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Online Submission

Dear Sir/Madam

Submission on Options Paper entitled 'Strengthening Australia's Foreign Investment Framework'

Herbert Smith Freehills is pleased to provide this submission on the Government's Options Paper entitled 'Strengthening Australia's Foreign Investment Framework' (**Options Paper**).

1 General comments

We regularly advise clients on the application of Australia's foreign investment laws and the process for obtaining foreign investment approval. As such, we are grateful for the opportunity to put forward recommendations to the Government to modernise and simplify the foreign investment framework.[1]

This submission contains a number of key recommendations for the Government to consider in relation to the following five areas:

1 Problems in the operation of the '30 day rule' (refer to section 2).

2 Problems with the status and operation of the Policy (refer to section 3).

3 Use of FIRB tax conditions (refer to section 4).

4 Need for an exemption for internal restructures (refer to section 5).

5 Comments and recommendations regarding new penalties and application fees, which in our view amount to an unwarranted tax on foreign investment (refer to section 6).

We have also attached as part of this submission, for consideration by the Government:

- other recommended amendments to the Act, Regulations and Policy to encourage foreign investment and reduce over-regulation (refer to Schedule 1); and
- other recommended amendments to clarify and harmonise the Act, Regulations and Policy and FIRB's administration policies (refer to Schedule 2).

2 FIRB's application of the '30-day rule'

Extending back to the introduction of the present framework decades ago was an over-riding objective that the vast majority of applications would be dealt with in 30 days and the mechanism would create a clear run for investments unless a decision was made within that time, save for exceptional cases.

Under section 25 of the Act, the Government has 30 days to make a decision on an application and a further 10 days to notify the applicant of that decision. If the 30 day

[1] *Foreign Acquisitions and Takeovers Act 1975* (Cth) (the **Act**), *Foreign Acquisitions and Takeovers Regulations 1989* (Cth) (**Regulations**), *Foreign Acquisitions and Takeovers (Notices) Regulations 1975* (Cth) (**Notices Regulations**) and Australia's Foreign Investment Policy (**Policy**).

period expires and no decision has been made the Act the Treasurer is no longer empowered to make a decision or an order in relation to the proposal. The exception to this is where the Treasurer makes an order extending the decision period by a further 90 days. Such an order must be published in the *Gazette,* meaning that the proposal is made public.

In most cases the Treasurer (through FIRB) is able to provide a decision within the required time frame and has in some instances accommodated applicants who seek accelerated approval when commercial obligations depend on it.

However, in many cases FIRB is unable to deal with an application within 30 days and will invariably invite applicants to withdraw and re-submit their application (sometimes more than once). This is presented to investors as though it is the default procedure which everyone must follow. This has the following effects:

- creating a procedure which foreign investors find puzzling – causing them to ask why they should be required to take action when the Government has not been able to meet the targeted timeline;
- applicants are effectively forced to withdraw and re-apply because they do not want to get FIRB offside and they do not want their proposed acquisition made public pursuant to a 90 day order;
- creating additional legal and internal expenses for investors; and
- reducing the intended impetus under the Act to ensure that FIRB functions efficiently, effectively and predictably.

Recommendation: if more than 30 days is required by FIRB to make a decision, the Minister should be able to extend the period for a further 30 days (not 90 days) by an instrument that is not published. If the extension is not signed, the approval would be deemed to have been given. That would help to ensure that applications are efficiently processed and provide applicants with greater certainty. FIRB should then be required to report in its annual report on the number of matters where extensions were granted and the reasons why (grouped into categories).

3 Status and operation of the Policy

Under the Act, ‘foreign government investors’ are not treated any differently to other ‘foreign persons’. However the Government imposes tighter restrictions on foreign government entities through its informal Policy, which is not legislated by the Parliament but is treated by the Government and FIRB as imposing mandatory obligations.

As it is not an Act of Parliament, the Policy is subject to (sometimes substantive) ad hoc changes, without prior consultation or notice to investors. We saw this in 2013 when tighter foreign government investor regulation was introduced, and more recently this year, when tighter regulation of private investment in agriculture was included. This unpredictable process for amending the Policy reduces investor confidence in the foreign investment framework and has the tendency to lead to uncertainty about how the regime applies.

