AUSTRALIA'S FOREIGN INVESTMENT FRAMEWORK: MODERNISING OPTIONS

SUBMISSION

Corrs Chambers Westgarth

May 2015

WWW.CORRS.COM.AU

CORRS
CHAMBERS
WESTGARTH
lawyers

Australia's Foreign Investment Framework: Modernising Options

On Monday 18 May 2015 the Government announced a consultation on options for modernising the foreign investment framework which includes a number of proposals relating to the modernisation and simplification of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**), the *Foreign Acquisitions and Takeovers Regulations 1989* (Cth) (the **Regulations**) and Australia's Foreign Investment Policy 2015 (the **Policy**) (**Options Paper**).

Corrs Chambers Westgarth (**Corrs**) is pleased to submit a proposal in respect of the options identified in the Options 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.

As you know, from a practitioner's perspective, we have worried that we have not given the foreign investment rules a serious "tune up" in a very long time and accordingly we support the proposals contained in the Options Paper and consider them significant in the context of the modernisation and simplification of Australia's foreign investment framework.

Clearly modernising and simplifying the foreign investment framework is critical to ensure that it is accessible and the obligations of foreign investors can be readily understood – this is even more so with the introduction of new and better penalties.

Andrew Lumsden
Partner

andrew.lumsden@corrs.com.au
Tel +612 9210 6385
Mob +61 418 110 665
Fax +61 2 9210 6611

Lizzie Knight
Partner

lizzie.knight@corrs.com.au
Tel +61 2 9210 6437
Mob +61 402 793 072
Fax +61 2 9210 6611

Introduction

	Issue	Option	Comment
1.1	**Incorporate the foreign government investor rules into the legislative framework** All direct investments, new businesses and acquisitions of any interests in land by foreign government investors generally require prior notification and approval, regardless of the value. Legislating the requirements would increase legal certainty for foreign government investors, legal advisers and the Government.	Incorporate the foreign government investor rules into the legislative framework	We support the incorporation of the foreign government investor rules into the legislative framework and consider that doing so will increase legal certainty and clarity in relation to the status of foreign government investor notifications and ensure that these notifications are subject to other provisions in FATA, including statutory timelines.
1.2	**Legislate the media specific requirements with a higher percentage threshold** All foreign investors require prior approval to make investments of 5 per cent or more in the media sector, regardless of value. Under the Policy, media sector is defined as daily newspapers, television and radio (including internet sites that broadcast or represent these forms of media). Foreign ownership specific restrictions in the media sector (newspapers and broadcasting) were removed from the *Broadcasting Services Act 1992* in April 2007 (after their removal was announced in July 2006). The *Broadcasting Services Act 1992* adopts a non-discriminatory 15 per cent quantitative threshold for 'deemed control'. Media diversity rules continue to apply to both foreign persons and Australians in a non-discriminatory manner. The existing foreign investment screening framework	Legislate the media specific requirements Increase the percentage threshold from 5 per cent to align with direct investment (10 per cent) or substantial interest (15 per cent)	We support an increase in the percentage threshold for media from 5% to align with the direct investment threshold for foreign government investors of 10% or in all other cases 15% which reflects the *Broadcasting Services Act 1992.*

	Issue	Option	Comment
	for business acquisitions requires notification at specified percentage triggers or above (either regardless of value, or also subject to meeting an applicable monetary threshold). While 15 per cent is the starting percentage currently under the Act, 5 per cent applies in the media sector and 10 per cent for acquisitions termed direct investments by foreign government investors. It is proposed to align the 5 per cent for the media sector with direct investment (10 per cent) or the substantial interest threshold (15 per cent).		
1.3	**Abolish or legislate the special screening requirements for heritage listed commercial developed property** Commercial developed property that is heritage listed is subject to a lower non-indexed threshold ($5 million). The historical requirement dates back to when each level of government did not have regimes to protect heritage values and there may have been instances when Commonwealth intervention was warranted in exceptional circumstances. This aspect of the regime is also fragmented as the requirement does not apply to relevant trade agreement partners whose investors have access to the higher monetary screening threshold of $1,094 million for acquisitions in non-prescribed sensitive sectors and of commercial developed property.	Abolish this requirement	We support abolishing a special screening requirement for heritage listed land. Heritage properties are protected by State legislation which broadly speaking provides for registration and listing of property. Once registered that property may only be developed or changed with the consent of the relevant authority. Accordingly, we submit that heritage listed properties do not need a special screening threshold.
2.1	**Update the legislation to reflect core administrative practices such as the no objections validity period, information sharing, screening timeframes and conditions**	Update the legislation to reflect core administrative practices	We support the updating of the legislation to reflect some core administrative matters. **Timeframes** However, care is required to ensure that these

