“STRENGTHENING AUSTRALIA’S FOREIGN INVESTMENT FRAMEWORK”

Submission Paper

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Executive Summary

The Importance of Foreign Investment

- The Liberal National Party ("LNP") has always welcomed and encouraged foreign investment. However, we are concerned that the Government's proposed changes to the foreign investment review framework are sending a very contrary and negative message to foreign investors.

- Foreign investment plays a critical role in the Australian economy, and we concur with Crown Group Chief Executive, Iwan Sunito's view that this is the time when Australia should be looking to maintain strength in the property industry and maintain job growth.

- However, Australia cannot afford to take the flow of foreign investment for granted. Foreign investors are continually looking to invest their money into offshore projects and opportunities, and Australia is just one of many places that is attracting these investment dollars. Whilst foreign investment rules (and the measured and considered enforcement of same) obviously play a key role in ensuring foreign investment is appropriately channelled to the national interest, care must be given to ensure that an overly restrictive or draconian regime does not see investment dollars invested elsewhere.

- The Government should only change its existing policy if proper assessment unequivocally and quantifiably demonstrates that the existing rules are no longer effective to protect the national interest. This view is shared by the Business Council of Australia.

Other Jurisdictions

- The Government's Options Paper makes reference to other jurisdictions with "similar regimes", however we note that, apart from New Zealand (which itself only applies to "sensitive land"), Australia will be the *only* jurisdiction to require an upfront, non-refundable application fee on foreign investment.

- Jurisdictions such as Hong Kong and Singapore apply additional costs by way of an increase in stamp duty, which would only be payable after investment approval has been procured and completion of the transaction has been effected.

The Application Fee

- **We strongly disagree with the introduction of an application fee for potential foreign investors.** This implementation of what is effectively a new tax does not appear to have been well thought through. It appears to be a non-refundable tax levied against foreign investments which only allows the investor the right to enter into the property market. It is not linked to, nor does it guarantee, investment approval or the ultimate settlement of the proposed acquisition.

- Most importantly, the implementation of an application fee of this nature sends an extremely negative message that whilst the Government is keen on investment dollars, it is not overly keen on the investors themselves. Whilst we do not believe it is the LNP's intention to discourage foreign investments, a policy that implies such a message will have the same effect.

Advanced Off-the-Plan Certificates

- The proposal to impose on property developers the equivalent application fees to obtain an advanced off-the-plan certificate is fundamentally flawed.
- By way of an example, where a developer is seeking an advanced off-the-plan certificate for blanket approval of a 100-unit residential tower, the developer would be obliged to pay a minimum of $5,000.00 per unit (assuming the units are marketed at less than $1M each). This equates to an up-front outlay of $500,000.00 which the developer would need to fund from its own resources. Bank funding would not ordinarily be available to cover such a cost, as this is usually dependent on the developer achieving a certain level of sales within the development, which of course, cannot be achieved without the blanket approval being in place.
- This additional up-front cost to developers will put significant pressure on already tight margins, and may well price projects out of the market.

The New Penalty Regime

- **We oppose the proposed penalty regime, which also sends an extremely negative message to potential foreign investors.**
- Wide-reaching powers (and especially the threat of criminal sanctions) could ultimately result in the reduction of development and the subsequent reduction in job creation. The introduction of criminal sanctions clearly sends a negative message that foreign investment is so fraught with danger that, unless done strictly within the confines of the regime, it is a criminal act.

Recommendations

- **We counsel against the Government implementing the proposed changes to the foreign investment review framework**.
- However **IF** the Government insists on proceeding with the proposed changes, we advise that closer attention be given to similar regimes that are currently in place in Hong Kong and Singapore. It is a much simpler system of "payment per acquisition" and does not carry the same level of negative undertone as is inferred by an upfront application fee. It also avoids the unnecessary additional cost-burden on developers to pay for application fees upfront.

Background of Hickey Lawyers' Engagement with Chinese Investors

Hickey Lawyers has long been active in promoting investment into Australia from Asia, particularly from China. Over the last three years we have spent considerable time and resources in making trips to Asia to specifically attract business investment to Queensland. In this process, we have secured engagement by major Chinese investors who have the capacity and the appetite for major investment in Australia (and in particular, Queensland), particularly in the core areas of tourism, construction, property and agriculture.

Presently, we have identified and are acting for seven major Chinese corporations (including State owned enterprises) which are looking at new investment opportunities in Queensland, including several separate projects comprising tourism, construction and property development, with each project being in the vicinity of between $3 billion to $4 billion. We also represent other groups who are either undertaking or looking to undertake residential or mixed use apartment projects in the order of at least $100 million per project.

These projects will not only stimulate the economy, but will create tens of thousands of jobs for Australians, not only during the construction phases, but with respect to ongoing operations of those projects.

