STRENGTHENING AUSTRALIA'S FOREIGN INVESTMENT FRAMEWORK:

SUBMISSION

Corrs Chambers Westgarth

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Strengthening Australia's foreign investment framework

On Wednesday 25 February 2015 the Treasurer, The Hon Joe Hockey MP, announced a consultation on strengthening Australia's foreign investment framework which includes a number of proposals relating to residential, commercial land, agricultural land and agricultural businesses as well as proposed application fees for acquisitions of shares/business and options on simplification (including harmonisation opportunities with other Acts) of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**), the *Foreign* Acquisitions *and Takeovers Regulations 1989* (the **Regulations**) and Australia's Foreign Investment Policy 2015 (the **Policy**) (**Discussion Paper**).

Corrs Chambers Westgarth (**Corrs**) is pleased to submit a proposal in respect of certain key matters raised in the Discussion Paper (**Submission**).

The authors of this Submission are specialists in the law and practice of foreign investment into Australia and regularly contribute to policy debate. In addition to being recognised practitioners, they are the authors of *Foreign Investment Regulation in Australia* published by LexisNexis. They regularly advise clients on foreign investment requirements in Australia and prepare and submit numerous applications for foreign investment approval.

The authors have prepared this Submission with input from a number of clients who are impacted by Australia's foreign investment framework.

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Introduction

More than 40 years since it was first introduced, Australia's foreign investment framework remains sound and is a useful policy tool. We support the broad thrust of the legislation and its administration.

In the years since its introduction, the legislation has rarely been litigated or amended.[1] Is this because it represents the zenith of the parliamentary draftsman's craft? Unfortunately, this is far from the answer – in reality, the legislation works despite itself.

It works because it has broad community support, is administered by a clever and sensitive bureaucracy and because much of the more complex parts of the rules are enshrined in policy rather than black letter law. The fuzziness of Australia's foreign investment framework is both a strength and a weakness.[2] For those of us who are asked daily to advise on Australia's foreign investment approval regime, fuzzy law[3] can make our practice as much an art as it is a science.

From a practitioner's perspective, we worry that we have not given the foreign investment rules a serious "tune up" in a very long time and we welcome the Discussion Paper. Our concern is that the ageing process is taking its toll on the legislative framework and there is a risk that the rules could damage our global competitiveness.

Clearly FATA needs modernising to ensure that it is accessible and the obligations of foreign investors can be readily understood – this is even more critical with the introduction of new and better penalties. We do not advocate wholesale changes to the policy just a "tune up" of the mechanical parts of the legislation.

In addition to the rewrite of FATA using plain English and in accordance with the Office of Parliamentary Counsel's guidelines on legislative drafting, we have suggested amendments to clarify the Australian foreign investment framework and to ensure FATA is consistent with Australia's initiatives to strengthen and deepen its engagement with foreign investors. Our proposed changes are briefly summarised in the table below.

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1 Indeed, it has been substantively amended only three times.

2 See Lumsden "National Interest Test" and Australian Foreign Investment" available at http://www.clmr.unsw.edu.au/article/accountability/national-interest-test-and-australian-foreign-investment-laws see also http://www.corrs.com.au/assets/thinking/pdf/MAAlertApr2011.pdf.

3 A term coined by John M. Green drawing on the concept of fuzzy law and its use in developing new computer technologies. See "Fuzzy law - a Better Way to Stop Snouts in the Trough?"(1991) *Companies and Securities Law Journal* 144.

