4 May 2022

Manager
Policy Framework Unit, Foreign Investment Division
The Treasury
Langton Crescent, PARKES ACT 2600
By email: FIRBStakeholders@treasury.gov.au

Dear Manager,

RE: 2022 Foreign Investment Reforms Discussion Paper

We the Society of Trust & Estate Practitioners Australia Pty Limited (STEP Australia) represent professionals from across Australia who are specialists in trusts, estate planning and in supporting the needs of families (young and old, wealthy and modest). The objective of a STEP Professional is to advance the interests of families across generations. This often involves us in identifying issues of relative importance to families and bringing these to the attention of those who can make a positive difference. This is the purpose of this submission.

STEP Australia's membership includes lawyers, accountants, financial wealth advisors and trustee company professionals from across Australia; our members bring a multi-disciplinary approach to the benefit of their clients. It is this unique multi-disciplinary approach that supports this submission.

We are writing in relation to the Discussion Paper issued by Treasury in February 2022 the purpose of which was to facilitate the development of a package of reforms to be pursued in the second half of 2022.

We note that the consultation period closed on 11 March 2022. However, STEP is keen to ensure that the submission we made in respect of the 2021 discussion paper are considered as part of this further consultation.

We are concerned that in the advisor and broader community there is only a very limited understanding that the FIRB framework now applies to assets acquired under a Will. This could leave practitioners exposed to negligence actions and foreign person beneficiaries exposed to significant penalties.

We would like to think that an incoming government might reconsider the position in respect of assets acquired under a Will at least in certain circumstances.

If that is not likely, we consider that some concessions should be afforded to those that may have undertaken transactions say up until 1 January 2024, given that the changes were introduced in the midst of a pandemic. This will enable advisors to review their Will stock to so that their clients can implement changes to their Wills.

STEP Australia would like to have its previous submission dated 24 September 2021 considered as part of this consultation. We are very keen to discuss what workable solutions might look like and would be open to working together on this. Find attached the submission previously made.

If you would like to discuss any of the above, please contact Bryan Mitchell TEP, STEP Australia Board Chair, on email bmitchell@mitchellsol.com.au.

Yours sincerely

Bryan Mitchell TEP
Chair of STEP Australia

CC: Danielle Bechelet, STEP Australia Policy Committee Chair
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24 September 2021

Manager
Policy Framework Unit, Foreign Investment Division
The Treasury
Langton Crescent, PARKES ACT 2600

By email: FIRBStakeholders@treasury.gov.au

Dear Manager,

EVALUATION OF THE 2021 FOREIGN INVESTMENT REFORMS – SUBMISSION

We the Society of Trust & Estate Practitioners Australia Pty Limited (STEP Australia) represent professionals from across Australia who are specialists in trusts, estate planning and in supporting the needs of families (young and old, wealthy and modest). The objective of a STEP Professional is to advance the interests of families across generations. This often involves us in identifying issues of relative importance to families and bringing these to the attention of those who can make a positive difference. This is the purpose of this submission.

STEP Australia's membership includes lawyers, accountants, financial wealth advisors and trustee company professionals from across Australia; our members bring a multi-disciplinary approach to the benefit of their clients. It is this unique multi-disciplinary approach that supports this submission.

We note that in accordance with section 4 of the *Foreign Investment Reform (Protecting Australia's National Security) Act 2020*, the Treasury is to conduct an evaluation of the operation of the reforms implemented by the *Foreign Investment Reform (Protecting Australia's National Security) Act 2020* and the *Foreign Acquisitions and Takeovers Fees Imposition Amendment Act 2020*.

We acknowledge the scope of the evaluation will primarily consider:

- the impact that the foreign investment reform Acts and their implementation have had on foreign investment in Australia and the broader Australian economy; and

- whether the right balance is struck between welcoming foreign investment into Australia and protecting Australia's national interest.

We welcome this evaluation and the opportunity to make a submission regarding the foreign investment reforms in furtherance of our objective to *advance the interests of families across generations*.

In this submission we will address the following questions posed by the Consultation Paper released by Treasury:

> Consultation questions
>
> To inform the evaluation, the Treasury is interested in hearing from stakeholders with regards to:

8.1 whether any other elements of the reforms, which are not already discussed at a consultation question above, have had a significant impact on stakeholders and, if so, what those impacts are; and

8.2 whether any other elements of the foreign investment framework, which are not already discussed at a consultation question above, have a significant impact on stakeholders and, if so, what those impacts are and how they could be addressed.

The amendment of Regulation 29 of the *Foreign Acquisition and Takeovers Regulation 2015* (Cth) is an element of the reform which has a significant impact on every single person who owns property in Australia and who will also die one day, as well as their intended beneficiaries.