	Issue	Option	Comment
	Administratively, workarounds or administrative guidance has been in place for a significant period. These include: • on information collection, appropriate uses, and sharing; • withdrawal and resubmission by an applicant to extend the review period without the use of an Interim Order that is publicly gazetted; • a default 12 month validity period for approvals; • applying requirements that do not have full legislative backing; • not proceeding with compliance action so long as the foreign person complies with certain requirements; and • waiver of conditions in certain circumstances (for example, condition no longer in the national interest due to changes in circumstances such as economic conditions, residency, or citizenship). Such changes would better support or allow: • appropriate information sharing amongst relevant Departments and agencies; • applicants to voluntarily agree to extend the screening period on a confidential basis; • the Treasurer to issue exemption certificates under a common framework; • the Treasurer to impose conditions if a foreign person initially failed to notify;		practices which have provided applicants and the Government alike with flexibility are not hardwired into legislation and ultimately undermine that flexibility. For example, it is well understood by practitioners that in some circumstances an application must be withdrawn and re-submitted to provide FIRB with additional time to consider an application rather than that application being gazetted and losing confidentiality. Legislating a framework for extensions to the time period may undermine the certainty provided by the statutory timelines (which distinguish Australia's foreign investment regime from a number of other international regimes) and the ability of an applicant to require a decision within the period. We submit that certain of these matters are better dealt with in guidance notes issued by FIRB which will provide sufficient flexibility to applicants and Government. **12 month approval validity** We submit that it would be useful to provide clarity that any approval for shareholder or investor arrangements which include pre-emption rights or option rights also extend to the exercise of those rights which may occur at anytime during the term of the arrangements, provided the document outlining the arrangement is signed within the 12 month period. We further submit that if approval for entry into security arrangements is obtained and the security documents are executed within the 12 month period, that further

	Issue	Option	Comment
	• the Treasurer to vary enforceable conditions (but only in a manner not to the foreign person's detriment); and • updating of the notification requirements.		approval should not be required for the enforcement of security in accordance with those security arrangements. **Conditions** The imposition of behavioural conditions as a means to protect the national interest are prevalent and well understood. Compliance with undertakings imposed is largely the norm. Under FATA the Treasurer's power in respect of a failure to comply with an undertaking is limited to divestiture. We submit that consistent with regulatory developments under the *Corporations Act 2001* (Cth) (**Corporations Act**) (with respect to ASIC) and the *Consumer and Competition Act 2010* (Cth) (with respect to the ACCC), that the undertaking / enforcement regime be legislated and provide FIRB / the Treasurer with options in addition to divestiture eg infringement notices / penalties.
3.1	**Increase the substantial interest (control) threshold for a single foreign person from 15 to 20 per cent** Foreign persons generally require approval if acquiring a stake of 15 per cent or more (depending on the relevant monetary threshold). Aligning the Act control threshold with the 20 per cent in the takeovers rules in the *Corporations Act 2001* would align non-government investor business acquisitions being notified to those where Australia's takeover rules consider that parties should generally make a takeover offer as control can change. This increase will automatically flow through to the	Increase the substantial interest (control) threshold for a single foreign person from 15 to 20 per cent	We support the alignment of the substantial interest test under FATA with the control threshold contained in the Corporations Act as well as the inclusions of specified interests being disregarded when assessing the threshold for example bare trustees, certain directorships and operators of clearing and settlement facilities. We consider that in addition, the concept of "substantial interest", "controlling interest", "interests in shares", "voting power" and "potential voting power" should be simplified and aligned with the definition of a "relevant interest" used in section 608 of the Corporations Act which is well understood and supported by a significant body of case law. We