Recommendation: as a matter of principle, if foreign investment by state-owned businesses is to be regulated, and further regulation is to be imposed on this class of investor, that regulation should be implemented pursuant to an Act of Parliament. The provisions could still impose the same restrictions as the Policy, but the process would be properly enacted and, importantly from the Government’s perspective, the Act would provide the Treasurer with the appropriate power to grant or deny approval and to impose penalties for breaches.

Leaving aside this principle, there are a number of instances in which state-owned businesses are being handled in a burdensome manner in respect of quite minor investments. Below we have set out two examples of these instances.

(a) **Pro-rata rights issues**

Under section 26(4) of the Act, there is an exemption from requiring compulsory notice to the Treasurer for private foreign persons who subscribe for shares under a pro-rata rights issue. Foreign government investors do not enjoy an equivalent exemption under the Policy.

(b) **Dividend re-investment plans**

Again, a dividend re-investment plan (**DRP**) is a pro-rata offering and is exempt for private investors under the Act but not for state owned investors under the Policy.

FIRB insists that state owned investors seek approval under the Policy for both these categories. They will not give general approval for rights issues even though under an accelerated offering the investor might only have 3 days to respond as an institutional investor, and with respect to DRPs, will only grant approval for 12 months, creating an administrative burden.

Recommendation: if the Policy is to be retained, a provision should be included exempting foreign government investors from requiring Government approval for participation in pro-rata rights issues (including DRPs). On the other hand, if our recommendation above in section 3 is accepted and the Policy is incorporated into the Act to the extent required, the pro-rata rights exemption in the Act should be extended to foreign government investors.

The Government should also consider extending the other exemptions under the Act to foreign government investors, where appropriate. (Further recommendations relating to foreign government investors are contained in section 4 of Schedule 1 and section 1 of Schedule 2).

4 Tax conditions

In recent years the Board has begun to impose conditions regarding income tax, which add administrative burden and, in some cases, do not rest easily alongside Australia's international treaties. Our concern is that FIRB is being used to impose an unlegislated form of tax administration law.

The Treasurer has indicated that tax conditions will increasingly become a feature of FIRB approvals, however no guidance has been given of the circumstances in which conditions would be imposed or what they would be designed to address.

Recommendation: if the Government believes there are deficiencies in the way the tax law works it should be addressed through the implementation of new or amended laws, not through the imposition of tax conditions on FIRB approvals.

5 Exemption for Internal restructures

5.1 General exemption

We regularly advise on internal corporate restructures and reorganisations of foreign corporate groups which own downstream Australian companies and assets. These transactions often involve:

- a direct transfer of shares in an Australian company from one intermediate holding company to another;
- an indirect transfer of shares in an Australian company via the transfer of an intermediate holding company to another company within the same group;
- a share issue by an Australian company to a company within the same group; or

- a dividend or capital return by the shareholder of an Australian company, the consideration for which is satisfied by the transfer of shares in that Australian company to a company within the same group.

If ultimate foreign ownership levels are above the prescribed thresholds and the value of Australian assets exceeds $252 million, the above transactions will be regulated under section 18(2)(b)(ii) of the Act and are notifiable to the Treasurer under section 25 or 26 of the Act. However, they have no practical bearing on the ultimate foreign holding company or companies (which remain the same) or the relevant Australian company or business.

Given that ultimate foreign ownership (i.e. the ultimate controller) does not change, these types of transactions do not (in and of themselves) give rise to national interest concerns and consequently almost always receive unconditional approval from the Treasurer. However, in the absence of an express exemption, investors will always notify the Treasurer of these transactions:

- because the transaction may technically be caught by section 26 and it is a criminal offence to fail to notify such transactions; and
- because of the possibility of a divestment order being made in the (albeit unlikely) event that the transaction was considered to be contrary to the national interest.

This imposes a strain on FIRB case officer resources and management time and is unnecessarily costly and time consuming for businesses.

