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20 March 2015

By email

Manager
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Foreign Investment & Trade Policy Division
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The Treasury Langton
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Dear Sir / Madam

Strengthening Australia's Foreign Investment Framework Options Paper February 2015

Thank you for the opportunity to make comments in response to the Strengthening Australia's Foreign Investment Framework Options Paper (February 2015) (**OP**).

The importance of foreign investment to the economic development of Australia is well documented, as are community concerns around the level of foreign investment. We support the efforts of the Government to balance these concerns by encouraging foreign investment that is not contrary to the national interest.

Accordingly, Gilbert + Tobin wishes to make a submission in relation to Proposals 5, 7.1, 7.2, 7.4 and 8 in the OP. Because some of our submissions in relation to Proposal 8 provide suggested solutions to the remaining questions we are considering, we have considered Proposal 8 first. Our detailed submissions in relation to Proposals 5, 7.1, 7.2 and 7.4 then follow.

1 Proposal 8 – Modernising and Simplifying the Foreign Investment Framework

14.	*The Government seeks feedback from interested stakeholders on options to modernise and simplify the Act, FATR and Policy and streamline interaction between applicants and the Foreign Investment Review Board.*
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*?*
16.	*Is the current regime for enforcement of FIRB conditions effective? What alternative measures could be considered?*
17.	*Should FIRB provide specific regulatory guidance on approaches to applications and difficult interpretation issues lie the Australian Securities and Investments Commission and the*

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Takeovers Panel?

Foreign investment in Australia is regulated by the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**Act**) (as well as certain other industry specific statutes), the Foreign Acquisitions and Takeovers Regulations 1989 (**FATR**) and the Australian Government's *Foreign Investment Policy* (**Policy**).

The Policy attempts to address deficiencies in the Act as a result of poor drafting and the march of time, and also introduces new limbs which require approval (although the Treasurer has no statutory power to block or unwind such transactions).

It is difficult to explain to foreign investors that they must lodge applications for transactions where the Treasurer has no statutory power to enforce that requirement. Nevertheless, we understand that addressing changes through the Policy gives the Treasurer more leeway to address changes in community priorities over time.

However, we offer the following in the way of suggested improvements to the current regime:

1 **Resourcing:** Consistency and transparency are extremely important in ensuring applicants that Australia is open for business. Applicants need to be able to assess accurately what transactions require approval, the level of detail required to be disclosed and the chances of success, making consistency as important if not more important than the content of the rules themselves. We would submit that the experience of applicants in this regard would be improved by the following measures (and further submit that the suggested fee revenue could be applied to developing these initiatives further):

(a) Reducing the rotation of the staff within the Trade Policy Division who serve as the FIRB Secretariat. The current rotation policy does not permit staff to develop the level of expertise required to deal with as complex a legal and public policy subject matter as Australia's foreign investment rules.

(b) Recruiting additional lawyers within the Trade Policy Division, while potentially more expensive, would help with the processing of business applications.

(c) In addition or as an alternative to paragraph (b), we suggest that establishing a forum for communication between law firms that frequently lodge FIRB applications and the Trade Policy Division will result in more consistent resolution of the recurring points of pain for applicants, their advisers and the Trade Policy Division, enabling applicant expectations to be set and managed more readily. This forum might involve:

(A) secondments of senior lawyers / partners for a period of time to the Trade Policy Division (ASIC has done this, for example, as have government bodies in other jurisdictions);

(B) an annual or bi-annual meeting between Trade Policy Division staff and senior lawyers / partners from the law firms that frequently submit FIRB applications, to discuss areas of ambiguity and develop consistent approaches;

(C) training sessions by senior lawyers / partners for Trade Policy Division staff to explain common kinds of transactions and the difficulties that arise, enabling a two way flow of information outside the context of a given FIRB application; and

(D) allowing law firms that frequently submit FIRB applications to review the Policy before it is released each year, to allow them to identify areas of ambiguity that are

likely to arise so that they can be addressed in a transparent fashion before the Policy is released, if appropriate in the context of Government policy.

(d) Although the introduction of Guidance Notes is a welcome step, there is significant room for improvement. For example, in some cases the Secretariat has started to request information about all >5% foreign holders of interests in private equity funds – this requirement is not evident from any information on the FIRB website, the Policy, the Guidance Notes or the Act, making it difficult for the client to provide the information in the context of confidentiality carve-outs they may have with their investors. These kinds of requirements, and the reasons for them, should be publicised to avoid surprises and ensure consistency in treatment of applications.