Issue	Comments	Proposal	Legislation / Regulation
Aggregate control test for Australian listed companies **Paragraphs 1 to 19**	Given the broadly dispersed ownership of ASX listed companies, it is difficult and costly to identify at any point in time whether an ASX listed company is technically a "foreign person" under FATA and the Policy.	Amend the Regulations to deem that an ASX listed company is not a foreign person when it meets certain criteria eg no single foreign holder holding more than 15%. Alternatively, a "substantially Australian" declaration model should be introduced, replicating existing Commonwealth legislation.	Regulation
"Associate" definition **Paragraphs 20 to 29**	The definition of "associate" in FATA is extremely broad and inconsistent with well established principles in other legislation such as the Corporations Act.	Harmonise the definition of "associate" in FATA to reflect the Corporations Act definition and principles.	Legislation
Upstream acquisitions **Paragraphs 61 to 67**	Notification is required for the acquisition of shares in a foreign corporation that results in the downstream acquisition of a substantial interest in an Australian corporation, regardless of the value of the transaction.	Amend FATA to make it clear that the threshold (currently $252 million) applies.	Legislation
Intragroup transfers **Paragraphs 30 to 33**	Under FATA, intragroup transfers between companies within the same corporate group often require FIRB approval as an "acquisition" by a foreign person.	Exempt intragroup transfers from FATA where the ultimate owner does not change.	Regulation
Pro rata capital raisings **Paragraphs 34 to 37**	Under FATA, a foreign person that subscribes for shares on a pro rata basis does not require approval. A similar pro rata exemption is not included in the Policy.	Include an exemption for pro rata in circumstances investments under the Policy.	Policy
Definition of "agricultural land" and "agribusiness" **Paragraphs 42 to 47**	We support the replacement of the definition of "rural land" with an alternative definition of "agricultural land". The definition of "agribusiness" needs to specify how it is intended to operate.	The definition of "agribusiness" should capture all primary production businesses as well as certain limited first stage downstream businesses beyond the farm gate.	Legislation
Rural land and associated agribusiness – annual programme **Paragraphs 48 to 56**	The new requirements for approval for rural land and associated agribusiness may unduly impact on companies which transact often, particularly in the context of routine and ongoing small acquisitions.	Permit foreign companies to obtain an annual programme for acquisitions of rural land and associated agribusinesses.	Regulation

Issue	Comments	Proposal	Legislation / Regulation
Annual programme application to land **Paragraphs 57 to 60**	Annual programmes for urban land grant applicants prior approval for direct acquisitions in urban land only. They do not extend to the acquisition of heritage property, shares in urban land corporations or units in urban land trusts.	Expand annual programmes to cover the acquisitions of all interests in land.	Regulation
Threshold for urban land trust / corporation **Paragraphs 38 to 41**	An acquisition of even a single share or unit in an urban land corporation or urban land trust triggers this notification and no threshold applies. If a foreign investor acquired commercial developed property directly, rather than via unit trust / company, a $55 million threshold would apply.	Apply a threshold to the acquisition of share or units in urban land trusts and urban land corporations, where the majority of the land assets are commercial developed property.	Regulation
Fees – general **Paragraphs 68 to 72**	There is a risk that if fees are linked to the value of a transaction, rather than the administrative burden, the fee will be misconstrued as a tax.	Fees to be introduced are linked to a reasonable estimate of the administrative cost of review, rather than the value of the transaction.	Regulation
Fees for advanced off-the-plan certificates and annual programmes **Paragraphs 73 to 78**	The Discussion Paper does not address fees for annual programmes and proposes a fee for advanced off-the-plan certificates based on numbers sold (determined after the fee is paid).	Introduce a flat fee for annual programmes and advanced off-the-plan certificates, which is linked to an estimate of the administrative cost of review.	New legislation
Payment of fees where transaction not successful **Paragraphs 79 to 84**	Foreign investors will often start the process of obtaining FIRB approval prior to being successfully selected in a competitive bid process to enhance the attractiveness of the bid.	The fee regime should include a "broken fee" reimbursement which may be repaid to the foreign investor or set-off against future applications.	New legislation
Timing for payment of fees **Paragraphs 85 to 89**	Foreign investors will be required to pay the application fee before their foreign investment application is processed.	Adopt electronic funds transfers as the method of paying application fees and a reconciliation mechanism for previous payments.	New legislation
Rural land register **Paragraphs 90 to 92**	There are some administrative issues in relation to the building of a national rural land register, having regard to the different requirements in each state for registration (for example Victoria does not require the registration of a lease and Queensland already has a register).	The land register will need to address a number of quirks and differences in the property law regimes in each State, where possible it would be good to avoid duplication.	N/A

"Accidental foreigners"

Issue

1 Where ownership of an Australian listed company is broadly dispersed, identifying whether an entity is considered a foreign person under FATA presents significant time and cost issues and involves a high level of uncertainty to the company.

2 As a result of the serious consequences of failing to comply with FATA (which will be further enhanced as proposed under the Discussion Paper), an Australian listed company is placed in the position of assessing whether it is a foreign person on an almost daily basis.

3 The time and cost associated with assessing whether a listed entity is a foreign person is considerable. In addition, the mechanisms available to listed entities to make that assessment may themselves not provide accurate results.

4 The securities registry of an Australian listed company does not necessarily reflect the beneficial owners of the securities. For example, securities in listed entities are often held by chains of nominees of custodians.

