MinterEllison

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Dear Sir/Madam

Strengthening Australia's Foreign Investment Framework – Options Paper

Thank you for the opportunity to comment on the proposed changes to the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**), as well as some of the legacy issues relating to it.

Please see annexed to this letter Minter Ellison's written submissions in relation to the issues raised in the Options Paper entitled *'Strengthening Australia's Foreign Investment Framework'* released by The Treasury on 25 February 2015.

Yours faithfully
MINTER ELLISON

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Annexure

Minter Ellison's response to the Options Paper entitled *'Strengthening Australia's Foreign Investment Framework'*

New compliance and enforcement area in the Australian 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?

We support the creation of the unit within the ATO. We believe that the ATO has an important role to play, for example, in data matching to cross check any tax return lodgements against other records to assist in identifying non compliance.

Perhaps more importantly, we are aware that some foreign investors that have invested in non complying real estate investments hold a view that the FIRB screening regime, including the penalty regime, is not connected with the ATO's monitoring and enforcement powers, leading to the perception that the risk of non compliance being detected is low. We see the ATO having a visible (and publicised role) as an important deterrent to foreign investors that might consider acquiring real estate investments in non complying investments.

We consider that it is important that the ATO has the necessary powers to obtain information, documents and evidence that relate to potential breaches of the foreign investment framework. We have not considered, and therefore make no comment, on whether the ATO's current powers are adequate; however, at a conceptual level we consider that it is critical that effective powers are in place.

We consider that it is important that the Government offers a "moratorium" for existing non compliance, whereby foreign investors that have acquired property which is not a complying investment under the foreign screening regime can voluntarily report their non compliance without risk of criminal prosecution (provided they undertake to divest the property within a reasonable period of time).

(i) Are there alternative approaches that should be considered?

We have not considered alternative approaches.

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

(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, subject to appropriate protections to make sure the information is not misused.

(i) Are there alternative approaches that should be considered?

We have not considered alternative approaches.

(b) Should the creation of a new compliance and enforcement area be funded by Government revenue or through the introduction of application fees on foreign investors?

The manner of funding of any such compliance and enforcement area, this is substantially a question of policy. However, we do not consider it appropriate that application fees be introduced or increased to fund the compliance and enforcement function of FIRB, since it effectively imposes the administrative cost of enforcement and compliance onto those foreign investors that are seeking to comply with any notification obligations under Australia's foreign investment policy.

Unlike recent proposals to supplement the funding of other regulators through imposing industry wide levies (such as in relation to ASIC and its supervisory role in relation certain financial industry sectors), introducing or increasing application fees would not appropriately allocate the cost of compliance and enforcement.

More broadly, the underlying policy of a user pays system in respect of foreign investment does not, in our view, give sufficient recognition to the critical role that foreign investment plays in the future development of Australia. Considering that Australian businesses and the Australian population benefit greatly from inflows of foreign capital, these benefits should be taken into account in setting application fees (if any).

(i) Are there alternative approaches that should be considered?

Assuming that a decision is made to include application fees, an alternative approach would be to limit application fees to only residential real estate acquisitions. Based on FIRB's 2012 - 2013 Annual Report the vast majority of the number of foreign investment proposals are in the real-estate sector, while the majority of the foreign investment value is in the non-real estate sector.

In this way, the costs of administration, compliance and enforcement would be more closely aligned with the sector that gives rise to the largest administrative burden, while minimising the potential deterrent effect on foreign business investment in Australia.

(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?

We are supportive of proposals that facilitate compliance officers receiving better quality information in relation to foreign investment proposals, as well as those that streamline the approval process.

While information sharing between Government agencies ensures that FIRB officers have access to important information regarding foreign investors (which should allow FIRB officers to make approval decisions more efficiently and with greater confidence), we consider that the introduction of application fees could have a negative impact on the approval process, as foreign investors could potentially be motivated to consider delaying seeking approvals until as late in the acquisition process.

(i) Are there alternative approaches that should be considered?

The alternatives we consider appropriate are suggested elsewhere in this submission.

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?

We are strongly supportive of the introduction of a civil penalties regime. We believe that given the lower evidentiary threshold relating to civil penalties, and consequently the greater prospect of civil penalties being enforced, they would be an effective addition to the FATA's existing criminal penalty regime and help to change foreign investor behaviours .