(e) In relation to statements of no objection in respect of business applications, it would be useful for the Government to provide reasons for its decisions, as this will help to guide prospective future applicants, but this should not be at the expense of confidentiality. Applicants highly value FIRB's historic diligent approach to maintaining confidentiality, and this needs to be maintained in order to ensure quality flow of information between applicants and FIRB.

2 **Foreign government investors**: The modification of the definition of "foreign government investor" to ensure foreign government investors from different countries are not aggregated has been a welcome change. However, there are still several points of pain around application of the Policy in this respect. First, the Policy is drafted intentionally broadly, meaning things like public sector pension funds are captured along with traditional state-owned enterprises and sovereign wealth funds. While we understand that FIRB does not apply the same level of scrutiny to passive investment by public sector pension funds, their treatment as foreign government investors has flow on effects that are disproportionate to the community concern. This is particularly the case in respect of private equity funds that include passive investment by public sector pension funds. This is a significant issue given the prevalence of US and Canadian pension fund money as a source of investment in these funds, making most private equity funds foreign government investors. If these funds are taken to be foreign government investors (notwithstanding that the fund is managed by a person that is not a foreign government investor and may even be Australian), then their investee companies in Australia will also be taken to be foreign government investors, and any bolt on acquisitions made by those investee companies will also require applications to be lodged (normally, these would be exempt due to their size). This is an intolerable burden on the investee companies, and is a factor in deciding to accept private equity money. Domestic fund managers may deliberately turn money away in order to avoid this consequence, and given that US and Canadian public sector pension funds are a significant source of investment, this diminishes the pool of money available for investment in Australia. There is no legitimate community concern around regulating this kind of investment by "foreign government investors".

3 **Extensions:** There is little practical difference between an informal system of confidential extension (withdrawing and relodging an application) and a formal system of confidential extension, in circumstances where applicants are fully informed about the process. Ensuring applicants are fully informed about the process is more important than what the process is, as long as the outcome (that a confidential extension – with no publication in the Gazette – of some kind is available) is achieved. However, there needs to be some assurance to applicants that there is an end to the extension process, and to this end a formal system of confidential extensions would be worthwhile. We would suggest that if an extension is required, there would be a period of time in which FIRB could make additional information requests and the confidential extension would last for 90 days after the requested information had been provided. With a regime like this, the current regime for interim stop orders could be removed altogether.

4 **Definition of 'associates':** The current definition of 'associates' in the Act is overbroad (to the extent it is comprehensible) and is otherwise opaque and difficult to apply, even for trained lawyers. One solution would be to conform this to the definition in the Corporations Act, which is easier to apply and has a wealth of interpretive guidance. However, we see no way to achieve this through the Policy, as it would be a direct change to the Act. Moreover, many of the provisions in the Act (such as the 15% / 40% control concepts) mirror provisions in other statutes regulating foreign ownership. Any changes to definitions in the Act need to consider whether the resulting outcomes under various foreign ownership laws will become inconsistent (and if so whether that matters).

5 **40% aggregate foreign ownership threshold:** This threshold brings companies and private equity funds that have large numbers of small and unrelated foreign investors within the Australian foreign investment net. Particularly where these companies and funds are Australian domiciled and controlled, there is no legitimate community interest in regulating them as foreign persons. Introducing an exception to the 40% threshold where the foreign ownership is widely held would take these entities out of the foreign investment net and would free up FIRB resources to review applications that are of greater concern.

6 **Corporate reorganisations:** As a matter of Policy, it is open to FIRB via the tracing rules in the Act to specifically exempt corporate reorganisations that do not result in any change of the ultimate beneficial foreign ownership of the underlying Australian business.

7 **Different kinds of entities:** The Act currently only recognises trusts and corporations, and in some circumstances treats these differently. It would be a welcome change to modernise the statute so that Australia's foreign investment framework applied the same way regardless of the structure of the transacting entities.

8 **Agency consultations:** FIRB should be transparent as to which agencies it is consulting, so as to enable three way communication to the extent any issues arise. This will result in more efficient resolution of matters that may otherwise be delaying FIRB's decision.

9 **Submissions from target in takeover bid** – The target company's views should be solicited in relation to takeovers. Not consulting the target company is incongruent with the breadth of consultations that FIRB already undertakes or has the power to undertake.