Recommendation: the Act should be amended to exempt internal corporate restructures from its scope, particularly where those transactions occur at or below the level of the ultimate parent company and where the total ownership interest of the ultimate parent company does not change. Such an exemption should equally be extended to foreign government investors under the Policy, if it is to be retained.

5.2 Exemption for 'prescribed foreign persons'

As an alternative submission if our recommendation in section 5.1 is not accepted, we believe that the Act should be amended to at least exempt internal corporate restructures from its scope for foreign investors from the US, New Zealand, Korea, Japan and Chile so that internal restructures undertaken by companies who are resident in those jurisdictions will be exempted.

We believe this is consistent with the spirit and intention of Australia's free trade agreements with each of those countries, in particular the Australia/US free trade agreement (as reflected in the exchange of letters between Ambassador Zoellick and Mark Vaile (then Minister of Trade) dated 18 May 2004).

That exchange of letters acknowledged that "internal corporate reorganisations and foreign-to-foreign takeovers have historically been classes of transactions that in almost all cases give rise to no concerns under foreign investment policy". It further goes on to say "Accordingly, Australia further notes that it would be desirable to minimise any screening of foreign-to-foreign takeovers and internal corporate reorganisations".

Recommendation: if a general exemption for internal corporate restructures is not implemented, the Act should be amended to exempt internal corporate restructures by prescribed foreign investors from its scope. (Further recommendations regarding 'prescribed foreign persons' are contained in section 3 of Schedule 1)

6 Comments and recommendations regarding new penalties and application fees

The comments and recommendations in this section 6 relate to the Options Paper's proposed new penalty regime and application fees.

As a preliminary point, as we have discussed in this letter (and discuss further in Schedule 1), we think there are a number of areas in which the foreign investment framework over-reaches, regulating transactions where there is no change in ultimate ownership and therefore no national interest concerns, for example, internal restructures and pro-rata rights issues. Therefore the imposition of penalties and applications fees in these instances would place an unnecessary burden on businesses and it would be preferable to reform the framework so that such transactions do not require approval. More generally, we see nothing wrong with fees designed to recover the Government's costs in administering the law. However the level of the proposed fees (up to $100,000) amount to a new tax on foreign investment which acts as an unwarranted deterrent.

6.1 Proposed application fees

We think there are a number of reasons why the introduction of application fees (as proposed) is inappropriate:

1. **(Unnecessary)** The proposed purpose for imposing application fees – enabling FIRB to undertake greater compliance and enforcement activities – is not justified in respect of business, commercial real estate and agricultural investment applications for which there is limited evidence of non-compliance with Australia's foreign investment framework (according to the Options Paper);
2. **(Mode of calculation)** The mode of calculating the fees – by reference to the value of the target entity – is arbitrary given that an application will not necessarily be any more complex simply by virtue of the value of the target. We note that ASIC and the ASX, when considering applications for relief, have different fee structures that depend on whether the application is a standard or non-standard application. In the case of FIRB, the value of a transaction may not be reflective of the complexity of the approval process where it is standard in nature, eg internal restructures.
3. **(Level of fees)** The level of fees proposed is too high. In the Options Paper, of the countries whose screening arrangements were examined, only New Zealand imposes application fees, and those fees are between approximately $12,500 and $22,500 for land acquisitions in sensitive land and between approximately $11,000 and $13,000 for significant business assets.
4. **(Discourage investment)** Requiring the payment of exorbitant application fees is not conducive to encouraging foreign investment in Australia for a number of reasons:
   - exorbitant fees will deter potential investors who could take their investments elsewhere;
   - the proposed fees would be charged regardless of whether the proposed investment is actually carried out;
   - five out of the six countries whose screening arrangements were examined in the Options Paper do not impose application fees, (the United States, Canada, Japan, Hong Kong and Singapore). Hong Kong and Singapore impose special stamp duty instead which is only payable upon a successful investment, rather than on a proposed investment.
5. **(Double-charging)** Without sufficient safeguards in place there is a risk that:
   - where a business proposal is withdrawn and re-submitted in order to extend the statutory deadline, the applicant could be charged twice; and
   - multiple consortium members collectively bidding for the same asset but each making a separate application will each be charged even

though there is likely to be a great deal of overlap in FIRB's analysis of the applications.