	Issue	Option	Comment
	definition of a 'foreign person' (currently a company is a foreign person if a single foreign person with Associates owns 15 per cent or more in the company). It will also flow through to the definition of a foreign government investor which also uses the 15 per cent test (that is, foreign government investors includes entities in which governments, their agencies or related entities from a single foreign country have an aggregate interest (direct or indirect) of 15 per cent or more). This will reduce compliance costs on investors and the Government as it will better focus the regime (both who is a foreign person and the proposals to be notified where control may change). It would also better align the framework with the more commonly understood takeovers regime, which is supported by an established body of law. Under the takeovers rules, specified interests are disregarded when assessing if the 20 per cent is met (for example, bare trust trustees, certain directorships, and operators of clearing and settlement facilities). The FATA also has provision to disregard certain interests. Incorporating some exceptions from the Corporations Act will also be considered as part of implementing this change.		submit that a direct interest in land remain a separate concept as it currently is under FATA with clarity provided in the Policy about what constitutes exclusive occupation and the value of lease payments for the purposes of the threshold. The Policy should also clarify that an exploration permit or licence does not constitute an interest in land. In adopting the relevant interest test from the Corporations Act we also submit that the tracing provisions in section 12C of FATA are amended to be consistent with section 608(3) of the Corporations Act.
3.2	**Allowing certain interests to be disregarded when applying the foreign person definition** 'Australian' companies that are Australian domiciled and controlled, can be deemed to be 'foreign persons' through the interests of numerous unrelated passive foreign shareholders exceeding the 40 per cent	Consider options to reduce the regulatory burden for substantially Australian entities	We support the reduction of the regulatory burden on Australian companies which may be deemed "foreign persons" as a result of exceeding the 40% aggregate ownership threshold. We submit an option to address this issue is to amend the definition of "prescribed corporation" to exclude an

	Issue	Option	Comment
	aggregate ownership threshold (that applies where no foreign person holds 15 per cent or more). This is or has been an issue for some major Australian listed companies as at different times their foreign ownership levels have neared or exceeded the 40 per cent threshold. The latter makes them foreign persons required to comply with the foreign investment framework (and under the screening framework they can be subject to less favourable treatment than investors from some of Australia's trade agreement partners). This may also be an issue for widely held unlisted entities. In these situations, the time and cost associated with an Australian publicly listed entity even assessing if it is a foreign person based on its share register can be considerable with the mechanisms available to them meaning the assessment may not be accurate.		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 aggregate substantial interest, provided that: • a single foreign person and their associates does not hold 20% or more in that company; • foreign governments, their agencies or related entities from a single foreign country do not have an aggregate interest (direct or indirect) of 20% 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, 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 companies would be able to apply for a declaration stating that they are to be treated as Australian.

	Issue	Option	Comment
3.3	**Simplifying the 'associates' definition without compromising integrity of the framework** The 'associates' definition has been subject to criticism for being too broad, including that it deems associates to include any associate of an associate. It is not suited to the modern day where there are many listed entities and individuals who are directors on more than one board (including 'independent directors'), and greater cross border investment and mobility. Possible models that have been raised include the associates definition under Australia's takeover rules and that in the *Broadcasting Services Act 1992*. From an integrity perspective, it may be necessary to have a definition where additional limbs may apply for closely held entities investing in land.	Consider options to simplify the associates definition to better align with modern practice	We support an amendment to the definition of "associate" to reflect that term as defined in the Corporations Act. We submit the Corporations Act definition is consistent with and better aligns with the use of Corporations Act concepts proposed elsewhere in the changes to FATA.
3.4	**Modernise the moneylending exemption in the Act to reflect current lending approaches** The moneylending exemption excludes the acquisition of assets, shares or interests from screening when undertaken in the ordinary course of a moneylending business (in practice this only applies to non-government investors). However, as lending practices have evolved since the Act's introduction in 1975, it would be appropriate to modernise the exemption and better align it with the approach in the *Corporations Act 2001*.	Better align the moneylending exemption with current lending approaches	We support the modernising of the moneylending exemption to reflect section 609(1) of the Corporations Act. We submit that if this exception is adopted, there is no policy basis to distinguish non-foreign government investors from foreign government investors, provided the foreign government investors otherwise complies with the definition, ie it takes a security interest in the ordinary course of its business of the provision of financial accommodation by any means and on ordinary terms.
3.5	**Exempt compulsory acquisitions and buy-outs following takeover bids**	Exempt compulsory acquisitions and buy-outs following takeover	We support the exemption of compulsory acquisitions and buy-outs from notification.

