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20 March 2015

Manager

International Investment and Trade Unit
Foreign Investment and Trade Policy Division
The Treasury
Langton Crescent
Parkes ACT 2600

By email: ForeignInvestmentConsultation@treasury.gov.au

Dear Sir/Madam,

Consultation Paper – ‘Strengthening Australia’s Foreign Investment Framework’

The Law Institute of Victoria is pleased to have the opportunity to provide responses to the Treasury’s Consultation Paper titled ‘Strengthening Australia’s Foreign Investment Framework’ (Consultation Paper).

The LIV’s responses to the specific questions posed in the Consultation Paper are set out in the attached submission.

If you would like to discuss the matters raised in the submission, please do not hesitate to contact myself or Karen Cheng, Property and Environmental Law Section Lawyer at the LIV, at kcheng@liv.asn.au or 03 9607 9522.

Yours sincerely,



Katie Miller
President
Law Institute of Victoria

Encl.

STRENGTHENING AUSTRALIA'S FOREIGN INVESTMENT FRAMEWORK

Consultation Paper

To: International Investment and Trade Unit
Foreign Investment and Trade Policy Division
The Treasury

Date: 20 March 2015



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GENERAL COMMENTS

The Law Institute of Victoria (LIV) is pleased to have the opportunity to provide responses to the 'Strengthening Australia's Foreign Investment Framework' Consultation Paper (the Consultation Paper).

It wishes to emphasise, however, that the submissions below are only made in response to the questions posed in the Consultation Paper in relation to compliance and enforcement issues, and are not intended to represent the LIV's, or its members', views as to the role of foreign investment in the residential real estate market either in Victoria or Australia.

SUBMISSIONS

For ease of reference, the LIV has adopted the numbering system set out in the Consultation Paper.

3. Proposed Residential Real Estate Reforms

3.1 New compliance and enforcement area in the Australia Taxation Office

1. ***The government seeks feedback on the creation of a new compliance and enforcement area in the Australian Taxation Office, including:***

a. ***Is the creation of a new compliance and enforcement area required to address concerns with foreign investment framework compliance?***

Yes, the LIV considers it is. As such, it is in agreement the consolidation of compliance and enforcement functions into one body would be beneficial and does not oppose the appointment of the Australian Taxation Office (ATO) as the body.

i. ***Are there alternative approaches that should be considered?***

It is also suggested public access of data should be consolidated into the functions of the compliance and enforcement body. The body should be able to provide access to all the information required by lawyers, conveyancers and their clients.

The LIV otherwise queries how the proposed compliance and enforcement area in the ATO will operate alongside the Foreign Investment Review Board (FIRB) as the Consultation Paper does not address this issue.

2. ***Are there other legislative impediments preventing data sharing between relevant agencies?***

The LIV notes there needs to be consideration of the potential impact of the Australian Privacy Principles.

a. ***Should the Treasurer and the Australian Taxation Office have authority to obtain information, documents and evidence that relate to potential breaches of the foreign investment framework?***

Yes, the LIV considers they should have the authority to do so.

i. ***Are there alternative approaches that should be considered?***

The LIV is presently unable to say.

- b. Should the creation of a new compliance and enforcement area be funded by the Australian taxpayer or through the introduction of application fees on foreign investors?**

If a new compliance and enforcement body is created, the LIV considers the cost should be borne by the users of the regime. Accordingly, the LIV is agreeable to the proposal of application fees on foreign investors.

- i. Are there alternative approaches that should be considered?**

The LIV is presently unable to say.

- c. Do the proposed changes appropriately balance the need for additional scrutiny on certain foreign investment applications while continuing to streamline the process for approving investments in single developments?**

The LIV considers that further details of the proposed framework will need to be made available, before this can be properly considered.

- i. Are there alternative approaches that should be considered?**

The LIV is presently unable to say.

4. Penalty Regime

- 3. The government seeks feedback on the proposed changes to the civil penalty regime, including:**

- a. Would a civil penalty regime be an effective addition to the rules to ensure compliance and assist with enforcement?**

The LIV considers that a civil penalty regime will be an effective addition to the rules to ensure compliance and assist with enforcement.

- b. Are the proposed penalty amounts appropriate and likely to serve as a deterrent?**

The LIV presently considers the proposed amounts are appropriate in terms of penalties and in serving to cover costs of implementing the proposed compliance and enforcement framework, however, it is unable to comment as to the deterrent effect.

- c. Is the proposal to extend accessorial liability an effective way to increase compliance?**

Whilst extending accessorial liability and introducing penalties may be an effective way to increase awareness, the LIV queries whether it will necessarily increase compliance.

It is suggested accessorial liability only be applicable in cases where a person has actual and particular knowledge of wrongdoing.

- i. Are there alternative approaches that should be considered?**

The LIV considers that further details of the proposed framework will need to be made available, before this can be properly considered.

- d. Is it necessary to increase the existing criminal penalties in light of the proposed new civil penalties?**

The LIV does not consider it necessary.

