Submission on Options Paper – *Strengthening Australia's Foreign Investment Framework*

Response to Question 1: A new compliance area in the Australian Taxation Office (ATO) is required to address concerns about foreign investment framework compliance

The government is to be commended for proposing the reforms in the Options Paper *Strengthening Australia's Foreign Investment Framework* Options Paper (**Options Paper**). There is little doubt that there is widespread non-compliance with foreign investment restrictions in relation to existing residential properties. This is demonstrated by a recent report in the *Sydney Morning Herald* in relation to the *Foreign Acquisitions and Takeovers Act 1975* (**FATA**) divestment order for the established residential property at 63-67 Wolseley Road, Point Piper, in Sydney, which stated:

> *[t]he extraordinary measure has shocked prestige agents who had believed the purchase did not require approval from the Foreign Investment Review Board because the purchase was in the name of an Australian company.*

It simply beggars belief that such an implausible proposition could be held by any reasonably competent professional. From this, it is clear that a number of third party service providers, real estate agents, intermediaries, directors, accountants and lawyers, treat the FATA with contempt.

Further, there are extensive conflicts of interest related to this issue which serve to conceal the extent of the problem, such as in the case of large media companies which purport to give objective commentary on this issue in English, yet generate substantial revenue from specialized foreign-language real estate classified publications.

There are also substantial vested interests in the property sector (such as well-resourced development companies and industry associations representing development companies) which go to great lengths of sophistry to convince the public that there is 'nothing to see here', when in fact anyone with an open mind can see exactly what is going on.

Given the existing paucity of transparency and enforcement in this area, these reforms are long overdue. No alternatives should be considered.

Response to Question 2(b): New compliance and enforcement should be funded by the introduction of application fees on foreign investors

Requiring foreign investors to pay for compliance and enforcement ensures that taxpayers in Australia are not subsidizing the unlawfulness of non-Australian residents.

Alternative approaches, such as charging fees based on a percentage of the purchase price or market value, are likely to be gamed by purchasers and their professional advisers.

Response to Question 3(a): A civil penalty regime would be an effective addition to the rules to ensure compliance and assist with enforcement

The FATA needs to have a sanctions regime which is more significant than a civil remedy but less significant than a criminal remedy, and this is ideally met by a civil penalty regime.

Despite this, an effective range of civil remedies should be available, as well as criminal sanctions and administrative powers (such as issuing infringement notices).

Response to Question 3(b): Civil penalties would be part of an effective addition to the rules to ensure compliance and assist with enforcement

The civil penalties should be significantly increased

While the introduction of civil penalties is to be welcomed, the amounts proposed for some civil penalties are manifestly inadequate at $42,500. In other contexts, persons who are intentionally dishonestly are subject to civil penalties of $200,000 (individuals) or $1 million (corporations) – see s 184 *Corporations Act 2001* (**Corporations Act**).

The time at which the 'market value' of a property is calculated for the purpose of the civil penalty provisions will need to be made clear.

Infringement notices and summaries of those notices should be publicly available

Given the overriding public interest in transparency, there should be no restriction on the publication of infringement notices issued under the FATA nor any restriction on the ATO issuing a summary of individual infringement notices (e.g. the infringement notice regime under s 798K *Corporations Act 2001* and associated regulations).

The proposed reforms also need additional evidence –gathering powers

While the proposals mention that the FATA will be amended to ensure that the Australian Taxation Office can issue a compulsory notice (**Notice**) to require the production of information, the FATA should also be amended to ensure that any evidence gathering regime is effective having regard to the likely use of that regime. The following enhancements are suggested:

- A search warrant power, with the ability to use evidence gathered in administrative (infringement notice), civil, civil penalty and criminal proceedings (e.g. ss 35 – 36A *Australian Securities and Investments Commission Act 2001* (**ASIC Act**));
- Offence provisions for non-compliance with Notices (e.g. s 63 ASIC Act);
- The ability to seek court orders where there has been non-compliance with a Notice (e.g. s 70 ASIC Act);
- Penalties for giving false information in response to a Notice, obstructing a person exercising a function in relation to a Notice (e.g. ss 64, 65 and 66 ASIC Act, and various provisions in the *Taxation Administration Act 1953*).
- An offence of conducting transactions so as to avoid FATA notification obligations (e.g. s 142 *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*).

Most importantly, the reforms to the FATA should include a regime for compulsory examination of persons similar to s 19 of the ASIC Act.

While at first bluish the above may seem unwarranted, given the proposed reforms will introduce civil penalties and criminal liability then the evidence gathering powers of the FATA will need to be commensurate with those remedies. For example, if a civil penalty proceedings was sought to be undertaken in respect of the FATA then the contravention would need to be proven the *Briginshaw v Briginshaw* standard – a level above the balance of probabilities but below beyond reasonable doubt – and this would require more than data-matched information. It would defeat the entire purpose of the reforms if a person could simply refuse to comply with a Notice, and there was little if any penalty for doing so.

Response to Question 3(c): The proposal to extend accessorial liability should be amended

The Criminal Code does not work as the Options Paper suggests

While the Options Paper states that a criminal penalty will be imposed under s 11.2 of the *Criminal Code*, s 11.2 of the *Criminal Code* does *not* criminalize conduct of a person that 'knowingly assists' the commission of an offence. Rather, s 11.2(3) of the *Criminal Code* requires that a person *intend* that their conduct aid, abet, counsel or procure the commission of any offence. If it is intended that the FATA

criminalize conduct of a person that 'knowingly assists' the commission of an offence, then reliance on s 11.2 of the *Criminal Code* to achieve this is misplaced.

As regards to accessories, information should be able to be disclosed to professional bodies

Given the involvement of professional advisers in offences under the FATA, the FATA should be amended to specifically enable the disclosure of any confidential information gathered under its powers to professional bodies, such as State law societies and Chartered Accountants Australia and New Zealand (e.g. s 127(4)(d) ASIC Act).

Response to Question 3(d): It is necessary to increase the existing criminal penalties in light of the proposed new civil penalties

Given the inadequacy of the proposed civil penalties – which need to be increased – the criminal penalties should be increased also.

Response to Question 5(a): New compliance and enforcement should be funded by the introduction of application fees on foreign investors

Requiring foreign investors to pay for compliance and enforcement ensures that taxpayers in Australia are not subsidizing the unlawfulness of non-Australian residents.

Alternative approaches, such as charging fees based on a percentage of the purchase price or market value, are likely to be avoided by purchasers and their professional advisers.

There should be no exceptions on paying the application fees.

Response to Question 5(b): The fees on foreign investment applications should be significantly increased

The application fees proposed are unlikely to represent anything near cost recovery for the particular applications and adequately fund the compliance and enforcement activities. The fees should be significantly increased.

Charging fees will not act as a barrier to foreign investment, given that foreign investment transactions involve significant amounts of money.

Response to Question 5(c): No special treatment should be given to applicants that submit multiple applications

The Options Paper does not set out any convincing rationale for why multiple applications should receive special treatment. Encouraging special treatment increases the risks of Australian taxpayers subsidizing the wrongdoing of non-Australian residents.

General

The inclusion of the following statement in the Options Paper is disappointing:

> *reflecting the fact that foreign persons who are temporary residents need a place to live during their time in Australia, temporary residents can apply to purchase one established dwelling to use as a residence while they live in Australia.*

If a resident was a genuinely *temporary* resident then they would have no ongoing interest in holding real property in Australia, and would not seek to do so given extensive transfer costs such as stamp duties.

There is nothing to stop a temporary resident such as a university student renting like other university students have done in Australia for decades.

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