	Issue	Option	Comment
	Chapter 6A of the *Corporations Act 2001* 'Compulsory acquisitions and buy-outs' requires or allows a party with a 90 per cent or more interest to compulsorily acquire the remaining securities as per the prescribed rules (100 per cent of the securities required before compulsory buy-out of convertible securities). It represents an unnecessary regulatory burden when a party may be required to do something under one statute (the Corporations Act) but requires prior notification and approval under another before proceeding (the FATA).	bids	
3.6	**Import selected exceptions from Australia's takeovers rules (subject to any necessary modifications)** Australian businesses (both listed and unlisted) have mechanisms such as dividend reinvestment plans and pro-rata rights issues that assist in their ongoing capital management strategies. Investors in these businesses will often look to avail themselves of these opportunities as they arise as a means to maintain their stake, reinvest their earnings, or manage their stakes as part of their broader portfolio strategy. Such mechanisms are not considered means by which investors take control of Australian businesses. The current framework for both direct investments and substantial interests works on the basis that acquiring once the applicable thresholds are met even one additional share or unit (irrespective of its price), requires prior approval. Those seeking approval on an annual basis generally reflect that they want the ability to make incremental acquisitions which are also of	Import selected exceptions from Australia's takeovers rules (subject to any necessary modifications)	We support the introduction of selected exceptions from Australia's takeover rules as exceptions to notification under FATA. We would submit that equal capital reductions and equal buy-backs which are extended to all securities in the class should not be distinguished from a pro-rata rights issues and should also be subject to exemption. We also submit on the same policy grounds that upstream corporate restructures which do not impact on the control or ownership of a company (ie the ultimate beneficial owners remain the same) should not be subject to notification as there is no policy concern from a foreign investment standpoint. We submit that concerns related to restructures which may impact on revenues may be addressed in the accounts submitted to the ATO and should be addressed as a tax matter and not from a foreign investment standpoint.

	Issue	Option	Comment
	benefit to the Australian business. For most of these investors, their stake does not significantly increase, and they have no intention to seek control in their own right. With the announced introduction of fees, better targeting of applications is important to maintaining Australia's reputation as an attractive investment destination. Chapter 6 of the *Corporations Act 2001* 'Takeovers' provides that certain acquisitions do not trigger a requirement to make a takeover offer (once a 20 per cent holding is reached). Each exception is premised on differing factors (for example, not triggering a change in control, or preapproval by non-related parties in the target). It is proposed to import the following exceptions which are not considered to change control (with potential modifications): 1. Rights issue (pro-rata): nil modifications proposed (an exemption to compulsory notification of shares already exists in the FATA and it is proposed that this is extended to all securities issues in all circumstances); and 2. Dividend reinvestment etc: there will only be negligible changes in percentage holdings unless an investor already holds a significant stake. It is proposed that this exception will be modified so that it is only applicable where the target has their primary market listing in Australia.		
3.7	**Provide an exemption for underwriters** As a normal part of doing business, foreign financial institutions in the business of underwriting may acquire	Provide an exemption for acquisitions in the ordinary course of underwriting	We support the exemption for acquisitions by foreign financial institutions (licensed by ASIC as underwriters) in the ordinary course of underwriting.

	Issue	Option	Comment
	a substantial shareholding as a result of their underwriting activities. This would normally be temporary with no intent to control but notification can be required. The introduction of an exemption for acquisitions by foreign financial institutions (licensed by ASIC as underwriters) in the ordinary course of underwriting is being considered. Such an exemption may require that the underwriter waive the exercise of their voting rights and sell down to third parties within 6 months. Australia's takeovers rules also provide an exception for underwriting activities. However, an exemption for non-professional underwriters is not being considered, including because such underwriting may not include a sell down obligation, and if so, could be used by for example, a steelmaker, to gain control of an Australian iron ore business.		We submit that this underwriting exemption extend to the underwriting of any pro rata rights issue (whether the underwriter is licensed by ASIC) on the basis that concerns about control are adequately addressed in the Corporations Act and the Takeovers Panel Guidance Note 17.
3.8	**Exempt from compulsory notification acquisitions where a majority owner (greater than 50 per cent) is increasing their direct interest** Under the framework, it is a criminal offence to acquire a substantial interest in an Australian company above the thresholds without prior notification (often referred to as compulsory notification). This applies even if the acquirer already has 'control' of the Australian company, as a majority owner. Under the business acquisitions framework in the Act, the Treasurer does not have powers unless firstly there is a change in control. Thus, there is no substantive reason to require notification and prior approval where a majority	Exempt from compulsory notification acquisitions where a majority owner is increasing their direct interest	We support the exemption from compulsory notification acquisitions where a majority owner is increasing a direct interest. We also submit on the same policy grounds that this exemption extend to indirect interests in the context of upstream corporate restructures which do not impact on the control or ownership of a company (ie the ultimate beneficial owners remain the same) should not be subject to notification (see item 3.6 above).

