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Dear Sir or Madam

Submissions on Consultation Paper

Norton Rose Fulbright Australia is pleased to have the opportunity to comment on the Australian Government's Consultation Paper on 'Foreign Investment Framework: 2017 Legislative Package' released on 8 March 2017 (**Consultation Paper**).

We make the following submissions on the Consultation Paper.

1 Submission on Issue 1 ('Residential land')

1.1 Inconsistent exemption certificate framework and treatment of failed off-the-plan settlements

(1) We are aware of the inconsistent exemption certificate framework and the treatment of failed-off-the-plan settlements.

1.2 Residential land used for commercial purposes

(1) We have experienced the issues raised in the Consultation Paper in respect of residential land used for commercial purposes.

(2) Student accommodation, retirement villages and aged care are attractive investment sectors. For example, capital from overseas institutional (as well as domestic) investors is increasingly being invested in purpose built student accommodation assets managed by a professional operator. Consistent with other commercial property, the end users of these properties (the students, retirees and elderly) are not the overseas investors themselves. Overseas investors see these asset classes as specialist subsectors of the larger commercial property sector and, in our experience, their investment decision making process is generally consistent with that of other investors across the commercial property asset class (including specialist subsectors).

1.3 Policy Option 5

(1) We prefer Policy Option 5 ('Introduce Options 2-4').

1.4 **Policy Option 4**

(1) In respect of Policy Option 4 ('Amend the treatment of residential land used for commercial purposes'), in particular we agree with the proposal to increase the screening threshold for residential land that is an aged care facility, retirement village or certain student accommodation to ensure that transactions concerning these facilities are not captured by the $0 screening threshold.

(2) We suggest that a screening threshold of $252 million (rather than $55 million) is appropriate:

(a) as such transactions will not typically be 'sensitive' in nature;

(b) in keeping with our comments at paragraph 1.2(2); and

(c) in keeping with our comments at paragraph 2.3 regarding the removal of the 'low-threshold' land notification requirement.

(3) This will then align the screening threshold across the entire commercial property sector, including these specialist subsectors.

2 Submission on Issue 2 ('Non-vacant commercial land')

2.1 **'Low threshold' non-vacant commercial land generally**

(1) We have experienced the issues raised in the Consultation Paper in respect of the lower threshold for non-vacant commercial land, in particular where that land is under prescribed airspace.

(2) In our view, the lower threshold for non-vacant commercial land places an unnecessary regulatory burden on investment in such land. We have also found that ascertaining whether land falls under a 'prescribed airspace' necessitates the review of multiple pieces of legislation and Civil Aviation Safety Authority maps. This task is extremely costly and time-consuming for applicants.

2.2 **Impact of 'low-threshold' non-vacant commercial land definition on land portfolios**

(1) Further, in our view, the current legislative framework creates an unintended consequence in that portfolios of commercial land may be captured where the portfolio contains a small amount of 'low-threshold' non-vacant commercial land. The existence of that small amount of 'low-threshold' non-vacant commercial land will 'taint' the balance of the portfolio, which would otherwise have been subject to the threshold of $252 million.

2.3 **Policy Option 3**

(1) We prefer Policy Option 3 ('Remove the 'low-threshold' land notification requirement') as this will completely address the concerns noted at paragraphs 2.1 and 2.2.

2.4 **Policy Option 2**

(1) If Policy Option 3 is not adopted, we consider Policy Option 2 ('Narrow the scope of the 'low-threshold' non-vacant commercial land definition) should instead be adopted. Adopting Policy Option 2 will partially address the concerns noted at paragraphs 2.1 and 2.2.

3 Submission on Issue 3 ('Low sensitivity business investment')

3.1 Low sensitivity business investment generally

(1) In our view, the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**Act**) captures a number of low sensitivity business investments, including the following investments:

(a) a fund investor (which may be funded by one or more government pension funds or municipal funds in the USA, Canada or Europe) may technically fall within the definition of 'foreign government investor' and therefore all acquisitions by the investor (except for passive investments less than 10%) of Australian assets or businesses require prior notification to the Treasurer under the Act. The exemption under regulation 56(4) of the *Foreign Acquisitions and Takeovers Regulation 2015* (Cth) (**Regulations**) in respect of non-material interests in businesses that are not sensitive businesses is too restrictive and almost never applicable; and

(b) a foreign investor looking to invest in a greenfields project that will involve construction over agricultural land (including solar PV or wind farm projects). Despite the fact that such transactions generally do not involve any agricultural business and that the value of the projects are generally significantly less than the $252 million threshold, such transactions require prior notification to the Treasurer under the Act because the land on which these projects is constructed technically falls within the definition of 'agricultural land', and therefore the much lower threshold of $15 million applies. In addition, because the threshold applies on a cumulative basis, following the first investment, any future investment by the same investor in respect of such greenfields projects will always be subject to prior notification.

(2) These transactions almost never raise national interest concerns.

3.2 $0 threshold for foreign government investors

(1) In our view, the $0 threshold that applies to many foreign government investors, and the wide definition of 'associate' under the Act, are operating to impose a significant regulatory burden on this category of investors.

3.3 Policy Option 3

(1) We prefer Policy Option 3 ('Exempt certain low value and low sensitivity business investments from notification requirements'). We agree with the proposed $100 million threshold, provided that this is indexed over time.

(2) We submit that the proposal that low value and low sensitivity business investments remain a significant action under the Act should not be adopted, as most investors require absolute certainty that their investment will not be the subject of any potential divestiture orders in the future. In our view, making this a significant action will not achieve the result contemplated by the Consultation Paper. Instead, a definitive list of sensitive sectors should be carved out from the regime to provide certainty to foreign investors.