5 Australian listed entities (and the Australian Securities Investment Commission) have the power under the *Corporations Act 2001* (Cth) (**Corporations Act**) to direct holders to provide:

- full details of their relevant interest in the company's securities and the circumstances giving rise to that interest;
- the name and address of any other person that has a relevant interest in those securities (and full details of the nature and extent of the interest and the circumstances giving rise to the interest); and
- the name and address of any person that has given the holder instructions about the acquisition or disposal of the securities, the exercise of any voting or other rights attached to the securities or any other matter relating to the securities (and full details of those instructions).

6 These provisions give a public listed entity the power to trace the beneficial ownership of its securities. Once a response is provided, the entity also has the power to issue a secondary tracing notice to any person named in the response to the initial tracing notice. This allows entities to trace ownership through a chain of nominees or custodians.

7 If issued with a beneficial tracing notice, a holder has two days to make disclosure in response to the notice. Of course, by that time, the beneficial owners of the securities may have changed.

8 The disclosure process is not standardised, and is based on manual forms that are faxed or mailed to the relevant intermediary from whom disclosure is sought. The regulations may prescribe fees to be paid to persons for complying with the disclosure direction, which is currently set at $5.00. Issuers generally outsource disclosure requests to firms that specialise in holder identification.

9 In addition to the cost of preparing separate forms and paying the prescribed fee, the listed company must then examine and assess the information and determine whether it is a foreign person. Due to the complex, specialist nature of the analysis required under tracing notices, many listed entities have to engage third party specialists to undertake these reviews for them at additional cost. The cost of the specialist analytical services is in the tens of thousands of additional dollars a year.

10 The process established under the Corporations Act for determining beneficial ownership was not established for the purpose of determining foreign ownership and the market is clearly not geared to assist companies in complying with FATA.

11 To manage the risk of what could literally be an infinite assessment process, a public listed company if it believes it is close to the 40% threshold will often take the conservative approach of treating themselves as foreign. This means FIRB are dealing with additional applications where there is little real impact from these applications on the policy.

12 Separately it casts these iconic Australian companies as "foreign" or, as we describe them, "accidental foreigners". This can of itself have costs when these groups deal with less sophisticated customers, investors and vendors who would prefer to deal with Australian entities. For example, in property transactions there is sometimes an emotional impact when negotiating arrangements with parties who want to deal with an "Australian entity", especially in the sale of rural or semi-rural property contributing to urban expansion.

13 This issue is further compounded by the proposal in paragraph 77 of the Discussion Paper, which contemplates advisers having to verify whether their client is a foreign person prior to registering a land title transfer. In the context of an Australian public listed company, a lawyer or conveyancer will not be in a position to verify the ownership of a company given the issues described above and the lack of legal power of an adviser to request information.

Proposal

Amend the definition of "prescribed corporation" to exclude an entity listed on the Australian Securities Exchange which may from time to time be "a foreign person" for the purposes of FATA as a result of the operation of section 9(1A) of FATA (ie the aggregate substantial interest), provided that:

- a single foreign person does not hold a substantial interest in that company pursuant to section 9(1) of FATA;
- foreign governments, their agencies or related entities from a single foreign country do not have an aggregate interest (direct or indirect) of 15% or more in that company; foreign governments, their agencies or related entities from more than one foreign country do not have an aggregate interest (direct or indirect) of 40% or more in that company; and
- the entity is headquartered and managed in Australia under a predominantly Australian management team, with the Chief Executive Officer and Chief Financial Officer of its Australian operations having their principal place of residence in Australia; its board having at least two

directors whose principal place of residence is in Australia; and the majority of all regularly scheduled meetings of the board in any calendar year being held in Australia.

Alternatively, look at a declaration process similar to that in the Airports Act for identified "accidental foreigners".

14 This proposal is consistent with the policy currently contained in FATA and provides transparency and guidance on when a person will not be considered to have a "controlling interest". Similarly, it provides matters that are more easily capable of external verification for the purpose of providing certification.

15 Section 9(2) of FATA provides that the Treasurer may deem that a person does not have a controlling interest when, having regard to all the circumstances, the person together with other persons is not in a position to determine the policy of the corporation.

16 We submit that where the shareholders of a company are widely dispersed and not otherwise acting in concert, then the ability of the individual shareholders to influence or direct the strategic direction or day to day management of a company is limited.

17 The limit on the control of the shareholders in this proposal is further supported by the requirement that the company is headquartered and managed in Australia by a predominantly Australian management team.