6 **(Other revenue generating methods)** Revenue to fund FIRB's additional activities can be generated by other means, for example, special stamp duty for foreign investments in land.

Recommendation:

If fees are introduced:

- the level of the fees should be designed to recover the Government's costs in administering the law, no more.
- they should be much lower than proposed in the Options Paper (we support the level proposed by the House Economics Committee);
- the mode for calculating the fees should not depend on the value of the target;
- if they are based on the value of the target there will need to be an adjustment mechanism if the actual value of the target at the time the transaction is carried out is different to the estimate given at the time of the application.
- there should be mechanisms to avoid unnecessary double charging; and
- if they are to be substantive fees i.e. more than administrative in nature, they should apply only once the investment is completed.

6.2 Proposed civil penalties

As noted above, given the limited evidence of non-compliance with Australia's foreign investment framework in relation to business, commercial real estate and agricultural investment applications, we do not consider it necessary or appropriate to impose additional penalties on these kinds of applications.

If additional penalties are to be imposed, we have the following suggestions:

- To facilitate compliance, Australia's foreign investment framework should be simplified and there should be additional guidance on how it applies, as discussed in Schedule 2 to avoid unintentional breaches.
- The proposed penalties for making an acquisition without approval should only apply where there is a mandatory notification obligation (that is, under section 26 or section 26A of the Act). It would be inappropriate to extend the additional penalties to transactions where foreign persons are instead subject only to a voluntary notification right (for example, where a foreign person proposes to acquire control of assets of an Australian business (under section 19) or where a foreign person acquires less than a controlling interest in a prescribed corporation but acquires an interest which gives foreign investors an aggregate controlling interest (ie, of 40% or more).

Recommendation:

1 New penalties for breaches in relation to business, commercial real estate and agricultural investment should not be introduced.

2 If new penalties are introduced, they should not apply to voluntary notifications and the foreign investment framework should be amended to avoid unintentional breaches.

We thank the Government for the opportunity to put forward our recommendations in this letter and look forward to discussing any of the matters contained herein (including in the Schedules), if required.

Yours sincerely

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Schedule 1

Other amendments to encourage foreign investment and reduce over-regulation

The foreign investment framework is expansive and regulates a wide range of foreign investment activity with a view to protecting Australia's national interests. There are areas, however, where we do not consider such stringent oversight to be necessary in order to protect the national interest. Reforming these areas will reduce the regulatory burden on investors and businesses and encourage foreign investment in Australia. It will also have the added benefit of streamlining FIRB's practice, without compromising the national interest. This Schedule 1 sets out a number of categories of transactions which we recommend be exempted from the application of the foreign investment framework.

1 **40% foreign owned entities which are listed or widely held (Part A)**	**Acquisitions by those entities** An entity will be classified as a 'foreign person' under the Act if two or more foreign individuals or corporations own, in aggregate, a direct or indirect interest of 40% or more in that entity. Consequently, a 'true blue' Australia-based and managed entity could be classified as a 'foreign person' for the purpose of the Act if a sufficient number of foreign companies invest in that entity. We often see this with ASX listed and other widely held entities. As a consequence, acquisitions of controlling interests in Australian companies or businesses by those entities will require FIRB approval despite the fact that they are Australia-based and managed and (if listed) subject to the stringent regulatory and corporate governance requirements not only of ASIC but also of the ASX. We query the justification for this, given: • the lack of practical control by any foreign investor over that entity's decisions and policies; and • the additional protections and accountability measures which are already built in under Australian laws and imposed by Australian regulators. If an exemption was introduced under the Act for investment by ASX Listed or widely held entities which are at least 40% foreign owned, there would need to be parameters to the exemption – for example, it should not be available if the relevant entity satisfies any of the other tenets of the 'foreign person' definition (for example, if an individual foreign investor proposes to acquire an interest of 15% or more in the corporation) or if the relevant corporation is a 'foreign government investor'. It could also be a pre-condition to availability of the exemption that the entity is Australia-based and managed, with at least 50% of the board members being Australian residents. **Recommendation:** the Act should be amended to exempt investments by ASX Listed or widely held entities which are at least 40% foreign owned from the scope of the Act (with certain exceptions).