4.1 Extending civil penalties and infringement notices to business applications

4. ***Should the new penalty regime be extended to business, commercial real estate and agricultural applications?***

In the interests of uniformity and simplicity in compliance and enforcement and greater public awareness, the LIV considers the new penalty regime should be extended to all applications.

5. Introducing Fees on Foreign Investment Applications

5. ***The government seeks feedback on the introduction of fees on foreign investment applications, including:***

a. ***Should the Government charge application fees on foreign investors to fund screening, compliance and enforcement activities?***

Yes, the LIV considers the costs should be borne by the applicants. However, see comments raised in question 5(b) below.

i. ***Are there alternative approaches that should be considered?***

Apart from the suggested *ad valorem* scale of fees suggested below, the LIV presently has no comment on alternative approaches.

ii. ***Should there be any exceptions to paying the application fee?***

The LIV does not presently consider there should be.

b. ***Is the level of the fees appropriate?***

The LIV is concerned the proposed discrete brackets for application fees are too broad and inflexible. For example, under the current proposals, there is a great disparity between application fees for a property sold for \$999,999 and another sold for \$1,000,001.

The LIV suggests it will be more equitable if application fees are set on an *ad valorem* scale.

i. ***Will the fees act as a barrier to foreign investment?***

The LIV does not presently consider they will.

ii. ***What might be the cumulative impact on business reinvestment?***

The LIV considers that applicants who are able to prove genuine hardship should be exempt from the payment of application fees. However, it is also noted that an *ad valorem* scale, as suggested above, may address the need for this exemption.

c. ***What options should be considered to ensure applicants that submit multiple applications (for example, bidders at auctions or business applicants that withdraw and resubmit) are not charged excessive fees?***

The LIV suggests an applicant should pay a partially non-refundable application fee upfront on each application. If an application does not proceed, a portion of the fee should be retained to cover actual administrative costs incurred in processing the application and any balance then remaining be refunded, on receipt of a refund application in a prescribed form.

6. Advanced Off-the-plan Certificates

6. ***The government seeks feedback on the proposed changes to advanced off the plan certificates, including:***

a. ***Should penalties be introduced for developers that fail to comply with obligations to market domestically?***

The LIV considers penalties should be introduced for developers who fail to comply with obligations to market in Australia.

i. ***If so, what should developers be required to do to prove they have marketed domestically?***

The LIV suggests –

- a copy of the estate agents' sale authority;
- a copy of the marketing schedule; and
- copies of the advertisements as actually posted on the internet and as published in print media.

ii. ***What level of penalty would be appropriate for developers that fail to comply with obligations to market domestically?***

The LIV is unable to comment in detail as it considers this to be somewhat outside its area of expertise, but suggests thought be given to a penalty equating to a percentage of the sale price.

iii. ***Are there alternative approaches that should be considered?***

The LIV is unable to comment in detail as it considers this to be somewhat outside its area of expertise, but suggests thought might be given to an on-the-spot fine regime, as an alternative approach.

7. Implementation of Agriculture Commitments

7. ***Should the definition capture all primary production businesses as well as certain first stage downstream businesses beyond the farm gate (for example, meat processing, sugar milling and grain wholesaling / storage / milling)?***

The LIV considers that it should do so.

8. ***If it is decided that the ANZSIC codes be used, which divisions (or sub divisions, groups) of the ANZSIC codes should be included in the definition for 'agribusiness'?***

On the basis of the information relating to the ANZSIC codes currently posted on the Australian Bureau of Statistics (ABS) website, the LIV considers those appearing under the heading "Chapter 3, Division A, Agriculture, Forestry and Fishing" are appropriate to be included.

9. ***Is there an alternative approach that should be considered to define agribusiness?***

The LIV considers that the definition of agribusiness should reflect the definition of 'primary production business' under Subsection 995-1(1) of the *Income Tax Assessment Act 1997* (Cth) (ITAA) with appropriate safeguards built in. See comments raised in question 10(a)(i) below.

7.2 Definition of ‘agricultural land’

10. **The government seeks feedback on the proposed definition for ‘agricultural land’:**

- a. **Is the proposed definition of ‘agricultural land’ consistent with common understanding of the term?**

The LIV considers a definition of ‘agricultural land’ should reflect it as being a place where a ‘primary production business’ is conducted and tie in with the definition of primary production business under Subsection 995-1(1) of the ITAA and relevant ATO rulings.

This ensures clarity and consistency across legislation, simplifying compliance and enforcement. It also ties in well with the proposal to appoint the ATO as the relevant regulator as it is already equipped to make determinations on such matters.

- i. **Are there alternative approaches that should be considered?**

At the present time the LIV is unable to say.

- b. **Would the proposed definition provide sufficient clarity as to what constitutes ‘agricultural land’ for the purposes of Australia’s foreign investment framework?**

Please refer to the issues raised below in questions 11 and 12.