18 Alternatively, a procedure for a "substantially Australian" declaration (as exists in relation to the *Airports Act 1996* (Cth)) could be introduced into Australia's foreign investment framework. Under this process, affected "accidental foreigner" companies will be able to apply for a declaration stating that they are to be treated as Australian.

19 This proposal is consistent with the ability to, on meeting certain criteria, apply to the Secretary of the Department of Infrastructure and Regional Development (pursuant to Regulation 2.07 of the *Airports (Ownership-Interests in Shares) Regulations 1996* (Cth)) for a "substantially Australian" declaration in relation to foreign ownership restrictions under the *Airports Act 1996* (Cth).

Associates

Issue

20 The application of the term "associate" under FATA is complicated as it is broader than other provisions of Australian law that seek to track share ownership thresholds.

21 Applicants under the Australian foreign investment framework whose ownership is broadly dispersed face practical difficulties in preparing and assessing their applications under FATA, and bear a risk that they may accidentally become a foreign person under FATA – whether they know it or not.

22 Importantly, the FATA definition of associate extends to (in the case of corporate applicants):

- any corporation in which the applicant holds a substantial interest;

- any person who holds a substantial interest in the applicant; and
- any associate of any associate of the applicant.

23 Of these extensions, the third one – which provides that any person who is an associate of a person by one application of the definition is also an associate of the person by another application of the definition – gives rise to significant potential confusion.

24 This is because the provision has the effect of extending the operation of each other category by an extra degree, resulting in a potentially infinite regression of applications.

25 For example, the combined effect of the associate rule is that not only each director of a corporate applicant will be taken to be an associate of the applicant, but also so will any other corporation in which any of the corporate applicant's directors serve as directors.

26 Practical implications arise too. Given the relatively small pool of professional directors, corporate applicants under FATA are advised to be particularly careful that the associate definition under FATA does not cause other companies that may, from a practical perspective, independently hold an interest in a target company to be taken to be associated with the applicant.

27 The manner in which the definition of "associate" under FATA creates far reaching links of association demonstrates a departure from the commercial reality that the existence of shared or common directorships is not sufficient to support a finding that substantive control is shared between these entities.

Proposal

Harmonise the definition of "associate" in FATA to mirror the Corporations Act definition and principles.

28 The inherent ambiguity of the concept of associate as currently drafted in FATA means that it is not correctly targeting behaviour which our foreign investment regime seeks to target and which is contrary to our national interest, namely foreign investors acting in concert. This proposal would achieve this objective and at the same time reflect a modern corporate world.

29 Further, the proposed amendment to the definition to reflect the concept used in the Corporations Act would enable foreign investment regulation to leverage a considerable and well established body of law on the meaning of the term associate, assisting clarity and, accordingly, compliance with the regime.

Intragroup transfers

Issue

30 Under FATA, intragroup transfers between companies and trusts within the same corporate group often require FIRB approval as they constitute an "acquisition" by a foreign person.

31 However, after FIRB approval is obtained for the original acquisition, subsequent corporate group restructurings, where there is no change in the ultimate beneficial owner, require further foreign investment approval.

Proposal

Exempt intragroup transfers from FATA in circumstances where the ultimate owner does not change.

32 Intragroup transfers should be exempt from sections 18 and 26 of FATA in circumstances where the ultimate controller or net foreign investment does not change. This exemption should also extend to capture transfers to trusts managed by a member of the group where units in the trust are owned by the group. This is important as most AREITS are trust structures (at least in part).

33 This proposal is consistent with the foreign investment policy concern as to the identity and character of an investor. As FIRB will have approved the initial investment into Australia and, accordingly, assessed the character of the ultimate beneficial owner, no further assessment should be required to protect Australia's national interest.

Pro rata "acquisitions"

Issue

34 Capital raising offers, such as rights issues or dividend/distribution reinvestment plans, which are made to existing holders of securities on a pro rata basis are exempt from notification under section 26(4) of FATA.

35 However, acquisitions under the Policy are not entitled to this exemption, and accordingly, must obtain separate approval prior to any pro rata capital raisings. This is because the pro rata capital raising is deemed to be a direct investment for the purposes of the Policy.

Proposal

Amend the Policy to provide an exemption to notification for "acquisitions" under a pro rata offer of interests in securities in companies and unit trusts.

36 All acquisitions (including by SOEs) of interests in securities in companies and unit trusts pursuant to a pro rata offer should be exempt in the Policy as the ultimate beneficial owner of the interest does not change, and indeed the investment of that foreign person does not change if all parties accept the pro rata capital raise. Accordingly, the pro rata capital raising does not result in any additional influence or control of the foreign investment.