2 **40% foreign owned entities which are listed or widely held (Part B)**

Securities trading in listed entities which are at least 40% foreign owned

When foreign investors trade in the securities of ASX listed entities and entities whose securities are listed on a foreign exchange (**Foreign Exchange Entities**), those investors may be required to obtain prior FIRB approval if the listed entity has aggregate foreign ownership levels at or around 40%. This is because:

- In the case of an ASX listed entity, the trading activity might tip aggregate foreign ownership levels to 40% or more. This would trigger a voluntary requirement to obtain foreign investment approval under sections 18(2)(b)(i) and 25 of the Act.
- In the case of an ASX listed entity or Foreign Exchange Entity, foreign ownership levels might already be at or above 40%, but the identity of the controlling foreign persons will change. This would trigger a voluntary requirement to obtain foreign investment approval under sections 18(2)(b)(ii) and 25 of the Act.

However:

- In each of the scenarios outlined above, accurate information regarding aggregate foreign ownership levels will not always be readily available, particularly where large numbers of small parcels are foreign owned.
- In the second scenario (in so far as it relates to Foreign Exchange Entities), the voluntary notification requirement will be triggered each time a different investor acquires securities (no matter how small a percentage interest they hold).

For these reasons, the foreign investment framework is practically unworkable in this context, both from a compliance and enforcement perspective.

If an exemption was introduced under the Act for trading in listed securities there would need to be parameters to the exemption – for example the proposed acquisition of a controlling interest by a foreign person (ie, of 15% or more) should continue to require prior notification.

Recommendation: the Act should be amended to exempt trading in listed securities from the scope of the Act (with certain exceptions).

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3 **Higher monetary threshold for 'prescribed foreign investors'**

'Prescribed foreign investors' (as defined in the Act) theoretically get the benefit of a higher $1,094 million threshold which removes the need to notify FIRB in respect of an investment in a target which is valued at or below that threshold (**Prescribed Investor Threshold**). Unfortunately, the Prescribed Investor Exemption is very prescriptive and has only limited application. In particular, it is not available if a foreign investment is undertaken through an intermediate holding company or special purpose vehicle which is incorporated in any jurisdiction other than the relevant prescribed foreign investor's jurisdiction. To reflect these often-used commercial structures, and enable prescribed foreign investors to benefit from the higher investment thresholds which have been agreed to, we suggest that the Prescribed Investor Threshold be broadened, with a proviso included to ensure that if a non-prescribed foreign investor (under the current meaning) holds 15% or more in that entity, the higher threshold will not apply.

Recommendation: the Regulations should be amended so that the 'prescribed foreign investors' specified in regulation 9 include entities (eg. intermediate holding companies or special purpose vehicles) in which no less than 85.1% is held by entities constituted under the laws

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		of the jurisdiction of the relevant prescribed foreign investor (i.e. the US, New Zealand, Korea, Japan or Chile), whether or not the first mentioned entity is incorporated or established in Australia or in an overseas jurisdiction, provided that the entity is not incorporated in a country that Australia does not maintain diplomatic relations with.
4	**Regulation of foreign government investors**	**Government grants of interests in Australian urban land** The Act offers an exemption for the acquisition by private foreign investors of interests in Australian urban land from a government body (section 12A(7)), but no similar exemption is provided for foreign government investors under the Policy. A private foreign investor who transitions from an exploration licence to a mining/production licence (which is granted by the Commonwealth Government) would generally get the benefit of this exemption and not require approval under the Act. Because foreign government investors are not eligible for this exception, it presents an additional risk for investment in exploration projects by foreign government investors, one which does not seem reasonably justifiable based on the character of the investor alone. **Recommendation:** if retained, the Policy should be amended to provide an exemption from requiring approval for foreign government investors receiving Government grants of interests in Australian urban land.
5	**Regulation of underwriters**	FIRB typically requires that the underwriting of Australian companies by foreign private financial institutions be notified to it under the Act. This is unnecessary since underwriting agreements are not designed to give an underwriter control, and in the event that an underwriter acquired a substantial shareholding as a last resort this would be on a transitional basis. The Corporations Act is helpful in this regard as it provides a number of exceptions from the general takeovers prohibition in respect of underwriting. ASIC states that these exceptions reflect an underlying policy that the takeovers provisions should not unduly prevent an issuer from using underwriting arrangements to manage the risk of a shortfall in a capital raising. We believe the same principle should apply to regulation of underwriters who may be foreign investors. **Recommendation:** the Act should be amended to exempt underwriting proposals from requiring notification under the Act.

