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Submission to the International Investment and Trade Unit Foreign Investment and Trade Policy Division

Consultation paper - Strengthening Australia's foreign investment framework

McCullough Robertson Lawyers

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1 Overview

McCullough Robertson Lawyers

1.1 McCullough Robertson Lawyers acts for clients, including many foreign investors, across a range of industries from the agribusiness sector, to mining and resources, to property developers. The comments in this submission are not designed to reflect the interests of any particular group of investors, but are aimed at achieving certainty, transparency and efficiency within the framework of the Government's policy objective of protecting Australia's national interest.

Australia's foreign investment framework

1.2 We acknowledge that all applications for approval need to be assessed on a case by case basis and due to the nature of the 'national interest' test there can't be prescriptive rules as to exactly what will, and will not, receive approval. Therefore, the Australian Foreign Investment Policy (**Policy**) is an appropriate means of communicating the factors that will be considered and to provide guidance to foreign investors (and advisors) to assist their understanding of the review process.

1.3 However, we consider it inappropriate that specific notification requirements are contained in the Policy that are inconsistent with the requirements under the foreign *Acquisitions and Takeovers Act* (**FATA**). We acknowledge that the government has the right (and in fact the obligation) to impose measures that it considers appropriate to protect Australia's national interest and we accept that this may include removing thresholds and exemption for investment by foreign government investors (**FGIs**) or lower thresholds for acquisitions of agricultural land. However, this should be done through amendments to the FATA rather than through statements in the Policy. This is vital to Australia's reputation as being a country which subscribes to the rule of law. The rules relating to foreign investment should be set out in the law (i.e. the FATA) and the Policy should be restricted to setting out the process and the underlying principles that will be applied in the exercise of any discretion by the Treasurer.

1.4 From an adviser's perspective it is also very important to be able to provide clear and certain advice to clients as to their legal obligations in relation to their proposed investment into Australia. Where some of the rules do not have the force of law (i.e. those contained in the Policy), this becomes impossible, and causes confusion and uncertainty on the part of the investors.

2 Submissions – responses to consultation questions

Proposed residential real estate reforms

2.1 As a general comment, we consider that it is appropriate to both broaden the scope of penalties for non-compliance with the requirements under the FATA and increase investigation and audit activities to ensure compliance. The ATO, with its existing capabilities would be an appropriate body to undertake the compliance and enforcement functions. It would also be appropriate that whichever body did undertake those functions had sufficient powers (such as authority to obtain information, documents and evidence) required to do so effectively.

2.2 We also do not consider that a modest application fee (that reflects the costs of processing an application) would be a disincentive to foreign investment.

Penalty regime

2.3 So long as the rules are clear and unambiguous, then an expanded penalty regime (including civil penalties and penalties for accessories) is an appropriate way to ensure compliance. It will ensure that foreign investors who are not committed to complying with Australia's foreign investment rules will not have a competitive advantage over those foreign investors who elect to comply.

2.4 The issue here is making sure the rules are clear. Importantly, a distinction must be made between breaches of the FATA and breaches of the Policy. Where no formal penalties are able to be imposed for breaches of the Policy the Government should make it clear what actions will be considered to encourage compliance (or deter non-compliance) with the Policy. This is particularly important if fees are to be imposed for applications under the Policy.

2.5 No increase in the criminal penalties is required where the civil penalty regime is appropriately extended.

2.6 The penalties proposed, including penalties for third parties who knowingly assist a foreign investor to breach the rules, are appropriate to the extent that the breaches are either deliberate or reckless and where FIRB approval would not have been granted if an application had been made.

2.7 It would be appropriate that civil penalties be extended to breaches of the FATA in relation to business acquisitions, commercial land and rural land acquisitions, however a distinction should also be made between:

(a) the penalties for breaches of the notification requirements where FIRB approval would have been granted; and

(b) the penalties for breaches of the notification requirements where approval would not have been granted.

Introducing fees on foreign investment applications

2.8 We think a modest administrative fee (that reflects the costs of processing an application) is appropriate. However the proposed fee structure for residential and rural land is effectively a tax on foreign investment and will impact on Australia's competitiveness as a destination for investment.

2.9 Under the proposed new rules relating to acquisitions of rural land, a proposed rural land acquisition valued at $150 million would be subject to a FIRB application fee of approximately $1.5 million. An 'application fee' of this magnitude is unreasonable and clearly does not reflect the cost of determining the application. This would put foreign investors at a significant competitive disadvantage to local buyers. It is also relevant that if the amended threshold for the acquisition of rural land is not reflected by a change to the FATA, this application would be merely under the Policy. It is completely unreasonable to expect a foreign investor to pay a $1.5 million application fee to comply with a policy that does not have the force of law and does not carry any penalties for non-compliance and in circumstances where the relevant legislation (the FATA) provides a specific $252 million threshold for these types of acquisitions. As an adviser in these circumstances it would be negligent for us not to advise clients of their actual legal obligations.

2.10 Fees should only be imposed if a proposed transaction proceeds. If that is too difficult to administer efficiently, then a refund of the fee (or the majority of the fee) should be available if the transaction does not proceed. This will encourage early notification – the

alternative will be that foreign investors may wait until all other conditions are satisfied to avoid the payment of fees unnecessarily. It will also prevent multiple fees on bidders at auctions or business applicants that withdraw and resubmit applications.