7.3 Definition of ‘urban land’

11. **The government seeks feedback on the proposed definition of urban or ‘residential land’, including:**

- a. **Is the proposed definition of ‘residential land’ consistent with a common understanding of the term?**

In the view of the LIV, it is not.

- i. **Are there alternative approaches that should be considered?**

Please refer to the comment, below, in question 12.

- b. **Would the proposed definition provide sufficient clarity as to what constitutes ‘residential land’ and related subcategories (such as new and existing dwellings) for the purposes of Australia’s foreign investment framework?**

Please refer to the comment, below, in question 12.

7.4 ‘Other land’

12. **The government seeks feedback on three possible options for the screening of ‘other land’:**

- a. **‘Other land’ be defined as all land that is not ‘agricultural land’ or ‘residential land’ and continues to be screened from dollar zero;**

Please refer to the comment, below.

- b. **‘Other land’ is not defined and any land that is not ‘agricultural land’ or ‘residential land’ no longer requires foreign investment approval; or**

Please refer to the comment, below.

c. 'Other land' is defined as a subset of what is left over from 'agricultural land' or 'residential land' capturing land that remains of interest while excluding some land from screening.

i. If option c is pursued, what types of land should continue to be screened?

Please refer to the comment, below.

Comment:

The proposed definitions of, 'urban land', 'residential land' and 'other land' are too broad and inconsistent with the proposed definition for 'agricultural land' and are quite inadequate to properly cover the range of land uses.

The LIV suggests a far more sophisticated categorisation of land should be employed which accords with commonly accepted usages. Categories could include agricultural, mining, industrial, residential commercial, retail and other land, where 'other land' is land which is not otherwise defined.

7.5 Agricultural land register

13. The Government seeks feedback on implementation issues around the foreign ownership of land register, including:

a. the foreign ownership details that would be published and collected by the register;

The LIV suggests foreign ownership details to be published and collected by the proposed register should capture existing data from each State land registry, revenue office and Government offices, the equivalent of the Victorian Office of the Valuer-General.

b. the two stage implementation approach to information collection (through self reporting then through state and territory land titles processes); and

The LIV considers that the success of the two stage implementation approach will be impacted on the ATO's ability to monitor compliance and enforcement.

c. how lawyers or register conveyancers would verify whether their client is a foreign person?

The LIV suggests relevant land forms should be amended to require declarations of residency. Any purchaser of a property should be required to personally sign the declaration form stating whether they are a foreign resident.

A lawyer or conveyancer must be able to rely on the declaration so they are divested of any liabilities and associated penalties.

Alternatively, verification of foreign residency may be incorporated into proposed verification of client identity (VOI) regimes for land transactions.

However, the LIV queries the extent to which the standard of VOI conducted by lawyers will need to be expanded, having regard to proposed VOI regimes and Legal Profession Uniform Law (LPUL) requirements.

Clarification is also sought as to why lawyers are required to verify an individual's foreign residency, as opposed to relying on their client's certification, when the lawyer does not necessarily possess the means to do so.

It is submitted that, in certain scenarios, a lawyer or conveyancer making reasonable enquiries still cannot be expected to have objective knowledge of a client's residency status, for example:

- where the client is a resident of the United Kingdom, the United States of America or New Zealand; or
- in the case of elderly members of the community, who are otherwise Australian citizens, but do not hold Australian passports or other forms of identification so that conducting VOI may be impractical or indeed impossible; or
- where the client's actual residency status is hidden behind complex company or trust arrangements.

The LIV is presently of the view that any accessorial liabilities or penalties should only extend to lawyers or conveyancers where they have actual and particular knowledge of their clients' residency status.

8. Modernising and Simplifying the Foreign Investment Framework

- 14. *The Government seeks feedback from interested stakeholders on options to modernise and simplify the Act, Regulations and Policy and streamline interaction between applicants and the Foreign Investment Review Board.***

The LIV does not consider itself to be in a position to provide further comments until consultation drafts for the proposed legislative regime become available.

- 15. *Are there harmonisation opportunities with other Acts (e.g. the operation of the Insurance Acquisitions and Takeovers Act 1991 or the Financial Sector (Shareholdings) Act 1998? Should the definition of 'Associate' in the Act conform with the definition of 'Associate' in the Corporations Act 2001?)***

Please refer to above comments at question 14.

- 16. *Is the current regime for enforcement of FIRB conditions effective? What alternative measures could be considered?***

The LIV does not consider the current regime for enforcement of FIRB conditions to be effective.

It is also suggested that all conditions should be removed when the applicant becomes a citizen, and certain conditions be removed when an applicant gains permanent or temporary residency status.

- 17. *Should FIRB provide specific regulatory guidance on approaches to applications and difficult interpretation issues like the Australian Securities and Investments Commission and the Takeovers Panel do?***

The LIV is presently of the view the FIRB – or the ATO, as proposed – should provide specific regulatory guidance, in the form of commentary and rulings, on approaches to applications and interpretation issues, similar to those released by the ASIC, ATO, and the Takeovers Panel.