Business Council of Australia

Response to Modernisation Options Paper on Australia's Foreign Investment Framework

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The Business Council of Australia (BCA) is a forum for the chief executives of Australia's largest companies to promote economic and social progress in the national interest.

About this submission

This submission responds to the federal government's request for feedback on options to modernise and simplify the *Foreign Acquisitions and Takeovers Act 1975 (Cth)* ('*FATA*'), *Foreign Acquisitions and Takeovers Regulations* and Australia's Foreign Investment Policy ('the Policy').

Our submission responds to a range of proposals outlined in the government's paper *Australia's Foreign Investment Framework: Modernisation Options.*

Summary

The *Foreign Acquisitions and Takeovers Act 1975 (Cth)* ('*FATA*') provides the legislative framework for Australia's Foreign Investment Review Board (FIRB) screening regime. The *FATA* allows the Treasurer or his delegate to review investment proposals to decide if they are contrary to Australia's national interest.

The Treasurer can block proposals that are contrary to the national interest or apply conditions to the way proposals are implemented to ensure they are not contrary to the national interest. Australia's Foreign Investment Policy provides guidance to foreign investors to assist understanding of the government's approach to administering the *FATA*. The Policy also identifies investment categories that require notification to the government for prior approval, even if the Act does not appear to apply.

The Business Council supports changes to Australia's foreign investment policy and law to continue to manage risks effectively under the *FATA*, and to address community concerns about foreign investment, particularly in sensitive sectors, while minimising government and business administration and compliance costs.

Our key recommendations are outlined in the following submission.

Key recommendations

Recommendation 1

That the government harmonise the *FATA* with other legislation, in particular by:

- changing the foreign investment notification requirements for a single foreign person from 15 to 20 per cent of total ownership, to be consistent with the *Corporations Act*
- raising the trigger for FIRB review of foreign government investors on substantial interest threshold from 15 per cent to 20 per cent of total ownership
- removing special screening requirements for heritage listed commercial developed property to reduce duplication with heritage laws at other levels of government and create a level playing field with trade agreement partners
- not requiring foreign majority shareholders (over 50 per cent), whose existing shareholdings are already approved, from notifying the FIRB of any increase in their shareholding.

Recommendation 2

That Australia's Foreign Investment Policy be amended to make it consistent with the *FATA,* to eliminate ambiguity and increase predictability for investors.

Recommendation 3

That Australian expatriates not be included in the definition of a foreign person.

Recommendation 4

That the government consider:

- exempting Australian-listed companies with minority foreign ownership from notification, or
- raising the trigger for FIRB review on aggregate threshold from 40 to 50 per cent in line with majority ownership, or
- granting the Treasurer power to exempt a company if certain pre-defined criteria are met.

Harmonise FATA with other legislation

The Business Council strongly supports the general approach outlined in the discussion paper *Australia's Foreign Investment Framework: Modernisation Options* to harmonise the *FATA* with other legislation.

Additionally, the government should consider going further and amend the foreign investment policy to be consistent with the *FATA*. Ensuring there are no policy inconsistencies between the *FATA* and the Policy provides investors with greater certainty and ensures the legislation is consistent with existing practice. Currently, the Policy

provides government officials with discretion and this increases ambiguity, which detracts from investor certainty. To modernise the investment regime, the government should consider making the investment regime consistent and predictable by aligning the two key documents.

With respect to harmonising the *FATA* with other legislation, we support increasing the threshold for a single foreign person investor from 15 to 20 per cent ownership. This would reduce administrative and compliance costs for all parties and make foreign investment notification requirements consistent with Australia's takeover rules in the *Corporations Act.*

Similarly, the Business Council supports the government's proposal to apply this change to the definition of 'foreign government investor'. To bring all FIRB review trigger thresholds for substantial interest into alignment, foreign government investors should also have the threshold raised from 15 per cent to 20 per cent.