Schedule 2

Other amendments to clarify and harmonise the foreign investment framework

The recommendations contained in this Schedule 2 are aimed at clarifying and harmonising the Act, Regulations and Policy and FIRB's administration policies.

Part 1: Areas where clarification amendments are recommended in the Act, Regulations and Policy

There are a number of minor inconsistencies and uncertainties in the Act, Regulations and Policy which, if clarified, would make the foreign investment framework more user-friendly and remove unintentional ambiguities regarding the requirement of FIRB review or notification. This section contains a number of recommendations for resolving some of these inconsistencies and uncertainties.

1	**Definition of 'foreign government investor' under the Policy**	When determining whether upstream or indirect ownership arrangements mean that an entity should be categorised as a 'foreign government investor' under the Policy, it is not clear whether the tracing provisions contained in section 12C of the Act should be applied (although we understand that this is the approach which is taken by FIRB). **Recommendation:** if retained, the Policy should be amended to clarify that the tracing mechanisms in section 12C of the Act are applicable to the definition of 'foreign government investor' (if that is the intended approach of FIRB and the Treasury).
2	**Application of section 18 to acquisition of units in a trust**	Currently, section 18 of the Act does not apply to the acquisition of units – it only applies to acquisitions of shares. If a foreign person proposes to acquire a controlling interest in a unit trust whose gross assets in Australia are valued above $252 million then that transaction would likely be caught, but only by the less obvious application of the tracing provisions contained in sections 12C or 19 of the Act. It would be simpler if section 18 was broadened to include units. **Recommendation:** If it is the Government's intention, the Act should be amended to expressly include the acquisition of units in a trust (and relevant exemptions should similarly be extended from shares to units e.g. moneylending exemption (section 11(5)(a)) and rights issue exemption (section 26(4)).
3	**Rights issue exemption for Australian**	Currently, foreign investment approval must be obtained if a foreign person proposes to acquire an interest in 'a share' in an Australian urban land corporation or 'a unit' in an Australian urban land trust estate. There is a rights issue exemption for the issue of shares in an Australian urban land trust estate (section 26A(4) of the Act) but no equivalent exemption for a rights issue by an Australian urban land

	urban land trust estates	trust estate (ie issue of additional units to existing unitholders). We believe that the rationale for the equity rights issue exemption applies equally to a unit trust rights issue. **Recommendation:** If it is the Government's intention, the Act should be amended to include an exemption for a rights issue by an Australian urban land trust estate.
4	**Replacing regulation 3(o)**	In 2013 the Foreign Investment Review Board (**FIRB**) released a memorandum stating that the exemption for passive investments by foreign persons in Australian public (real estate) trusts that are Australian urban land trusts (in regulation 3(o)) was no longer operational due to the fact that references to 'a prospectus approved by the Corporate Affairs Commission of a State or Territory' had become obsolete. The memorandum declared an interim policy to replace regulation 3(o) whilst the Government considered how to clarify its position. We think that the interim policy is unclear and inconsistent with the original legislative intent of regulation 3(o) for the following reasons: • it imposes a lower threshold (10% and 5% respectively, each lower than the substantial interests test specified in regulation 3(o)); • "Listed trusts" must now have a predominantly non-residential property portfolio. The interim policy does not specify what percentage of residential property holding would cause a listed trust to fall within this test. Contrast this with a clear 10% threshold for developed residential real estate in regulations 3(o)(i)(D) and 3(o)(ii)(C); • other "public trusts" must also hold less than 10% of the trust's real estate assets in developed residential real estate assets that have been acquired from non-associates. The interim policy does not specify at what time the associate relationship is determined and whose associates it is referring to and does not take into account the burden of calculating which assets were acquired from associates in the past; • the interim policy also requires interests to be "passive interests" and refers to the concept of a "strategic stake", neither of which are defined in the interim policy or the Act. The cause for the change to regulation 3(o) was the abolition of the Corporate Affairs Commission in 1990. Nowadays, unit trusts which accept funds from the public do so by issuing a product disclosure statement in accordance with Part 7.9 of the Corporations Act (as opposed to a 'prospectus'). In addition, there was a transitional stage between the state based Corporate Affairs Commission and the introduction of the PDS regime where unit trusts lodged prospectuses with ASIC (or its predecessor the Australian Securities Commission) in connection with offers to the public. Therefore there is a straight-forward solution to updating regulation 3(o), as follows. **Recommendation:** the interim policy relating to regulation 3(o) should be removed and regulations 3(o)(i)(A) and 3(o)(ii)(A) should be amended to include the following underline language: '…a prospectus approved by the Corporate Affairs Commission of a State or Territory <u>or a prospectus approved by the Australian Securities and Investments Commission or any predecessor, or product disclosure statement issued pursuant to Part 7.9 of the Corporations Act 2001'.</u>