37 This exemption is consistent with the current position in FATA and there is precedent for extension of exemptions in FATA to apply to Policy matters. For example the recent changes to the acquisition of rural land (not currently addressed by FATA) include the exemptions contained in FATA for urban land for example an acquisition from a government agency.

Threshold for urban land trusts and corporations

Issue

38 Currently under FATA and the Regulations, an acquisition of an interest in a share in an Australian urban land corporation or a unit in an Australian urban land trust estate (entities where the value of their total interests in Australian urban land exceed 50% of the value of their total assets) is an acquisition of an

interest in Australian urban land and requires notification under section 26A of FATA.

39 An acquisition of even a single share or trust unit triggers this notification and no threshold applies. As a result, Australia's foreign investment approval framework potentially captures even the smallest of portfolio investments in Australia.

40 A direct acquisition by a foreign person of an interest in commercial developed land does not require notification unless the value of the commercial developed land is greater than $55 million.

Proposal

Raise the threshold for the acquisition of a share or unit in an urban land corporation or urban land trust from zero to the $55 million, where 50% or more of the underlying "urban land" assets of the Australian urban land corporation or trust are commercial developed property.

41 There is no discernible policy reason why the direct acquisition of developed commercial property should be treated differently to the acquisition of a share or unit in an urban land corporation or urban land trust whose assets are developed commercial property. This proposal provides consistency to the management and rationale of developed commercial property.

Definition of "agricultural land" and "agribusiness"

Issue

42 The Government's indication of the introduction of a new $55 million screening threshold (based on the value of the investment) for investments in agribusinesses creates the need for objective definitions of "agribusiness" and for certain first stage processing functions to be identified as being within the definition.

43 The line for rural land value and associated agribusiness is not always clear. Presumably the value of an agribusiness ought to exclude the value of associated freehold rural land for the purpose of calculating the threshold.

44 We support the definition of "agribusiness" by reference to the Australian and New Zealand Standard Industrial Classification (ANZSIC) codes, but believe it might be helpful to explain how this works more clearly, specifying whether certain first stage processing functions are covered.

Proposal

Replace the definition of "rural land" with an alternative definition of "agricultural land", which together with "agribusiness" will be defined by reference to Australian and New Zealand Standard Industrial Classification (ANZSIC) codes. The "agribusiness" definition should capture all primary production businesses as well as certain first stage downstream businesses beyond the farm gate.

45 We suggest the definition captures all primary production businesses as well as certain first stage downstream businesses beyond the farm gate (for example, meat processing and the distribution of agricultural products). We can see an argument that it should encompass businesses that just transform agriculture products but that would include, for instance, breweries or pasta

manufacturers who do not grow grain but produce pasta, or large operators who produce animal feed but buy in their entire product.

46 Ultimately, a policy decision needs to be reached on which industries the Government intends on capturing and the Regulations used to identify the activities within the policy, especially since these industries and their description will likely change over time.

47 Additionally, we support the suggestion to amend FATA to replace the definition of "rural land" with an alternative definition of "agricultural land", which more accurately ties the definition to the policy objective and the ordinary meaning of the term.

Annual Programme to apply to rural land acquisitions and associated agribusiness

Issue

48 An unintended consequence of the Government's policy to introduce the new $15 million threshold for rural land, and indicating it will introduce a new $55 million threshold for agribusiness, may be that foreign companies (particularly those based in Australia who are foreign by dint of shareholding) will be disadvantaged in their capacity to transact in the rural land and agribusiness markets on a level playing field, increasing the costs of compliance for both foreign companies and FIRB.

49 We suggest that this cost to the Government and the economy could be minimised relatively simply and suggest that foreign companies who are involved in the acquisition of rural land and associated agribusinesses be permitted to apply for an exemption certificate (as already exists in relation to urban land under sub-regulation 3(h) of the Regulations), commonly referred to as an "Annual Programme". A similar pre-approval also exists under the Policy in relation to interests in rural land that are incidental to an activity other than agriculture (eg acquiring interests in rural land for easements for pipelines). Under this proposal foreign companies would be permitted to apply to FIRB for "prior" approval for the acquisition of rural land and associated agribusinesses up to a certain amount each year.

50 The time and cost associated with preparing and submitting a FIRB approval and obtaining consent are not insignificant particularly in the context of small and multiple rural land or associated agribusiness acquisitions and having regard to current land values. In particular, the new threshold will disproportionately impact the ongoing and routine acquisition of small parcels of rural land.