10 **Higher thresholds under Free Trade Agreements**: At present, a number of Australia's free trade treaties allow for higher thresholds for investments by acquirers from the relevant country. However, our understanding of the current interpretation of these provisions is that they have very narrow application – they cannot be relied upon where, for example, an Australian BidCo is used to acquire the target. We submit that the relevant criteria for relying on higher thresholds should be the country of ultimate control, and that the existing tracing rules in the Act could be a mechanism to achieve this.

2 Proposal 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?

i. Are there alternative approaches that should be considered?

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

b. Is the level of the fees appropriate?

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

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

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?

Submission: We submit that fees would be appropriate for some applications provided that these fees directly support the FIRB Secretariat, fees are set at a level that does not discourage foreign investment and certain categories of transactions are excluded.

Fee revenue could assist Treasury with resourcing, training and outreach initiatives, all of which have long-term benefits in terms of enhancing the effectiveness and credibility of Australia's foreign investment framework (as set out in more detail in our response to Proposal 8). In order to ensure fees are applied in this manner, fee revenue should not go into general consolidated government revenue but should flow directly to Treasury and specifically the FIRB Secretariat.

However, fees must be set at levels that do not discourage foreign investment or compliance with Australia's foreign investment rules. In this regard, the proposed fees for business transactions appear to be excessive by international standards, and we would suggest that fee levels for business transactions should be around half of what has been proposed in the OP.

Notwithstanding the above, a number of applications should be excluded from the fee regime:

- In recognition of the complexity of Australia's foreign investment framework, the Policy encourages applicants to make applications in "borderline cases" given that the only downside of lodging is potential delay. If fees are introduced, the downside of lodging increases, and there is a risk that applicants will be discouraged from lodging applications in cases where they are uncertain as to whether an application is required. We submit that in circumstances where an application is lodged in a "borderline case", and FIRB ultimately concludes that it does not have jurisdiction, any fees paid should be refunded.

- Australian domiciled entities which are ASX listed, and Australian-managed private equity funds, may be "foreign" for purposes of the Act due to small passive investments by a multitude of unrelated foreign persons. These types of investors undertake a substantial volume of investment activity in Australia and would be more severely impacted than the occasional investor by application fees. As these investors do not raise the same kinds of community concerns as other "foreign persons" given their essentially Australian nature, we submit that it would be appropriate to exempt them from fees altogether, or if that is not feasible then to cap fees on an annual basis. (Please also see our comments on Proposal 8 in relation to the 40% threshold, which would also address these concerns.)

- Acquirers engaged in a program of land acquisition as part of their ordinary course business activities in Australia (such as foreign persons whose business involves the acquisition of land for the purposes of developing and operating a large number of stores) should not be required to pay fees for every acquisition and should instead be subject to an annual cap.
- Applications that are required under the Policy only should not incur application fees.

3 Proposal 7 – Implementation of Agriculture Commitments

The opportunities for the Australian agricultural sector in the coming century have been well documented. We support the Government's initiatives to continue to develop policies which support growth, competition and profitability across the entire agribusiness value chain while providing safeguards to the interests of the Australian community.

We also support this consultation process as a mechanism to ensure that the Australian Government is able to design the proposed definitions and regulations in a manner that is proportionate and tightly focussed.

From a strictly regulatory perspective, it is critical to ensure that the foreign investment thresholds and ensuing compliance regime for agribusiness do not unnecessarily discourage beneficial investment, particularly by, and in respect of ASX listed companies which may be "foreign persons" for purposes of the Act, and does not introduce red tape without commensurate benefits to the Australian public. In this regard, it is important that the proposed agribusiness regulation is appropriately targeted, clearly communicated and avoids unintended outcomes.

3.1 Proposal 7.1

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)?

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'?

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

(a) ANZSIC Codes

Submission: We submit that 'agribusiness' should be identified as those businesses included in Division A (Subdivision 1) of the ANZSIC code.

Division A (Subdivision 1) of the ANZSIC code is the Agriculture, Forestry and Fishing Division includes growing crops, raising animals, growing and harvesting timber, and harvesting fish and other animals. These are precisely the activities understood by the Australian public to represent agriculture while the other divisions and subdivisions in the ANZSIC Code expand well beyond such activities.