(b) Are the proposed penalty amounts appropriate and likely to serve as a deterrent?

In isolation, we consider that the proposed civil penalties regime is appropriate.

However, in our experience, some stakeholders consider that the existing penalties are significant, but that some foreign investors have felt that the risk of detection is extremely low. As such, depending on the effectiveness of FIRB and the ATO's market scrutiny, it may not be necessary to materially increase the level of penalties, provided that the risk of detection is increased pursuant to the further scrutiny proposed by FIRB through the ATO.

(c) Is the proposal to extend accessorial liability an effective way to increase compliance?

We consider that further definition is required in relation to the meaning of accessorial liability. In particular, whether it would conform with the normal principals of accessorial liability in the relevant criminal codes. For example,

would a real estate agent (or lawyer) be an accessory if it failed to check that a buyer was a foreign investor? This would, in our view, place an unreasonable level of regulatory compliance burden on those parties. Therefore, greater definition and specificity is required as to what classes of "accessories" the Government is seeking to target in this regard (and what conduct would attract liability). We understand that the Australian Government is consulting with other bodies such as the Law Council of Australia in relation to these issues.

(i) Are there alternative approaches that should be considered?

Provided that the obligations on a real estate agent or lawyer are not unduly onerous, we do not consider alternatives proposals are required.

As to what obligations would be appropriate for lawyers and real estate agents, we would expect that a process for lawyers or real estate agents to confirm that they have been instructed by their client as to whether they are foreign investors should be all that is required.

(d) Is it necessary to increase the existing criminal penalties in light of the proposed new civil penalties?

We consider that it would be incongruous if the maximum pecuniary penalty in respect of a criminal breach of the FATA was less than the maximum pecuniary penalty in respect of a civil breach of the FATA. Accordingly, the existing criminal pecuniary penalty should be increased to a level at least equal to the proposed civil penalties.

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

We consider that the new civil penalties regime should be extended to business, commercial real estate and agricultural applications.

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?

This is substantially a question of policy. However, based on interactions with our clients, foreign investors are already concerned about Australia being a high cost environment in which to do business. Therefore, the introduction of significant fees could act as a material deterrent to investment in Australia, particularly for small business acquisitions.

Foreign capital is fungible and Australia should not introduce application fees where it is inconsistent with the approach of foreign countries with whom we compete for foreign capital (including, for example, Canada in the mining sector).

If a fee based on the quantum of the investment is to be introduced the fee should not be such that it will dissuade investment (or be seen to be giving an advantage

to domestic purchasers to compete with foreign investors). That is, the fee should be competitively neutral between domestic and foreign purchasers of real estate or business investment. In this respect, we note that the only other jurisdiction that has an application fee for business acquisitions is New Zealand. All other examples provided in FIRB's options paper relate only to residential acquisitions.

We remain concerned that the introduction of fees of the levels proposed will dissuade foreign investment and also be perceived as an indicating that Australia does not genuinely welcome foreign investment.

(i) Are there alternative approaches that should be considered?

See our comments above in item 2(b)(i).

(ii) Should there be any exceptions to paying the application fee?

If FIRB introduces application fees, we consider that the following circumstances should be exempt from those fees:

- withdrawal and re-submission of applications;
- re-freshes of FIRB approvals;
- circumstances where a FIRB approval is not required but an application has been made (eg. under FIRB's policy, or voluntary notifications); and
- the circumstances described in item 5(c) below.

(b) Is the level of the fees appropriate?

(i) Will the fees act as a barrier to foreign investment?

As described above, based on interactions with our clients, foreign investors are already concerned about Australia being a high cost environment in which to do business. Therefore, the introduction of significant fees could act as a material deterrent to investment in Australia, particularly for small business acquisitions.

As to the quantum of the fees proposed, it appears that from a percentage perspective, the proposed business application fees would be approximately 0.01% of the size of the target business. Where the fees represent such a small percentage of the relevant foreign investment, it is difficult to see the application fee materially affecting foreign investment appetite in relation to Australia.