2.11 Fees should not be payable on applications relating to internal corporate restructures or transfers under which the ultimate beneficial ownership of the relevant asset does not change.

2.12 If fees are to be imposed for applications under the Policy then there should be a specified time frame for a response to those applications (as there is under the FATA).

2.13 The Policy expressly states that where there is doubt about whether FIRB approval is required, the foreign investor should lodge an application. FIRB should not impose a fee in these circumstances if it turns out that the application was not required. This however will take some discipline within FIRB to accurately determine whether the application was in fact required (rather than just accepting the fee and processing the application).

2.14 Fees should not be imposed on applications under section 25 FATA (i.e. voluntary notifications). For example, the Treasurer has the power under the FATA to prevent or unwind a transaction which involves the acquisition of an interest in an Australian business or prescribed corporation that is itself less than a substantial interest, if that acquisition results in foreign persons holding an aggregate substantial interest in the Australian business or prescribed corporation. A foreign investor who acquires less than a substantial interest should not be subject to FIRB application fees just because other foreign investors already hold an interest in the target business or company.

2.15 Any fees imposed on developers for sales under an off the plan certificate should be imposed only after the sales have completed, otherwise the developer will bear the cost of application fees where the contract does not complete, which will provide a significant disincentive to sell to foreign buyers.

2.16 Clarity on aggregation of applications will be required. For example, will the application fee for the acquisition of a farm for $1 million be different if that farm comprises of one lot or two? That is, will the fee be charged per lot?

Advanced off the plan certificates

2.17 It would be appropriate to impose penalties on developers who do not satisfy the requirement to market domestically, so long as the exact requirements are set out clearly (i.e. what will constitute domestic marketing? e.g. would an online marketing campaign be acceptable if it were accessible irrespective of location)?

Implementation of agriculture commitments

2.18 The definition of primary production business should not be extended to 'beyond the farm gate'. Extending the definition beyond that would increase ambiguity and uncertainty. This kind of uncertainty will be even more problematic where fees are imposed for applications (as it becomes less reasonable to instruct foreign investors that when in doubt, they should apply for approval). Certainty is also more important where penalties are likely to be imposed for non-compliance (including innocent non-compliance).

2.19 In addition, any acquisition of a primary production business that forms part of the same arrangement as the acquisition of rural land should be processed as one application (and only be subject to a single application fee).

2.20 An exception should be made for the acquisition of assets that may be used in the conduct of a business of primary production (e.g. plant and equipment or livestock) that do not give the purchaser control of the business itself (i.e. mere asset acquisitions).

2.21 The current definition of 'rural land' is appropriate and provides some level of certainty by cross referencing to the definition under the Income Tax Assessment Act. There is also very little room for ambiguity in the terms 'wholly and exclusively'. However reference to 'primary purpose' and extending the concept of agricultural land to mixed use land will add an element of uncertainty that will be unhelpful, particularly if it is intended that different fee scales will apply to agricultural land and 'other' land.

2.22 If an Agricultural Land Register is to be implemented, it should be done in a one step process through the State and Territory land titles offices, with transitional provisions to require notification to the titles offices of foreign ownership of existing landholdings. Changes to the registration should only be required if there are substantial changes to the ultimate foreign interests in the land (i.e. minor changes in foreign shareholdings of a company that holds agricultural land should only be subject to notification to the land

titles office if similar notification is required to FIRB. The information gathered should not be publically available (although it may be appropriate to publish aggregated information, such as statistics of levels of foreign investment from certain countries).

2.23 The proposed definition of residential land also lacks certainty. Land will often be acquired by developers to be subdivided and used for numerous different purposes. Is it proposed that the residential fee scales will apply to broad acre land acquisitions that are to be used for a mixed purpose development if that development is to include at least one residential dwelling (including, for example, a commercial property with a caretaker's residence)?

2.24 The concept of 'other land' should be defined to include all land that is not 'agricultural land' or 'residential land' and should continue to be screened from dollar zero, subject to the existing thresholds and exemptions in the Regulations.

Modernising and simplifying the foreign investment framework

2.25 Annual programs should be available for acquisitions of rural land (as there is no apparent policy reason for annual programs to be available for urban land but not rural land). This would have the obvious advantage of providing a smoother, faster acquisition process for land that falls within the approved program. Fees could be payable in arrears based on the number of properties acquired.

2.26 Under the current Policy, it is expressly stated that '*other exceptions in the Act that apply to privately-owned investors do not apply to foreign government investors*'. Clarification should be provided as to whether the thresholds under the FATA that relate specifically to certain types of foreign government investors (i.e. prescribed foreign government investors) still apply.

2.27 All of the rules relating to foreign investment into Australia should be contained in the FATA (although significant redrafting of the FATA would also assist to improve clarity). The Policy should merely contain guidance on how the Government assesses that national interest test. Having inconsistent rules in the FATA and the Policy does not promote the impression of Australia as an ideal destination for foreign investment. The perception that the Government imposes its own rules outside the legislative framework (via the Policy) could lead to the perception of sovereign risk due to a lack of adherence to the rule of law.

Other comments on the Consultation Paper

2.28 The Policy should set out a clearer set of guidelines on what will, and what will not, be in the national interest when it comes to the acquisition of rural land and agribusinesses. The Policy currently includes a fairly high level of specificity on how the national interest test will be applied in the context of residential real estate and a similar level of detail would now be appropriate for acquisition of rural land and agribusinesses, given the substantially reduced thresholds.

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