For ease of comparison, we have reproduced Regulation 29 as it applies both pre and post 1 January 2021:

Pre 1 January 2021	**Post 1 January 2021**
29 Will or devolution The excluded provisions do not apply in relation to an acquisition of an interest in securities, assets, a trust or Australian land that is acquired by will or devolution by operation of law, other than as a result of an arrangement under Part 5.1 or 5.3A of the *Corporations Act 2001*	29 Devolution The excluded provisions do not apply in relation to an acquisition of an interest in securities, assets, a trust or Australian land that is acquired by devolution by operation of law, other than as a result of: (a) the operation of section 18A of the Act (increasing percentage of interests without acquiring additional interest in securities); or (b) an arrangement under Part 5.1 or 5.3A of the *Corporations Act 2001*

As stated at paragraph V of Guidance Note 02 (updated on 9 July 2021):

> *From 1 January 2021, a foreign person who acquires interests through a Will (for example, an interest in Australian land or a substantial interest in securities in an Australian entity) is no longer exempt from the foreign investment review framework, and therefore could be taking a notifiable action, significant action, notifiable national security action or a reviewable national security action.*

Given the broad definition of "foreign person" in the *Foreign Acquisitions and Takeovers Act 1975* (Cth), the amendment to Regulation 29 impacts:

- Any person who owns property in Australia and has an intended beneficiary that is, or who may become, a foreign person;

- Any person who wants to provide long-term wealth and asset protection for their intended beneficiaries by way of a testamentary discretionary trust, where the terms of that trust do not exclude foreign persons;

- All beneficiaries who, at the time they acquire an interest under a Will, happen to be a foreign person.

We will deal first with the "devolution by operation of law" exemption and the resulting inconsistencies in the context of succession/inheritance law. Page 72 of Guidance Note 02 (updated on 9 July 2021) highlights the inconsistencies of treatment between:

- beneficiaries who acquire interests under a Will, versus beneficiaries who acquire interests under the operation of the laws of intestacy; and

- interests acquired as a result of a negotiated settlement, versus interests acquired as a result of a Court Order after a contested hearing.

STEP members, who are experts in their field, universally agree that it is better for people to die testate (with a Will) than intestate (without a Will). Reasons for this include:

- ready and easy identification of the person/s who is/are legally responsible for administering the estate; and
- control over the division of one's assets in a orderly manner and thereby less likely to lead to litigation over the estate.

However, and putting other estate planning considerations aside, the current regulation encourages intestacy, as the FIRB regime will then not apply for those beneficiaries. A professional is in fact encouraged and very likely professionally required, to advise a client to embrace an intestacy (partial or full) approach to securing certain lands to those of their selected beneficiaries who they wish certain property to pass to. This is an absurd approach to professional advice. Curiously, those that are likely to benefit most are those who can afford higher level professional expertise.

Turning now to the question of litigation, all States and Territories of Australia have legislation which enables an applicant to apply to the Court for further provision from someone's estate. This is commonly known as "contesting the Will" or “seeking pressing a family provision claim”. In recognition of the financial and emotional toll that estate litigation takes on the people involved, not to mention the Court resources required for contested hearings, many of our State Courts have developed practice directions[1] which encourage litigants to resolve their disputes *without* a contested hearing.

The way that the "devolution of operation of law" exemption is framed (as confirmed by Guidance Note 02), it encourages litigants to take matters to a contested hearing, rather than resolve them out of Court. Anecdotal evidence suggests that more than 90% of contested estates are settled out of Court. Strategically the professional advisor is encouraged and very likely professionally required, to advise a client to complete the

[1] See, for example, Supreme Court of Queensland *Practice Direction 8 of 2001*

contested issue through to a Court order. This is contrary to principles of achieving efficient justice.

It would be an incredibly unfair and unjust outcome if, for example, a settlement was reached and implemented only for a foreign person to be forced to dispose of their "hard fought for" inheritance because under the current regime they are unable to retain say, the family home due to the process that they must subsequently endure.

Turning now to the removal of the exemption for interests acquired under a Will. It is of particular concern that ***all*** residential real property, irrespective of value, is subject to the FIRB regime.

As estate planning experts, we regularly observe that for many "ordinary Australians", the assets that they have acquired during their lifetimes consist of the family home, some money in the bank and their superannuation interests.

We are not overstating the issue to say that a significant number[2] of Australians who have children or other extended family who live and work overseas are impacted by the effects of the amendment to Regulation 29. It is a devastating consequence of the amendment that a child who is a foreign person (because they are not ordinarily resident in Australia) could be forced to dispose of the family home that they inherited from their parents because they are a foreign person at that time and do not meet any of the criteria for an exemption.