Based on FIRB's 2012 - 2013 Annual Report only 3.13% of the proposals submitted to FIRB in the 2012 – 2013 year related to investments of more than $50 million. Accordingly, under the current proposal for application fees, there are only limited fundraising opportunities in respect of the large acquisitions. Only 18 proposals in the 2012 – 2013 year exceeded the $1 billion threshold which would trigger the proposed maximum $100,000 application fee.

(ii) What might be the cumulative impact on business reinvestment?

Significant application fees may discourage staged investments in Australian businesses.

(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?

A material part of the administrative cost from FIRB's perspective relate to understanding the background of the individual or entity proposing to make an acquisition – whether a business acquisition or a residential real-estate acquisition. In the context of residential real-estate acquisitions, exemptions from application fees ought reasonably to apply where multiple applications are submitted within a reasonably short period of time.

For residential real-estate, provided that only a single acquisition is made, only a single application fee ought to be payable in respect of applications made within, say, a 3 or 6 month period.

We do not consider that a similar exemption is appropriate in the context of business acquisitions, considering that acquisitions of businesses tend to raise more complex questions than acquisitions of residential real-estate, and as such require consideration in each instance.

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?

This is substantially a question of policy. We note that the concept of 'marketing a property domestically' has not been defined, and would need to be prior to the implementation of any penalties. This would need to take into account physical and electronic forms of marketing.

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

Noting our comments above, we would expect that a statutory declaration with supporting evidence would suffice.

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

This is substantially a question of policy. However, we consider that the level of penalties proposed is appropriate.

(iii) Are there alternative approaches that should be considered?

FIRB should consider mechanisms to facilitate direct payment of fees by relevant purchasers, rather than by the developer (who may have difficulty

determining how many properties might be sold to foreign persons at the time of applying for the advanced off-the-plan certificate from FIRB).

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)?

It is not clear to us why a separate/new category of agribusiness is required; the inclusion of 'agricultural land' within the FIRB regime should suffice to capture the majority of transactions involving agribusinesses. If there is to be a such a category, it needs to be very clearly defined and enshrined in the legislation in an accessible manner.

We consider it most appropriate that the definition of 'agribusiness' be limited to processes occurring prior to the 'farm gate' rather than including downstream businesses. First, there are practical difficulties is determining which downstream businesses ought to be caught and which ought not be caught. Second, the definitions of 'agribusiness' and 'agricultural land' work together. As such, unless the definition of 'agribusiness' is limited to only primary production activities (i.e. ending at the farm-gate), land used for businesses providing services or processes used by primary producers will also constitute 'agricultural land'. This could potentially distort the type of land recorded in the "agricultural land register", by including what is effectively developed non-residential commercial property in the agricultural land register. I.e. it would not record agricultural land, but any land related to the agricultural supply chain.

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'?

We consider that using the ANZSIC codes is an appropriate means of classifying those businesses which should be included in the definition of 'agribusiness'. We would consider Division A of Chapter 8 (excluding sub-division 05 which relate to Agriculture, Forestry and Fishing Support Services) to appropriately reflect the pre-farm gate processes we have discussed above.

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

As suggested above, we consider it most appropriate that 'agribusiness' is defined by reference to activities occurring within the 'farm-gate'.

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?

Without commenting on the common understanding, we acknowledge the need to recognise both on-going mixed use of land (eg, a farming property with wind turbines or an exploration licence) and changed land use over time (eg, a farming property on the suburban fringes that is acquired to be turned into a residential development). We suggest that the relevant factor should be the proposed purpose/use to which the purchaser intends to put the land rather than its use at the time of acquisition or potential future uses of the land by a person other than the foreign investor. Such an approach would, however, presumably require post-

FIRB approval conditions (as is currently the case with acquisitions of land for development).

In relation to the references in the definition to historic uses of land, we consider that this should be removed, as it would overly complicate the compliance process, and should be unnecessary for FIRB to achieve an understanding of Australian land used for agricultural purposes. There are also potentially unintended consequences from including historic land use in the definition of 'agricultural land'. For instance, land that was historically used for agricultural purposes, but is now used for residential purposes would be carved out of the definition of "residential land".

(i) Are there alternative approaches that should be considered?

