in early, meaningful consultation with the applicant to allow issue areas, such as 'sensitive land' mentioned above, to be identified and addressed prior to submitting an application. This consultation could also provide an opportunity for FIRB to outline potential conditions that may be applied to an approval.

Thank you again for this opportunity to provide feedback on the new FIRB reforms. Please contact Lucinda Tonge at ltonge@cleanenergycouncil.org.au or on 0432 612 955 should you wish to discuss these matters further.

Yours sincerely,

Anna Freeman
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[4] Australian Government, Foreign Investment Review Board GN02, page 22.