	Issue	Option	Comment
	controlling owner is increasing their holding. Risks to the national interest would be minimised through limiting access (for example, exclude foreign government investors and acquisitions impacting sensitive sectors or land rich entities). With the announced introduction of fees, better targeting of applications of interest is important to maintaining Australia's reputation as an attractive investment destination.		
3.9	**Refine the foreign person definition** Since the introduction of the framework, its 'foreign person' definition has been incorporated into other Commonwealth legislation, as well as some State and Territory legislation, as is, or in a modified form. It includes all natural persons not ordinarily resident in Australia and thus can include Australian expatriates who are no longer considered ordinarily resident in Australia. It does not include foreign governments or body politics.	Consider refinements to the foreign person definition	We support refinements to the definition of foreign person to ensure the definition is clear and consistent with other Commonwealth legislation.
4.1	**Broaden coverage of annual programs** Annual program arrangements are designed to minimise compliance costs for frequent foreign investors (a single approval every 12 months rather than potentially many spread over the period). In applying for an annual program foreign investors are required to specify the type of property acquisition they propose to make, the reason for the acquisition and location(s) where the acquisitions will be made. If granted, the program will specify an annual monetary	Allow annual programs to cover indirect acquisition of interests in land	We support the coverage of the annual programmes being broadened. 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. In addition, the policy basis for the extension of the annual programme to indirect acquisitions equally apply to the acquisitions of rural land ie reduction of compliance costs and ensuring a more level playing

	Issue	Option	Comment
	limit for the acquisitions that an investor can make during the period. Where the limit has been used or the foreign person wants to purchase other types of property, the normal notification arrangements apply. Investors are required to report on acquisitions made through an annual program, as well as their compliance with any other conditions. Annual Programs currently only apply to acquisitions of direct interests in urban land. This has limited their usefulness to investors and the Government. The business environment and practices have evolved since the introduction of the annual programs and it is now common for properties to be acquired indirectly by acquiring the property holding entity (the seller may also dictate at which level the sale takes place for their own commercial interests). Widely held (listed and unlisted) real estate investment vehicles are also now common. However, as there is no obvious policy rationale to differentiate, it is proposed that annual programs be extended to cover acquisitions of indirect interests in urban land (for example, shares or units in Australian urban land corporations or trusts). While reducing compliance costs for both the investor and Government, annual programs assist in levelling the playing field between foreign and non-foreign persons. What land types this should be made available to will be considered.		field between foreign and non-foreign investors. Accordingly, we submit the annual programme extend to include rural land (whether or not the acquisition of rural land is incidental to a foreign company's business).
4.2	**Fix and update the exemption for passive investments in urban land trusts**	Legislate the interim arrangements for passive investments in land trusts	We support legislating the interim arrangements for passive investments.

	Issue	Option	Comment
	The exemption for passive investments by foreign persons in Australian public urban land trusts is no longer operational as a result of obsolete references in the regulation. An interim solution where no action will be taken when a foreign person acquires a passive interest (10 per cent threshold for listed; 5 per cent for others) in a real estate investment trust or property trust in certain circumstances is in place. It is proposed to legislate this subject to any required minor amendments. It is not being proposed to legislate the 15 per cent threshold of the obsolete exemption as the percentages for passive investment and (potential) control do not need to be mutually exclusive. As the framework also deals with collective control, the passive ceiling proposed is lower than the single person control threshold to reduce risks to the national interest arising from any collective foreign control.	(subject to any required minor modifications)	As the exemption is consistent with the Policy in that it relates to passive investments and is capped at 10% for listed companies and 5% for non-listed companies, we submit that it should be made clear this exemption also applies to foreign government investors.
4.3	**Broaden the scope of exemptions for Australian urban land corporations and trusts** Some acquisitions of interests in urban land corporations and trusts would be exempt if the interest was acquired directly. • For example, exemptions such as the $55 million developed commercial property threshold do not flow through. • Pro-rata unit issues are not exempt. There is no discernible policy rational to distinguish between some direct and indirect acquisitions. It is proposed to extend the current exemptions to interests	Broaden the scope of exemptions for Australian land corporations and trusts	We support that the thresholds for urban land (ie the proposed $252 million below) equally apply to urban land corporations and trusts. We also support that exemptions proposed to apply in respect of companies (for example see items 3.6, 3.7 and 3.8) also apply to urban land corporations and trusts. We further submit that FATA is clarified with respect to upstream offshore acquisitions which may in that corporate chain include an Australian urban land corporation, such that an upstream acquisition only requires approval if it meets the proposed $252 million