We believe that this articulation of "agribusiness" is appropriate for the policy commitments described in the OP.

Using Division A, Subdivision 1 would allow FIRB to make the important distinction between production, and upstream support services.

The "agribusiness" definition should not capture upstream businesses or those that take a value-add approach. Assessing businesses that value-add or engage with genuine agribusinesses is inherently complex territory and distracts from the policy benefits of addressing the actual areas of community concern, being the appropriate review of investment by foreign persons into Australian agriculture. A broader definition also risks introducing red-tape in respect of businesses that would not be seen by the community to be engaged in agriculture.

On the other hand, an appropriately explicit/plain-meaning definition of agribusiness would assist the Government's desire for robust foreign investment framework around agriculture without making the position unnecessarily uncertain.

It is for that reason that we support the use of the definition in Division A, Subdivision 1.

(b) Alternative approaches

Submission: We submit that an exemption consistent with Regulation 3(j) of FATR should be applied to passive investments in listed agribusinesses

The proposed investment threshold of $55m in agribusinesses (regardless of the percentage interest in the target that this may represent) presents particular issues for ASX-listed companies and their investors that could be addressed by introducing an exception to the new agribusiness rules similar to Regulation 3(j) of FATR.

The issues peculiar to ASX-listed companies in the agribusiness space are as follows. First, the proposed threshold of $55m may represent a very small proportion of the market capitalisation of a large number of ASX listed companies. This creates the possibility of a shareholder in such a company being required to obtain approval for regular, non-control related trading activities. This could be a significant barrier to institutional investors who are critical for maintaining the liquidity of trading in large ASX listed companies.

In addition, situations will arise where, as a result of the market price of shares increasing over time, "foreign persons" who have invested in an ASX-listed agribusiness may find themselves holding a passive investment of shares valued in excess of the $55 million threshold. It is impractical for such persons to apply for a statement of no objection, or retrospectively for a statement of no action, in respect of such increases in value.

A regime similar to Regulation 3(j) of FATR would address this.

By way of explanation, Regulation 3 of FATR contains a number of exceptions in respect of the notification requirement for Australian urban land. Relevantly, Regulation 3(j) of FATR applies to listed Australian urban land corporations. This exception allows a person to acquire up to 15% of an ASX-listed Australian urban land corporation, as long as the corporation's portfolio consisted predominantly of non-residential real estate and provided it does not cause aggregate foreign ownership to exceed 40%. The Explanatory Statement for the Foreign Takeovers Bill 1989 (Cth) recognised that foreign portfolio interests did not raise the same level of community concern as other kinds of more active investment.

FIRB has continued this approach in its treatment of listed Australian urban land trusts, except where the acquirer is a foreign government investor. In this regard, on 1 August 2013, FIRB issued a press release "Treatment of foreign passive investments in public (real estate) unit trusts" setting out FIRB's

policy to allow a foreign person (other than a foreign government investor) to acquire a 'passive' interest (generally less than 10%, although interests of less than 10% may not be passive in certain circumstances) of a listed Australian urban land trust without FIRB approval (provided that the trust's portfolio consists predominantly of non-residential real estate).

Creating an exception to the new agribusiness rules which recognises that passive investments do not pose any particular community concerns would alleviate the burden that ASX-listed agribusinesses and their investors would face under the new agribusiness rules.

3.2 Proposal 7.2

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?* *i. Are there alternative approaches that should be considered?* *b. Would the proposed definition provide sufficient clarity as to what constitutes 'agricultural land' for the purposes of Australia's foreign investment framework?*

Submission: We submit the complementary use of an alternative approach – a passport for ASX listed companies

A problematic element of the cumulative $15m threshold for agriculture land (assuming any likely final formulation of that term) arises as a result of the fact that many ASX-listed companies are deemed to be foreign and will find themselves immediately exceeding the $15m threshold.

The effect of this is that all future proposed acquisitions of agricultural land (regardless of value) will require prior approval under the Policy. We do not believe that community interest is served by requiring Australian domiciled ASX listed companies, in which thousands of Australians invest, to apply to acquire marginal interests in agricultural land. Fundamentally, the imposition of the new threshold will increase the red tape for ASX listed companies that own agricultural land and substantially increase FIRB's workload with limited benefit.