The Business Council supports the government's proposal to remove special screening requirements for heritage listed commercial developed property, to remove duplication with heritage laws at other levels of government. Additionally, this requirement exposes an inconsistency with the more favourable conditions granted to trade agreement partners, so removing this requirement would create a level playing field for all investors.

Streamline processes

The Business Council supports the proposal not to require notification if a foreign majority owner (over 50 per cent) of an Australian asset increases its shareholding in the Australian asset. Under *FATA's* business acquisitions framework, the Treasurer does not have powers to act on foreign ownership unless there is a change in control. A majority owner who increases their shareholding in an Australian asset would not change the character of control. It would logically follow that further notification should not be necessary.

Removing the notification requirement is sensible under these circumstances as FIRB's calculus for assessing risk under the national interest has not changed. These proposals make even more sense when combined with the government's recently announced changes to charge fees for each individual FIRB application. Exempting majority owners from FIRB notification would ensure they are not charged an additional fee and deter further investment in Australia.

Australian expatriates should not be deemed foreigners

A foreign person under *FATA* includes all natural persons not ordinarily resident in Australia. This would include Australian nationals who are primarily resident overseas, such as expatriates.

The Business Council recommends not including Australian expatriates in the definition of a foreign person.

In a modern globalised labour market, place of residence changes according to occupation and opportunities. Australia should not maintain policies that distinguish

between Australian citizens and discriminate against a certain group of them. These policies may inadvertently limit the movement of Australian nationals.

Australian nationals residing overseas should enjoy the same rights and privileges to investment as Australian nationals resident in Australia.

'Accidental Foreigners'

A company that is recognised in Australia and abroad as Australian, has a strong Australian history and connection, and is Australian incorporated or publicly listed on the ASX, nevertheless would be considered a foreign company under *FATA* if:

- one of its shareholders was a foreigner but held more than 15 per cent of shares, or
- the total aggregate of foreign owners exceeded 40 per cent.

Submissions made by BCA members Corrs Chambers Westgarth, King & Wood Mallesons and Gilbert & Tobin note that a number of Australian-listed companies are captured by these thresholds.

For example, Scentre Group – an Australian-listed company and owner and operator of Westfield shopping centres would be viewed by *FATA* as a foreign company because it had a minority foreign ownership greater than 40 per cent. Corrs Chambers Westgarth referred to this anomaly as the 'accidental foreigner'.

Under *FATA,* 'accidental foreigners' are subject to more FIRB scrutiny than foreign investors from free trade agreement (FTA) countries. Private investors from countries such as the United States, Japan, Korea, New Zealand and Chile are able to invest up to A$1,094 million without FIRB notification under the *FATA*. In comparison, an 'accidental foreigner' company would be required to provide notification to the FIRB if it invested more than A$252 million in an Australian company.

Public Australian companies are particularly affected by the 40 per cent aggregate ownership rule, as their shares and trusts are openly traded on the stock exchange.

These companies find it difficult to determine whether they are a ‘foreign’ company as it requires close monitoring of the stock register to determine the nationality of its shareholders. This is both burdensome and inefficient.

The Business Council encourages the government to consider either of the following three options:

- exempting Australian-listed companies with minority foreign ownership from notification, or
- raising the aggregate threshold from 40 to 50 per cent in line with majority ownership, or
- granting the Treasurer the power to exempt a company if certain pre-defined criteria were met – for example, the majority of the board was Australian, its base of operations was Australia, no individual foreign person held more than 20 per cent of shares and the foreign shareholding was widely dispersed.

The Business Council considers that adopting either of the three above alternatives would not create any additional economic or social risk and would more accurately reflect modern capital markets. It would also recognise that Australian companies will attract investment from both domestic and international sources. These companies should not face more onerous administrative requirements than other Australian businesses.

BUSINESS COUNCIL OF AUSTRALIA
42/120 Collins Street Melbourne 3000 T 03 8664 2664 F 03 8664 2666 **www.bca.com.au**