Further, the fees associated with applications for approval are very high. Considering now that the median price of residential property in many capital cities of Australia is over $1M, many foreign person beneficiaries simply will not have the financial resources to go through the approval process. This may result in them deciding to disclaim or forfeit an inheritance, which would be an unfair and undesirable outcome for that beneficiary and against the wishes of the deceased. The applicable fees (taken from Guidance Note 10) are set out below.

To these amounts will be the professional fees that are also very likely to be incurred as many will not be able to personally deal with the issue.

The probable impact of amendment is high when it is considered that *in 2020, there were over 7.6 million migrants living in Australia. This was 29.8% of the population that were born overseas*[3]. This statistic alone guarantees that there will be many Australian residents who, as part of their natural love and affection for their relatives will benefit one or more of these without realisation of the FIRB impact.

[2] Australian Department of Foreign Affairs and Trade "Smartraveler" website states that "[a]t any time there's around one million Australians living and working overseas." Accessed 24 September 2021.
[3] Australian Bureau of Statistics website Migration, Australia. Accessed 24 September 2021.
Migration, Australia, 2019-20 financial year | Australian Bureau of Statistics (abs.gov.au)

TABLE 2: KINDS OF ACTIONS AND APPLICABLE FEES

Consideration for the action			Applicable fee	
Residential land	Agricultural land	Commercial land, tenements, businesses and entities	Fee for single action	Fee for single Reviewable national security action [a]
Less than $75,000 [b]	Less than $75,000 [b]	Less than $75,000 [b]	$2,000	$500
$1 million or less	$2 million or less	$50 million or less	$6,350	$1,587.50
$2 million or less	$4 million or less	$100 million or less	$12,700	$3,175
$3 million or less	$6 million or less	$150 million or less	$25,400	$6,350
$4 million or less	$8 million or less	$200 million or less	$38,100	$9,525
$5 million or less	$10 million or less	$250 million or less	$50,800	$12,700
...	...	...	...	...
Over $40 million	Over $80 million	Over $2 billion	$503,000 maximum fee	$125,750 maximum fee

(a) where an action is a reviewable national security action, fees are calculated at 25 per cent of the fee for an equivalent notifiable action.
(b) under section 53 of the Fees Regulation, a lower fee of $2,000 will apply where the consideration value of an action is less than $75,000. See the de minimis rule for further information.
Note: for the complete schedule of fees for a single action (including reviewable national security actions) see here.

Finally, the removal of the exemption for interests acquired by Will means that there is a high risk that testamentary discretionary trusts which are created by Wills will be treated as foreign, for the mere reason that one of the many potential beneficiaries is a foreign person. The effect of sub-section 18(3) of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) is that all beneficiaries of a discretionary trust are treated as having a beneficial interest in the maximum percentage of income or property of the trust that the trustee may distribute to that beneficiary.

This means that if, for example, one great-grandchild of the Will-maker is a foreign person, the whole discretionary trust established under the Will shall be deemed foreign and enliven the FIRB regime requirements.

Given the nature and purpose of testamentary discretionary trusts as multi-generational wealth and asset protection vehicles, the intention of a Will-maker may be thwarted by either:

- The exclusion of foreign person family members as beneficiaries of the testamentary discretionary trust; or

- The testamentary discretionary trust being subjected to the FIRB regime.

While we recognise the importance of strong national security laws, we are of the view that the removal of the exemption for interests acquired under a Will have serious, and unfair, impacts on any Australian person that simply wants to leave their hard-earned estate to their intended beneficiaries.

It is with respect that it is suggested that crafting a Will and then dying is not a strategy that is likely to be embraced to get-around the FIRB principles. We can only suggest that the breadth and extent of the exemption amendment is far wider than intended.

We therefore recommend that the exemption for interests acquired under a Will be reinstated.

If however, it is decided that Australia's national security interest requires the exemption to remain in place, we recommend that additional criteria be embraced such as;

- only deceased estates with an aggregate value of say, $50M (or other very high monetary threshold) be subjected to the FIRB regime and for this to be indexed; and/or
- the restricted property be identified as non-residential with a value that exceeds $20M, indexed.

If you would like to discuss any of the above, please contact Peter Bobbin TEP, STEP Australia Board Chair, on email pbobbin@colemangreig.com.au or Chris Herrald TEP, STEP Queensland Chair, on email cherrald@mullinslaweyrs.com.au.

Yours sincerely

Peter Bobbin TEP
Chair of STEP Australia

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