We have been working closely with both potential investors and clients looking to attract investment, and it is clear that there are areas in the proposed reforms to the foreign investment review framework that are of serious concern to potential foreign investors and local property developers alike.

It is critical that the Federal Government embraces the golden opportunity to attract billions of investment dollars into Australia without imposing unnecessary policies that could easily send the wrong message to foreign investors that they are not welcome in Australia.

Response to Proposed Amendments to Foreign Investment Review Framework

1. NEW COMPLIANCE AND ENFORCEMENT AREA IN THE AUSTRALIAN TAXATION OFFICE

1.1 Generally, we **support** greater compliance and enforcement measures within the foreign investment review framework. We have no issue with appropriate penalties being imposed on those who are actively and intentionally breaching the foreign investment rules.

1.2 We **support** the creation of a new compliance and enforcement area in the Australian Taxation Office to address compliance matters.

1.3 We **agree** that the Treasurer and the Australian Taxation Office should have the authority to obtain information, documents and evidence that relate to potential breaches of the foreign investment review framework to better compliance and data collection.

1.4 In respect to funding, we **do not** believe that this should be paid by either the Australian taxpayer or the foreign investor or by way of application fees. Our feedback with respect to the regime is set out in more detail below.

2. PENALTY REGIME

2.1 Residential, Business and Commercial Real Estate

(a) Whilst we accept that breaches of the foreign investment review rules need to be properly enforced, and appropriate deterrents need to be in place, a penalty regime of this nature runs the risk of becoming a *blanket* deterrent to investment on the whole, rather than a *targeted* deterrent to those actively looking to breach the rules.

(b) For example, imposing criminal sanctions on property developers marketing exclusively overseas sends the message that Australia is not "open for business" and that foreign investment is an almost unwanted back-up should local investment not suffice.

(c) The proposed penalty regime will simply be looked upon as a threat, rather than a properly considered and targeted mechanism to ensure that the rules are properly enforced. The last thing Australia wants to see is the Government's penalty regime having the unintended consequence of deterring otherwise compliant investment simply because it sends an unnecessarily negative message.

(d) We also note that the penalty regime is intended to extend to property developers and interested third parties. Imposing another layer of unnecessary and draconian penalties and "red-tape" on developers may have the undesired effect of tightening margins which are already overstretched. This could obviously result in a reduction in development and a reduction in jobs. This is discussed in more detail in Parts 2.1 and 3.2 below.

(e) Furthermore, this new penalty regime **should not** be extended to business, commercial real estate and agricultural applications. In our view, it would be completely unnecessary to implement this new policy and risk sending a negative message, particularly when the current policy is already sufficient in enforcing compliance in this area. On the Government's own admission, "there is limited evidence to suggest non-compliance in these areas" (Options Paper, page 11).

2.2 Property Development

(a) We **disagree** with the penalties introduced for property developers who elect to market exclusively overseas. The market is currently extremely dependent on overseas investment and any restriction or fetter placed on property developers (and, in particular, the threat of criminal sanctions) could have the very real effect of turning off the foreign investment tap.

(b) Where developers have acquired advanced off-the-plan certificates to sell 100% of their stock to foreign investors, criminal sanctions to market solely to foreign investors is manifestly excessive.

(c) We **concur** with Crown Group Chief Executive, Iwan Sunito's view that this is the time when Australia should be looking to maintain strength in the property industry and maintain jobs growth. It is rather unnecessary for the Government to call for prison time for developers marketing solely offshore. There is no compelling evidence that marketing overseas is undermining the domestic market, and we also share the view of Business Council Australia that the Government should only change its existing policy if proper assessment unequivocally and quantifiably demonstrates that these rules are no longer effective to protect the national interest.

(d) Developers looking to develop visionary world-class projects simply cannot succeed without the required wealth from foreign investors to fund the project. Foreign investments needs to flow at stages of the project, and is not just limited to "mum and dad" foreigners buying the end-product. Developers are often reliant on foreign investment capital and off-shore syndicated funding to acquire sites and commence and progress construction.

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3. INTRODUCING FEES ON FOREIGN INVESTMENT APPLICATIONS

3.1 Residential Real Estate

(a) The Government **should not** charge application fees on foreign investors to fund screening, compliance and enforcement activities.

(b) In our extensive experience dealing with overseas investors (particularly from China and South-East Asia), they are highly sensitive to any implication that Australia does not want them here.

(c) In our view, it is not the amount of fee imposed, but rather the message that it sends. The message could quite easily be interpreted as "whilst we welcome foreign investment, we do not want the foreigners themselves".

(d) The application fee is effectively a minimum $5,000.00 up-front tax imposed on foreign investors seeking to make an acquisition. It is not linked to the success of an application or the settlement of the acquisition. It is nothing more than a non-refundable tax on the *right* to enter the property market, notwithstanding whether approval is ultimately granted, or whether the acquisition ever actually completes. It is akin to charging customers a door fee solely for the right to enter a supermarket, irrespective of whether or not that customer ultimately buys any groceries. In such circumstances, most customers would understandably choose to go elsewhere.