51 In addition, the requirement to obtain FIRB approval for acquisitions of rural land and associated agribusinesses will mean that any agreement to acquire rural land or agribusiness will need to be conditional on obtaining FIRB approval. This conditionality may impact on a seller's willingness to sell the land and will impact on the timing for the sale of the land, extending any completion of the transaction by, at a minimum, 30 days. This can itself have costs when the foreign company deals with less sophisticated sellers who

would prefer to deal with Australian entities and is particularly disproportionate in its application to Australian companies who are an "accidental foreigner", as discussed at **paragraphs 1** to **19**.

52 These factors are likely to negatively impact on the ongoing investment in rural land and associated agribusinesses by foreign companies who have existing significant investments and operations in Australia and are committed to investment in Australia.

Proposal

Introduce an annual programme for acquisitions of rural land and associated agribusiness similar to the existing annual acquisition programme for urban land.

53 Under this proposal foreign companies would be permitted to apply to FIRB for "prior" approval for the acquisition of rural land and associated agribusinesses up to a certain amount each year.

54 This proposal is an extension of and consistent with the Policy which enables an annual programme for companies where the acquisition of land is incidental to its business (for example pipeline companies).

55 We submit that this proposal meets the Government's policy objectives of scrutiny and ensuring that the proposed transactions are not contrary to Australia's national interest[4] as:

- oversight about the character of the investor and the nature of the proposed investment in rural land and associated agribusiness will continue, with applications for annual programme certificates requiring information on the identity of the acquirer, details of the location and estimated dollar costs of the acquisitions.
- it is consistent with the approach for urban land and the Government's policy for rural land, given applications for an annual programme for rural land and associated agribusiness would be considered having regard to the applicant's previous investment in Australia, the nature of that investment and the applicant's existing operations in Australia, including for example that the applicant is headquartered and managed in Australia. An applicant's rural land and associated agribusiness investment history would also be a relevant consideration to determining the size of the programme for that applicant.
- it is consistent with the Government's policy in relation to pre-approval programs of interests in rural land that are incidental to an activity other than agriculture, as such pre-approval programs are limited to certain monetary values, grant approval for a maximum of 12 months and require the applicants to report the details of each acquisition to FIRB every three months.

[4] See Lumsden "National Interest Test" and Australian Foreign Investment" available at http://www.clmr.unsw.edu.au/article/accountability/national-interest-test-and-australian-foreign-investment-laws see also http://www.corrs.com.au/assets/thinking/pdf/MAAlertApr2011.pdf.

- approval for larger transactions on a case by case basis and having regard to the national interest would still occur. The annual programme for rural land and associated agribusiness (as is the case for urban land) may be granted subject to conditions. For example, the annual programme may not permit a foreign company to make a single acquisition in excess of the $252 million threshold.
- the proposal would enable the Government to monitor compliance with FATA and obtain data about the acquisitions. As is the case with the annual programme for urban land, a successful applicant under the annual programme for rural land and associated agribusiness would need to provide an annual programme report describing the property acquired and type, the date of contract, the date acquired, the nature of the interest in the land (including lease) and the consideration paid. Further, a foreign company would be required to report each acquisition to the Australian Taxation Office as part of the national land register.

56 The introduction of an annual programme for acquisitions of rural land and associated agribusiness will enable foreign companies an opportunity to invest in rural land, without the administrative burden and potentially uncompetitive position of making acquisitions conditional on receipt of FIRB approval.

Annual programme application to land

Issue

57 Currently, annual programmes for urban land grant applicants prior approval for direct acquisitions in urban land only. They do not extend to the acquisition of heritage property, shares in urban land corporations or units in urban land trusts.

58 This limitation diminishes the value of the annual programme to applicants and increases FIRB's administrative burden in respect of acquisitions of heritage property, shares in urban land corporations or units in urban land trusts by applicants who have received annual programme approval.

Proposal

Expand annual programmes (including the additional annual programmes proposed in **paragraphs 48** to **56**) to cover the acquisitions of all interests in land.

59 Given the rigorous approvals process for annual programmes and annual reporting requirements, which address the Government's policy objectives of scrutiny and ensuring that proposed transactions are not contrary to Australia's national interest (see **paragraph 55**), an applicant who receives approval should not be restricted to making direct acquisitions in land only.

60 There is no discernible policy reason why the direct acquisition of land should be treated differently to the acquisition of a heritage listed property or a share or unit in an urban land corporation or trust whose assets are interests in land. This proposal provides consistency to the management and rationale of all land and annual programme approvals, which are an exemption to land (and allow

the Treasurer to consider the character of the investor in relation to acquisitions of all land).