The agricultural landholdings of associates should not be included in the cumulative threshold, as it is not practicable for a particular proposed purchaser to undertake the level of enquiry that would be required without undue administrative burden and cost. Alternatively, the definition of 'associate' can be modified (see further item 15 below).

(b) Would the proposed definition provide sufficient clarity as to what constitutes 'agricultural land' for the purposes of Australia's foreign investment framework?

Yes, subject to our comments above. However, we consider that further clarity could be provided through the release of guidance notes by FIRB.

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?

Without commenting on the common understanding, the mere existence of a residential dwelling on what is otherwise agricultural, vacant or other land should not change the characterisation of that land. We suggest that a concept of 'wholly and exclusively' or at least 'substantially/predominantly' used for residential dwellings should be included. Appropriate exclusions for serviced apartments, motels and hotels will presumably continue to be included.

(i) Are there alternative approaches that should be considered?

Other than as stated above, we have not considered alternative approaches.

(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?

Yes, subject to our comments above. However, we consider that further clarity could be provided through the release of guidance notes by FIRB.

12. The Government seeks feedback on three possible options for the screening of 'other land':

Regardless of which option is pursued, a definition should be included for each category of land – eg, vacant land, developed commercial real estate etc, if to be used, should all be defined concepts. It is also incongruous that land used for mining purposes is currently considered to be 'Australian Urban Land'.

This is substantially a policy question, however we would welcome any changes that facilitate greater investment in Australian property. From that perspective, option (b) appears to be the most attractive. We also note that the monetary thresholds for acquisitions of interests in developed commercial real estate are sufficiently high to presumably already exclude much of the property in that sector, at least outside of the major capital cities.

(a) 'Other land' be defined as all land that is not 'agricultural land' or 'residential land' and continues to be screened from dollar zero;

(b) 'Other land' is not defined and any land that is not 'agricultural land' or 'residential land' no longer requires foreign investment approval; or

(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?

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

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

We suggest that the information be limited to that otherwise recorded on title.

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

To speed the development of the agricultural land register, a mandatory notification obligation is required. However, mandatory notification by 30 September 2015 is unlikely to be workable as some investors require time to establish whether they are in fact foreign investors for the purposes of the Act and Policy. If 30 September 2015 is the mandatory reporting data there should be a, say 6 months moratorium on penalties and prosecution for non compliance with the 30 September 2015 date.

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

We broadly support this initiative and the proposed two-stage process (noting that the second stage will require liaison with the relevant State/Territory titles offices). We suggest that there be some form of moratorium to encourage self-reporting by

all foreign investors (including FGIs who may have historically acquired property without obtaining necessary FIRB clearance under the Policy) to come forward in the initial establishment period without the possibility of adverse action.

In terms of verifying whether someone is a foreign person, this is relatively straightforward for natural persons. It is not practicable, however, to expect a lawyer or registered conveyancer to undertake detailed due diligence on the purchaser to a contract for sale of land. Rather, we suggest that certain purchasers be obliged to make statutory declarations to that effect and to provide supporting evidence. Some categories of corporations (for example, listed companies and fund managers investing on behalf of others who may not be known to them) should be excluded from the regime.

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.

In addition to those issues noted below we note that there are a number of provisions in the current foreign investment regime which ought to be modernised and streamlined:

- there are benefits for FIRB's policy relating to investment by foreign government related entities to be enshrined in the FATA. As it currently stands, the requirements of the policy do not have effect as law, and consequently, foreign investors often struggle to clearly understand that their obligations under, and the potential risks and consequences of non-compliance with, FIRB's policy;

- broadly, the current definitions of different types of land are limited and do not easily cover the different types of land that typically arise in different scenarios. As a broad concept we consider that more specific definitions of different types of land would improve the FATA. As noted above, this should include some allowance for certain levels of 'mixed' use without changing the characterisation of the land (eg, a residential building on a working farm should not be treated as residential real estate).

