

17 July 2015

Manager  
International Investment & Trade Unit  
Foreign Investment & Trade Policy Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Via email: [ForeignInvestmentConsultation@treasury.gov.au](mailto:ForeignInvestmentConsultation@treasury.gov.au)

Dear Sir/Madam

## Submission on Foreign Investment Reforms – Draft Legislation


Attached is a submission prepared by the Property Law Committee of the ACT Law Society, in response to the draft legislation to implement the Australian Government's proposed foreign investment reforms ("Submission").

We welcome the Government's proposal to modernise and improve the foreign investment framework of Australia.

However, we are concerned with a number of the proposed amendments and how they may affect the property sector. We are also concerned by the limited exposure period and the inability of the Property Law Committee to provide proper consideration of the proposed amendments.

We set out the following submission addressing a number of these concerns for your consideration.

Yours sincerely



(jw) John Chamberlain, Chair  
Property Law Committee  
ACT Law Society

## Property Law Committee of the ACT Law Society

### SUBMISSION ON FOREIGN INVESTMENT REFORMS – DRAFT LEGISLATION

This is a submission prepared by the Property Law Committee of the ACT Law Society (“Committee”), in response to:

- the exposure draft of the Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015 (“**Draft FATA Amendment Bill**”);<sup>1</sup>
- the draft Foreign Acquisitions and Takeovers Regulation 2015 (“**Draft Regulations**”);
- the exposure draft of the Register of Foreign Ownership of Agricultural Land Bill 2015 (“**Draft Agricultural Land Register Bill**”),

(“**Submission**”).

We welcome the Government’s proposal to modernise and improve the foreign investment framework of Australia.

We are concerned the short exposure period does not allow a proper consideration of the proposed amendments. We have therefore focused our Submission on how the proposed amendments affect the property sector and dealings with land. Unfortunately, with such a limited response time our submission is unavoidably high level.

Below are our comments and recommendations on the proposed legislation as far as they affect the property sector.

#### 1 PENALTY PROVISIONS

We have particular concerns regarding the proposed penalty provisions and the retrospectivity of the offence and civil penalties provisions.

We are particularly concerned by the likelihood that these penalties were envisioned to be enforced in the domestic residential property market.

We have the following key comments on the regime.

##### 1.1 Limited publicity around infringement notices

As previously announced by the Government, the infringement notice regime will only be applied in relation to breaches of the legislation with respect to acquisitions of residential land.

The revised version of the Commonwealth Guide to Framing Commonwealth Offences, Infringement Notice and Consequential Orders (initially issued in June 2011) contains a minimum amount of information as to what can or cannot be included in the context of the issue of an infringement notice and the publicity surrounding the issue of an infringement notice. We are concerned that there are some regulators which have not complied with the spirit of these regulations. It is hoped that the use of infringement notices in the area of foreign investment regulation will not suffer from the same problems.

There is no admission of liability when an infringement notice is issued and the fine paid. The fact that an infringement notice has been issued can be notified and one cannot guard against over enthusiastic newspaper or other media reaction to the report of the issue of an infringement notice. However, it is vital that the limitations on exposure to publicity should be maintained in accordance with the guide issued by the Commonwealth Government referred to earlier.

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<sup>1</sup> Unless specified, section references are to sections in the Foreign Acquisitions and Takeovers Act 1975 (“**Draft FATA**”) as amended by the Draft FATA Amendment Bill.

## 1.2 Retrospective offences and civil penalties for breach of existing conditions

We are very concerned that the transitional provisions retrospectively make breaches of conditions attached to existing approvals an offence and impose civil penalties. Such retrospectivity is contrary to fundamental principles of Australian law and should not be imposed unless there are clear and justifiable policy grounds.

Item 10 of Schedule 3 (Application and transitional provisions for Schedules 1 and 2) of the Draft FATA Amendment Bill applies Part 5 (offences and civil penalties), except for sections 106 and 107 of the new provisions, to conduct engaged in after commencement (including in relation to orders or notices given before commencement).

## 2 Australian vendors of residential land subject to record keeping requirements

Sections 118 – 120 of the Draft FATA: create extensive regulatory requirements for record keeping relating to significant or notifiable actions.

The provisions as currently drafted result in Australian vendors being required to comply with the record keeping requirements when selling residential land.

The provisions on record keeping are currently drafted to apply to a "person", rather than to a "foreign person".

While the provisions may refer to a "person" intentionally to ensure that associates of a foreign person (who may not be foreign persons themselves) are captured where appropriate, the Law Society is concerned with the effects of using the term "person" in section 118(1)(d) of the Draft FATA. Section 118(1)(d) states that a person must keep records which relate to the "disposal of an interest in residential land", where the **acquisition** of the land is a significant or notifiable action (or would have been if the action had not been specified in an exemption certificate).

The fact that any person must keep records which relate to the **disposal** of an interest will have the result that Australian vendors, who sell interests in residential land to foreign persons are captured by section 118(1)(d), and are consequently required to comply with broad and potentially onerous record keeping provisions. The Law Society submits this is not in line with the purpose of the record keeping provisions or the foreign investment framework generally, given the objective of both is to monitor the conduct of foreign investors. Further, many Australian vendors will not be aware of these obligations, given that they would not otherwise be required to deal with the foreign investment framework. This could result in unjust outcomes for these vendors, particularly given the strict liability nature of the offence of breach.

We submit that the Government should amend section 118(1)(d) to make clear that these requirements do not apply to Australian vendors who are not associates of foreign persons for the purposes of a given acquisition.