Part 2: Areas where clarification amendments to FIRB's administrative policies are recommended

FIRB has a number of administrative policies which change from time to time and are not always consistent with the Act or the Policy or apparent to an applicant. This section contains a number of recommendations for clarifying some of these inconsistencies.

1	**Effect of informal ACCC clearance on timing for approval**	If a transaction is subject to obtaining informal clearance from the ACCC, in our experience FIRB has applied an internal policy of only referring the matter to Treasury for a decision under the Act if and when that clearance has been obtained, which may necessitate withdrawal and re-submission of an application one or more times to restart the statutory timeframe for FIRB. This procedure is not detailed publicly in the guidance by FIRB on its website. Informal policies such as this (which draws into question the statutory timeframe for assessing a foreign investment application) impact on investor confidence and create additional regulatory burden. **Recommendation:** in addition to our recommendation regarding amendment to the '30 Day Rule' in section 2 of the letter, FIRB should provide clear guidance on how informal clearance from the ACCC could affect timing for approval.
2	**Two-step notification by foreign government lenders**	Under the Policy, foreign government lenders who are not APRA regulated ADIs (as those terms are defined in the Policy) must notify FIRB if they will retain an interest of 10% or more of an Australian business or assets following the enforcement of a security interest. In our experience, for practical reasons (ie timing of enforcement is likely to be unpredictable) such lenders notify FIRB <u>before</u> acquiring a security interest in prescribed assets, however there is some uncertainty as to whether a subsequent notification needs to be made before that security interest is enforced. There are deeming provisions contained in the Act which, broadly speaking, have the effect of requiring a single notification to be made to FIRB when private foreign persons acquire a right or option to acquire prescribed shares or assets. We are aware of examples where FIRB has taken the view (albeit informally) that foreign government lenders who are not APRA regulated are entitled to rely on those deeming provisions, despite the fact that any notification made by them may only be required under the Policy and not the Act. In those circumstances, foreign government lenders have only been required to adopt a one stage notification process, with any foreign investment approval extending to both taking and enforcing the relevant security. However, this position is by no means settled. **Recommendation:** if retained, the Policy should be amended to clarify that foreign government lenders who are not APRA regulated ADIs and who intend to acquire a security interest requiring notification to FIRB, need only notify FIRB once of the proposed acquisition and are not required to notify FIRB again if, following enforcement, an interest of 10% or more is retained (if this is the intention of FIRB and the Treasury).
3	**Online application system**	With the introduction of an online application system (which came into effect in the second half of 2014), there has been inconsistent messaging from FIRB (in its 'How to Apply Guide' and verbally) as to whether an application still needs to be accompanied by a statutory notice. **Recommendation:** the Notice Regulations should be amended to make it clear that statutory notices are no longer required when making an application to FIRB (if this is the intention of FIRB and the Treasury).