- for the purposes of the concept of "Australian Urban Land" (or potentially "Other Land" following changes to the FATA), the FATA currently includes leasehold and licence interests. The manner in which investors ought to calculate the value of a leasehold interest (for the purpose of determining whether an Australian target is an "Australian Urban Land Corporation" or "Australian Urban Land Trust Estate") is not clear considering that leases are generally recognised as expenses rather than assets in an entity's balance sheet;

- in the context of mining tenements, whether or not a tenement constitutes an interest in Australian Urban Land depends on whether it gives a right to occupy the land. This can be a difficult factual question, and for that reason we consider that greater clarity should be provided as to what tenements or tenement conditions will constitute a right to occupy the land;

- we consider that section 12A(7) ought to be extended to circumstances where transfers of interests in Australian Urban Land are subject to the approval of the

Commonwealth, a State or Territory. There does not appear to be a material difference between, for example, a foreign investor applying to the Minister of Mines for a mining lease to be granted in Western Australia, and a foreign investor applying to the Minister of Mines for consent to a transfer of a mining lease. While section 12A(7) would operate as an exemption in the first scenario, it would not operate as an exemption in the second scenario;

- the transition of mining projects from exploration licences to mining leases is also an area that requires clarification. There is a current risk that material investment could be made into mining projects before FIRB approval is required or obtained, or that an additional FIRB approval is required when a project transitions from an exploration to a mining project. This is potentially a material deterrent to major foreign investment in mining projects in their early or even late stages of exploration. We consider that any revisions to FATA should provide appropriate mechanics for foreign investors to obtain FIRB approval upfront approval in respect of exploration projects, so that, subject to only limited conditions, foreign investors can be confident that divestment will not be required where a mining project is transitioning from exploration to mining phases;

- noting the 'passive investment' administrative exemption on FIRB's website and the intention to update the current exemptions for Australian listed entities, consideration should also be given to exempting all dealings with securities in foreign listed companies from the regime, regardless of whether or not they are Australian urban land corporations or Australian urban land trust estates. It is somewhat incongruous for the FIRB regime to apply to dealings in such securities, and we question FIRB's ability to monitor and enforce such requirements in foreign jurisdictions;

- it is becoming increasing common for FIRB to delay its decision pending the outcome of an ACCC merger clearance or other Australian regulatory application. It does this by getting the applicant to withdraw and resubmit. This is contrary to the statutory decision making period, and we suggest could be better dealt with by FIRB making its decision conditional upon subsequent ACCC clearance;

- the Act does not contemplate either exemption letters or retrospective clearance. If these courses of action are to remain available to FIRB, they should be reflected in the legislation; and

- the reference in the Regulation 3(p)(ii)(B) to heritage listing should be updated to reflect the broader and more current requirements set out in FIRB's policy.

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*?)

We strongly support the proposed harmonisation process in relation to FATA. In particular we note the definition of "Associate" ought to be amended to conform with the definition in the Corporations Act 2001 (Cth) (Corporations Act). That definition captures the necessary relationships of control or influence which the definition is the FATA

appears to be intended to cover. The current definition is impractically broad, especially considering that "associates" of "associates" are captured.

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

See our comments above regarding civil penalty regime.

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

As noted to FIRB when we met with Ms Deidre Gerathy in November 2014, we believe that there is a case for a greater level of external publication and consultation by FIRB in relation to the operation of the Act and the Foreign Investment Policy. While we note that FIRB has, at times, published Guidance Notes (we understand that 5 were issued during 2012 and 2013) we consider that foreign investment screening outcomes would be greatly enhanced through the publication of further guidance notes on key issues. This would promote greater transparency and public confidence from foreign investors on how FIRB administers and applies the Act and policy.

In particular, we consider that there would be a material benefit in publishing a guidance note in relation to interacting with FIRB prior to making a formal application for approval. An informal consultation process with FIRB whereby foreign investors or their advisers could write to, or meet with, FIRB to discuss the nature and structure of a proposed investment in order to understand whether the deal structure was likely to give rise to any national interest issues, was seen as being of immense value to Chinese foreign investors. The process gave the investor confidence in the likely outcome of the formal application process.

If the Act is not amended to contemplate exemptions or retrospective clearance (as suggested above), consideration should also be given to a 'binding ruling' regime such as that used by the Australian Taxation Office or a 'class order' regime such as that used by ASIC. These regimes would support the Act, and would allow investors greater certainty and would also presumably help reduce the regulatory burden on FIRB.