	Issue	Option	Comment
	acquired indirectly through urban land corporations and trusts.		threshold.
4.4	**Raise the developed commercial real estate screening threshold for some (non-sensitive) commercial real estate from $55 million to $252 million (indexed)** The higher $1,094 million (indexed) threshold applies to developed commercial real estate for relevant trade agreement partners (non-government investors from Chile, Japan, Korea, New Zealand and the United States). For all other non-government investors a $55 million (indexed) threshold applies. Until December 2006, this threshold was aligned with the general business threshold. While developed commercial real estate is not defined in the Act, it is taken to be accommodation facilities (or parts thereof) and non-residential commercial land. It can include operational mines and infrastructure that may be considered sensitive or critical such as power stations or toll roads. It is proposed that the $252 million threshold would apply to accommodation facilities, office and industrial buildings, but not mines and critical infrastructure. Definitions of various land types such as developed commercial real estate are subject to further consideration.	Raise the developed commercial real estate screening threshold for non-sensitive commercial real estate from $55 million to $252 million (indexed)	We support the increase for thresholds for developed commercial land from $55 million to $252 million. We consider the definition of developed commercial land adopted reflect an ordinary understanding of that term, ie developed non-residential land. We submit that "critical infrastructure" is already addressed in separate legislation or is otherwise addressed in the "prescribed sensitive sectors" and that accordingly a further concept of "critical infrastructure" to which another threshold applies is not necessary. We further submit that a separate test is not required for "critical infrastructure" which can be addressed under the national interest grounds of national security. To the extent there are concerns about critical infrastructure this could be better managed from a policy perspective with the introduction of conditions. We also submit that operating mines do not from a policy perspective pose any concerns which would warrant special consideration which is distinct from other commercial developed property.
4.5	**Adjust definition of 'foreign government investor' to reflect the proposed new single foreign person control threshold of 20 per cent**	Adjust definition of 'foreign government investor' to reflect the proposed new single foreign person control threshold of	We support the adjustment of the definition of "foreign government investor" to reflect the new proposed threshold of 20%.

	Issue	Option	Comment
	Currently, foreign government investors include entities in which governments, their agencies or related entities from a single foreign country have a 15 per cent interest (40 per cent for multiple foreign countries). It is proposed that the 15 per cent threshold be increased to 20 per cent to maintain alignment with the 20 per cent threshold proposed for foreign persons generally (see 3.1). This may provide some relief to entities that are currently captured, but are not controlled by foreign governments. As part of modernisation options, further consideration will be given to disregarding specific interests when applying the percentage tests.	20 per cent	We also submit that in the case of private funds in which foreign government investors from one single country hold 20% or various countries hold 40% (ie a number of pension funds from one country) should not be deemed to be a foreign government investor provided the investors in that fund are passive investors and do not have any control in respect of the operation or decision making of the fund or fund manager.
4.6	**Extend some existing exemptions to foreign government investors** Some existing exemptions for non-government investors could be extended to foreign government investors. For example: • pro-rata capital raisings; and • clarify that acquisitions of securities in Australian urban land corporations and trusts only need approval if the acquisition constitutes a 'direct investment' (that is, 10 per cent or more, or the ability to control). Exemptions would not be extended where they may raise national security concerns.	Extend some existing exemptions to foreign government investors	We support the extension of certain exemptions to foreign government investors including pro rata capital raisings. We are concerned that any "national security" carve out to exemptions which are stated to apply to foreign government investors would not provide foreign government investors with sufficient certainty or clarity about whether notification is required. Accordingly, we submit that any exemptions which are extended to foreign government investors should be clearly stated to apply other than in relation to prescribed sensitive sectors.
4.7	**Annual program facility for interests in land for foreign government investors (but case-by-case**	Introduce an annual program facility for interests in land for	We support the extension of annual programmes to foreign government investors.