Upstream acquisitions

Issue

61 Prior to 2010, section 26 of FATA required compulsory notification of the acquisition of a "substantial shareholding in an Australian corporation". This meant that it only applied when a foreign person acquired shares in an Australian corporation (rather than shares in a foreign holding company of an Australian corporation).

62 In 2010, section 26 of FATA was amended to require the compulsory notification of the acquisition of a "substantial interest in an Australian corporation".

63 The tracing provisions under FATA provide that any person which holds a substantial interest in a corporation will be deemed to hold the same interest in any subsidiaries of that corporation as the corporation holds in such subsidiaries.

64 The effect of the 2010 amendment to FATA, together with the tracing provisions, is that the transactions between foreign corporations which are not subject to section 18 of FATA (as the acquisition of shares is not in relation to the relevant corporation is not a "prescribed corporation") may still result in a foreign person acquiring a "substantial interest in an Australian corporation" and accordingly requires prior notification to the Treasurer.

65 Effectively, this means that notification is required for any acquisition of shares in a foreign corporation that results in a foreign person acquiring a substantial interest in a "downstream" Australian corporation, regardless of the value of the downstream Australian corporation.

Proposal

Amend section 26(2) of FATA to refer to a "substantial interest" in a prescribed corporation.

66 The Revised Explanatory Memorandum to the *Foreign Acquisitions and Takeovers Amendment Bill 2009* states that:

> … the Treasurer's powers [under FATA] do not apply to acquisitions of interests in Australian corporations and businesses valued below the relevant monetary thresholds. Accordingly references to acquisitions which are subject to the Treasurer's powers throughout this document refer only to the acquisitions of interests in those entities valued above the monetary thresholds.

67 This proposal is consistent with the intention of Parliament as set out in the Revised Explanatory Memorandum. In addition, it is consistent with the current stated intention of the Government, which in paragraph 18 second dot point of the Discussion Paper provides that FIRB approval is required for the "acquisition of an interest in an offshore company whose Australian subsidiaries or gross assets are valued above $252 million (indexed annually)".

Fees – general

68 We appreciate the desire by Government to introduce a user pays based fee system for foreign investment applications. Clearly it is important, as part of Australia's support and recognition for foreign investment, that any fees imposed fairly represent the actual administrative cost of assessing applications and ongoing compliance and are otherwise managed and collected efficiently.

69 There is a risk that if the fees are linked to the value of a transaction, rather than the administrative burden, the fee will be misconstrued as a tax.

Proposal

Fees are linked to a reasonable estimate of the administrative cost of review and monitoring of compliance, rather than the value of the transaction.

70 We propose that the fees are linked to a reasonable estimate of the administrative cost of review of the application and monitoring for compliance, rather than the value of the transaction.

71 The Government may wish to have regard to the fees imposed by other Commonwealth agencies, such as ASIC, ASX and the Takeover's Panel. Fees for comparative corporate transactions range from $15,000 for ASX to review a listing application and accompanying documents to $1,139 for ASIC relief applications in relation to takeovers, as set out in the table below:

Document	Fee imposed
ASX	
IPO – Reviewing an Appendix 1A (application for ASX listing) and accompanying documents	$15,000
ASIC	
Lodging a disclosure document that is: (a) a prospectus (b) a profile statement (c) an offer information statement	$2,290
Lodging a Bidder's Statement	$2,290
Application for relief in relation to takeovers	$1,139
Takeovers Panel	
Application fee	$2,290
New Zealand - Overseas Investment Office	
Consent for a land transaction decided by the relevant Ministers	NZ$22,488.89
Consent for a land transaction decided by the Regulator (OIO) under delegation	NZ$19,524.44
Consent for significant business assets transaction decided by the Regulator under delegation	NZ$13,186.67

72 Accordingly, we believe that the average application for a commercial application is analogous to an IPO or Bidder's Statement and should be no more than $8,000.

Fees for advanced off-the-plan certificates and annual programmes

73 The Discussion Paper in paragraph 43 second dot point states that property developers will be charged an application fee for advanced off-the-plan certificates based on the number of dwellings sold to foreign investors, raising timing issues in relation to payments.

74 As advanced off-the-plan certificates are prior approvals to acquisitions and, accordingly, the number of dwellings sold to foreign investors will be unknown at the time of application, the quantum of the fee will be also unknown before FIRB assesses the application.