As such we propose that Australian domiciled ASX listed companies who are given a letter of no-objection in relation to an acquisition of land continue to have the benefit of that no objection until their circumstances change in a relevant way (i.e. they cease to be domiciled in Australia or cease to have a majority of Australian resident directors, for example). There should be an accompanying obligation on those companies to inform FIRB if those circumstances change.

We believe this outcome would couple appropriate oversight with a common-sense approach to the review of marginal acquisitions by companies Australia, subject to Australian corporate governance standards and whose shares are held by thousands of Australian citizens.

3.3 Proposal 7.4

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;* *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?*

Submission: We submit that (1) 'Other land' be defined as all land that is not 'agricultural land', 'residential land' or 'mining tenements' and continues to be screened from dollar zero, but that Regulation 3 be updated in a number of ways to provide meaningful exemptions; and (2) in relation to mining tenements, a specific regulatory regime be developed that is tailored to the peculiarities of mining tenements, including a definitive position on whether mining tenements require prior approval; if so, which mining tenements; and appropriate screening thresholds and exemptions.

Other land

We submit that the community has legitimate concerns about acquisitions by foreign persons of land other than agricultural and residential land, including all of the types of land listed in paragraph 69 of the OP and which currently comprises 'Australian urban land' other than residential land. A $0 threshold applying across the board will, however, overburden FIRB with applications that do not protect community interests, as recognised by Regulation 3 of FATR.

This could be addressed either by creating new approval thresholds for specific sub-categories of 'other' land, or by modernising Regulation 3 of FATR. Regulation 3 currently provides a number of exemptions to the requirement that acquisitions of Australian urban land be notified regardless of value. Although these exemptions are broadly appropriate, they are deficient in a number of respects:

- Several exemptions refer to out-dated legislation and therefore can no longer operate (eg Regulation 3(o) of FATR).
- Several exemptions apply specifically to acquisitions of "land" and therefore do not clearly apply to acquisitions of other interests in Australian urban land (such as shares in Australian urban land corporations), meaning whether an application is required depends on the structure of the transaction. For example, there is little reason to distinguish between the acquisition of developed commercial land valued below $55m and the acquisition of shares of an Australian urban land corporation the majority of assets of which constitute developed commercial land valued below $55m, yet current regulations clearly exempt the former and not the latter.
- The exemptions do not apply to Australian urban land trusts in the same way that they apply to Australian urban land corporations.

Updating Regulation 3 would alleviate the burden of a $0 threshold on 'other land' without requiring significant legislative change.

Mining tenements

In relation to mining tenements, there is a great deal of confusion as to which mining tenements constitute "an interest in Australian urban land" requiring approval from $0 and which do not, as this determination presently revolves around the questions of whether:

- The rights granted by the tenement result in a "right to occupy" the land. This turns on complex legal questions around rights of access versus rights of occupation, which differ from one state / territory to the next and one kind of tenement to the next.
- The tenement has "a term (including any extension) reasonably likely, at the time the interest is acquired, to exceed 5 years". It is unclear whether this refers only to the unexpired term of the tenement, and it is particularly unclear what the impact of the qualifier "reasonably likely" means in the context of an extension. Moreover, the term and extensions of mining tenements differ from one state / territory to the next and one kind of tenement to the next.

In some cases, this results in equivalent tenure requiring approval in one jurisdiction but not in another. We submit that it would properly implement FIRB policy and serve the community interests better if there were unambiguous and consistent treatment of mining tenements that was readily understandable by the community at large.

To generalise, there are three broad types of mining tenements in Australian jurisdictions: exploratory titles, extractive titles and infrastructure titles (they each have different names in different jurisdictions). It is critical as a first step for FIRB to develop its policy as to which of these titles should be subject to FIRB approval (for instance, exploratory titles represent a lower order of importance in the context of Australia's national interest and, we believe, should all be exempt from FIRB approval). It will then be necessary for FIRB to consider how it wishes to deal with a range of other interests that may crystallise in an extractive title. Developing a regime that is tailored to the peculiar nature of mining tenements as distinct from other kinds of land will require careful planning and consultation, but would create more certainty for applicants, their advisers and the Trade Policy Division than the current regime (which grafts requirements that apply to fundamentally different kinds of land onto mining tenements).

4 Conclusion

We welcome this opportunity to consult in relation to the modernisation of Australia's foreign investment framework. Please do not hesitate to contact any of the below persons if you should have any questions regarding the above submissions.

Yours sincerely

G+T

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