	Issue	Option	Comment
	issue) Currently, all foreign government investors must get prior approval before acquiring an interest in land. Pre-approval has been provided to varying degrees over time on a case-by-case basis depending on who the investor is and their intended purchases. Under an explicit power to allow for annual programs, a certificate could limit the transactions covered and impose legally enforceable conditions. While reducing compliance costs for both the investor and the Government, annual programs assist in levelling the playing field between foreign and non-foreign persons. Reductions in investors costs can also be significant if investors undertakes many small acquisitions. In addition to item 4.6, it is proposed that an annual program (pre-approval) facility be formalised to minimise the compliance burden arising from certain land acquisitions (for example, interests acquired for pipelines) on the understanding the issue of such annual programs will be considered on a case-by-case basis.	foreign government investors	

	Issue	Option	Comment
5.1	**Framework to apply equally irrespective of transaction structuring** Due to its age, the Act focuses on share acquisitions. While the Act addresses units in the urban land framework legislated in 1989, and there have been some ad-hoc changes since then, the issue has not been comprehensively addressed. It is proposed that this package will address this issue in a manner that would simplify the framework through greater consistency, while also ensuring the legislation cannot be easily avoided. The intention is that exemptions will also apply equally irrespective of the transaction structuring, unless there is policy or administrative rationale to discriminate (for example, see also 4.1 and 6.2).	Framework to apply equally irrespective of transaction structuring	We support that the framework apply equally to securities and units ensuring simplification and consistency.
6.1	**Remove investments in financial sector companies from the foreign investment framework for all investors** Foreign investors can require the Treasurer's approval under both the *Foreign Acquisitions and Takeovers Act 1975* and the *Financial Sector (Shareholdings) Act 1998* for the same investment (with both decisions made on national interest grounds). However, non-government investors from Chile, Japan, Korea, New Zealand and the United States do not need to obtain foreign investment approval for investments into financial sector companies because of trade agreement commitments (the *Financial Sector (Shareholdings) Act 1998* still applies). The current double-up for non-trade agreement investors adds	Remove investments in financial sector companies from the framework (the *Financial Sector (Shareholdings) Act 1998* would still apply)	We support the removal of investments in financial sector companies from the foreign investment framework.

	Issue	Option	Comment
	cost, time and additional red tape.		
6.2	**Tidy-up the legislation and Policy** A general tidy-up is proposed to remove obsolete provisions and provide more clarity. Examples covered by this item include: • Legislate some existing administrative approaches (for example, approval validity, impact of change in residency/citizenship on conditions); • Have 'foreign person' defined once (there are numerous instances of a foreign person definition for a specific provision in the Act that has been supplemented elsewhere in the Act so that it is the same definition of foreign person throughout the Act), unless there is a strong policy rationale to do otherwise; • Remove potential double counting of subsidiary assets when determining access to the higher threshold; • Remove unintended consequence of 2010 amendments that it is possibly now an offence not to notify offshore transactions; • Ensure consistent use of terms such as interests in shares and units; and • Align definitions with whole-of-government definitions (for example, charity definition), unless there is a strong policy rationale to do otherwise.	Tidy-up the legislation and Policy	We support a tidy up of FATA, the Regulations and Policy to ensure consistency and clarity and in particular support the removal of the unintended consequences of the 2010 amendments in respect of offshore transactions (including in relation to urban land corporations / trusts). In addition we submit: • FATA should be amended to provide clarity in respect of foreign investors with whom Australia has an FTA so that it is clear, for example, that a company incorporated in Australia where 100% of its shares are owned by US shareholders would be entitled to rely on the higher threshold of $1,092 billion. Under this proposal, provided the ultimate company is incorporated in an FTA country, then the higher threshold would be accessible irrespective of the interposition of companies in the chain. This is consistent with the policy position to look to the ultimate beneficial owner in each circumstance; and • the concept of a prescribed foreign government investor (which applies to foreign government investors from countries with whom Australia has an FTA) should be clarified to ensure that it is clear that a separate threshold applies to such foreign government investors.