75 The Discussion Paper does not contemplate fees applicable to annual programmes. On the basis of the proposed policy objectives stated in the Discussion Paper, it is assumed that fees will also be introduced for annual programmes.

Proposal

Introduce a flat fee for annual programmes and advanced off-the-plan certificates, which is linked to an estimate of the administrative cost of review.

76 As the number of the foreign acquisitions under an advanced off-the-plan certificate will not be known until after FIRB approval has been obtained, to avoid complicated reconciliation methods (which will impact on the certainty of budget of FIRB), we submit the fee for advanced off-the-plan certificates be linked to the administrative cost of review of the FIRB application.

77 Annual programmes are similar to advanced off-the-plan certificates, in that they grant applicants "prior" FIRB approval for acquisitions, which may or may not be completed. Accordingly, we submit that the application fee for an annual programme should also be linked to the administrative costs of review.

78 The linking of the payment to the administrative cost of review is further supported by the requirement that under each advanced off-the-plan certificates and annual programme, applicants are required to regularly report to FIRB, which will reduce the cost of compliance.

Payment of fees for unsuccessful transaction

79 The Discussion Paper in paragraphs 45 – 46, highlights certain situations where applicants may be required to submit multiple applications, and consequently, incur multiple application fees, such as bidders at auctions and applicants who withdraw and resubmit their applications in order to extend the statutory deadlines.

80 Foreign investors will also often start the process of obtaining FIRB approval prior to being successfully selected in a competitive bid process to enhance the attractiveness of the bid.

81 These categories of investors may find themselves in situations having paid the FIRB application fees in order to put themselves in a more competitive position to enable them to invest in Australia and essentially "lose" their application fee if they do not proceed with the transaction.

Proposal

The fee regime should include a "broken fee" reimbursement which may be repaid to the foreign investor or set-off against future applications.

82 In such situations, FIRB may consider implementing a "broken fee" reimbursement, to be repaid to investors in respect of unsuccessful transactions.

83 This broken fee arrangement could involve a portion of the application fee set-off against future applications. The set-off portion of the application fee would act as a discount to any applications submitted by the foreign investor in the following 12 month period.

84 The set-off amount reflects the fact that FIRB will have considered the character of the investor in the application for the ultimately unsuccessful transaction and represents, in effect, an amortisation of the previous learnings.

Timing for payment of fees

85 The Discussion Paper in paragraph 44, states that FIRB will only assess an application once payment of the relevant fee had been received. This raises procedural questions in relation to the form and timing of payment of the application fees.

Proposal

Adopt electronic funds transfers as the method of paying application fees, quoting the case name (or number if this can be generated on submission of the application) and a reconciliation mechanism for off the plan payments.

86 Given the move to the online lodgement portal, which has brought with it increased efficiency in the submission of applications, the implementation of electronic funds transfer as the method for paying application fees will be required.

87 The ASX prefers payment via electronic funds transfer, but also accept cheque and payment of fees is usually upfront.

88 Similarly, ASIC requires upfront payments of filing fees. Payment options accepted by ASIC include cheque, payment via Australia Post, credit card, BPay or electronic funds transfer.

89 As FIRB only has an office Canberra, and accordingly will not support acceptance of cheques over the counter, the online lodgement system will need to cater for electronic funds transfer.

Rural land register

90 There are some administrative and design issues in relation to the building and maintaining of a national rural land register, having regard to the absence of a uniform approach to registration across the States and Territories (for example

Victoria does not require the registration of a lease and Queensland already has a register).[5]

91 While we can see the benefit of having a rural land register, an unintended consequence could be a reduced competitive advantage for bidders in a competitive situation who require FIRB approval. Given FIRB's impeccable track record of maintaining confidentiality, seeking FIRB approval does not presently impact applicant's competitiveness. The maintenance of confidentiality of the rural land register will be key in order to ensure foreign investor's competitiveness is not compromised.

Proposal

Steps should be taken to consider and address a number of the quirks and differences in the property law regime of each State, where possible it would be good to avoid duplication.

92 The land register will need to address a number of quirks and differences in the property law regimes in each State and issues around maintaining confidentiality. We would be happy to discuss the details of these differences with you in more detail.

[5] Many of these were raised in Lumsden Of Mountains and Mole Hills: Is An Agricultural Land Register Worth the Cost? – Available at: http://www.clmr.unsw.edu.au/article/accountability/mountains-and-mole-hills-agricultural-land-register-worth-cost#sthash.c7rpyzbZ.dpuf.