(e) We share the Property Council of Australia's view that the only thing new taxes do is discourage people from buying, which will lead to less purchases, lower supply to the property market and subsequent upward pressure on prices.

(f) In our view, this new policy could cause a backlash and will send the wrong signal to investors. It is likely to jeopardise the continued strong growth of foreign investment that has been seen over the past few years and the Government could lose more from existing revenue streams if building and construction activity declines sharply. Australia simply cannot afford to discourage foreign investment.

(g) The Government should fund the enforcement area from other sources rather than through a new tax system targeted on one class of investor.

(h) **We urge the Government to abandon new fees for property purchases**. Should the Government wish for Australia to continue to prosper from foreign investment, it should maintain its current status quo in this regard. The Government simply cannot reconcile the position that Australia is open for business, whilst imposing an up-front new tax on the investment business they want to encourage.

3.2 Property Development

(a) We **strongly disagree** with the Government's proposal to levy an application fee for property developers when seeking an advanced-off-the-plan certificate. Property developers, whether from Australia or from overseas, play a crucial role in providing more job opportunities, dwelling supplies and boosting Australia's economic activity. The Government should be cautioned when considering tightening the rules in this area.

(b) The application fee imposed on developers is manifestly excessive. It is not only an excessive amount of lump sum cost for developers to take into consideration during the funding process, it will also obstruct the selling and development process by causing unintended costs, unnecessary delays in processing applications and complication in the application procedure.

(c) The lack of clarity on how these fees are calculated also causes particular concern.

(d) By way of an example, where a developer is seeking an advanced off-the-plan certificate for blanket approval of a 100-unit residential tower, the developer would be obliged to pay a minimum of $5,000.00 per unit (assuming the units are marketed at less than $1M each). This equates to an up-front outlay of $500,000.00 which the developer would need to fund from its own resources. Bank funding would not ordinarily be available to cover such a cost, as this is usually dependent on the developer achieving a certain level of sales within the development, which of course, cannot be achieved without the blanket approval being in place

(e) Additionally, there does not appear to be any guarantee of any refund, credit or offset if stock is sold to Australians, and this outlay would generally need to be paid well in advance (possibly up to several years) prior to settling any sales and receiving revenue.

(f) This facet of the policy appears to have been poorly thought through and it will hit Australia hard. We should be encouraging developers to undertake visionary projects and world class development rather than the opposite. We, along with other key property industry bodies**, strongly urge** the Government to reconsider the obvious flaws in this proposed reform before implementing its final policy.

4. COMPARISON WITH OTHER JURISDICTIONS

4.1 Whilst the Options Paper makes reference to other jurisdictions with “similar regimes” we note that, apart from New Zealand (which itself only applies to “sensitive land”), Australia will be the only jurisdiction to require an upfront, non-refundable application fee on foreign investment.

4.2 Australia already has some of the toughest rules for foreigners purchasing property, and it will go far beyond that of other regimes if this new policy comes into effect. The Government will run the risk of damaging Australia’s foreign attraction.

4.3 Whilst other jurisdictions do charge fees on foreign investment, these fees (such as those charged in Singapore and Hong Kong) are charged by way of additional stamp duty, which would only be payable once the foreign investment application has been approved and, indeed, the acquisition itself settles. These jurisdictions do not actually require an upfront fee payment, rather, it is more akin to a transfer fee which is only payable when the transfer is being lodged and the contract is sure to settle.

4.4 The Government’s proposal of an up-front application tax is fundamentally different to those applied in other jurisdictions.

5. RECOMMENDATIONS

5.1 We counsel against implementing any application fee as it runs the significant risk of undermining economic growth and job creation. Foreign investment doesn’t just apply to mum and dad foreigners looking to buy residential apartments, but also applies to large-scale foreign investors in property development and projects which have the potential to create and maintain jobs for Australians over an extended period of time. Obviously any move to restrict, fetter, prohibit or unnecessarily hinder foreign investment could seriously jeopardise such economic growth.

5.2 However, **IF** the Government is still prepared to proceed with a new regime of taxing foreigners on property acquisitions, then we recommend that the Government take a closer look at similar models in other jurisdictions. As noted above, both models in Hong Kong and Singapore impose the fee by way of additional stamp duty which means it is only payable once approval has been procured (i.e. not upon an application) and when the transaction has been completed. This system is a far simpler model of “direct payment per acquisition” and avoids:-

(a) the negative connotation of being required to pay an upfront application fee before even been granted the right to purchase a property;

(b) unnecessary application fee(s) being paid where potential investors are bidding at multiple auctions or are otherwise unsuccessful or ultimately do not complete the transaction for whatsoever reasons; and

(c) property developers having to unnecessarily pay the up-front fee for procuring an advanced-off-the-plan certificate.