3.4 Policy Option 2

(1) In our view Policy Option 2 ('Introduce new exemption certificates for low sensitivity business proposals') will still impose a significant regulatory burden as foreign persons (but generally foreign government investors) will still need to apply for an exemption certificate (and pay the associated application fee).

(2) Further, if an exemption certificate is given by the Treasurer, the foreign person will be subject to ongoing reporting requirements and conditions which may be imposed by the Treasurer, and will be required to apply for a further exemption certificate if the action which the foreign person proposes to undertake varies from the specified parameters upon which the exemption certificate is given.

(3) We also propose that the Australian Government consider extending this exemption to other actions by foreign government investors (eg acquisitions of certain Australian land below an appropriate screening threshold).

4 Proposed extension of Policy Options

(1) In addition to the example provided at paragraph 3.1(1)(b), there are a number of other circumstances in which low sensitivity business investments, particularly investments made by foreign government investors, are captured by the Act.

(2) For example, we have acted for a number of foreign government investors (including foreign government investors which fall within the definition of an associate under the Act) in commercial office leasing transactions, and in each case our client has been required to give prior notification to the Treasurer under the Act (and pay the applicable fee) irrespective of the low value of the transaction and even though the transaction was not likely to be contrary to the national interest.

(3) In each case, approval has been granted and the fee has been refunded to our client, however, we believe that the burden of this process and the significant fee that must be paid is acting as a deterrent for investment in the commercial office leasing space.

(4) We submit that Policy Option 3 should apply to both investments by foreign government investors as well as the acquisition of interests in Australian land, subject to a specified list of sensitive sectors such as the acquisition of agricultural businesses, residential land, telecommunications, public infrastructure and other sectors already specified under the Regulations.

5 Submission on Issue 4 ('Commercial fees')

5.1 Commercial fees generally

(1) We have experienced the issues raised in the Consultation Paper in respect of the delay in the commencement of consideration of applications until the correct fee has been determined and then paid, and the adverse impact that this has had on the processing of those applications and the overall timetable for the transactions to which the applications relate.

(2) We agree that fees are of particular concern to foreign government investors given that actions which they propose to take are almost always notifiable actions.

(3) We are of the view that the current fee framework is too complex.

(4) We agree that the definition of 'internal reorganisation' requires clarification as we have experienced situations where the action proposed by a foreign person is an internal reorganisation in the ordinary sense of that word but does not fall within the definition in the Fees Act (as defined in the Consultation Paper).

5.2 Policy Option 2

(1) We agree with Policy Option 2 ('Minor changes to the fees framework') in respect of the expansion of the definition of internal reorganisation.

5.3 Policy Option 3

(1) We also agree with Policy Option 3 ('Streamline the fees framework'). We prefer the flat fee structure on the basis that, as noted in the Consultation Paper, this will result in a higher compliance cost saving than a tiered fee structure.

(2) Another reason we prefer the flat fee structure over a tiered structure is it will be less likely to lead to uncertainty as to what the appropriate fee ought to be. For example, it could become

difficult to assess a tiered fee if the consideration is deferred or otherwise indeterminable at the time the application is made (for example, in the case of the granting of an ongoing royalty as part consideration). Additionally there will be no incentive to manipulate a transaction structure to deliver a reduced application fee outcome.

6 Submission on Issue 5 ('Miscellaneous technical issues and ideas for further reform')

6.1 Mining

(1) Reference to 'mining operation' in 'low-threshold' non-vacant commercial land definition

(a) Regulation 52(6)(c)(vi) of the Regulations prescribes a $55 million screening threshold for certain mining operations on non-vacant commercial land.

(b) The definition of 'mining operation' is circular, in that it always relates to an underlying mining or production tenement. As a result, the $0 screening threshold applies.

(c) We are not sure when mining operations could be conducted on commercial land without the land also being covered by a mining or production tenement and would appreciate guidance from FIRB as to what situation regulation 52(6)(c)(vi) is intended to cover.

(d) This issue further supports our view that 'low-threshold' land notification requirement should be removed (as noted at paragraph 2.3).

(2) Specific exclusion of exploration tenements from 'mining or production tenement' definition

(a) While FIRB Guidance Note 24 ('Foreign Investment in Mining') provides that the acquisition of an interest in an exploration tenement by a foreign person is generally not a notifiable and significant action, it may still be the acquisition of an interest in Australian land if certain conditions are satisfied.

(b) This area of the foreign investment regime has been uncertain both under the 'old' and 'new' regimes, and it would be helpful to have a definitive position on this area.

(c) We believe that the definition of 'mining or production tenement' should be amended to specifically exclude mining tenements that relate to prospecting activities or exploration activities, rather than mining or production activities. Exploration tenements should also be specifically excluded from section 12 of the Act so that, for example, an exploration tenement does not fall within the scope of section 12(1)(c) of the Act.

(d) Further, to the extent that a notification to the Treasurer under the Act regarding a transaction involving an exploration tenement is made and a no-objection notification is given, a further notification should not be required for the conversion of that exploration tenement to a mining or production tenement.

6.2 Consultation partners

(1) We note that FIRB has previously advised of its intention to publish an indicative list of consult partners, to inform applicants where information provided to FIRB may be sent (and thereby help better tailor applications). We agree that an indicative list of consult partners would be helpful.

(2) We suggest that FIRB also publish a list of the situations in which each consult partner is likely to be consulted and the likely timing of each consult partner's response, to further assist applicants to better tailor their applications.

6.3 **Parent company approval**

(1) We have recently assisted a client with a notification to the Treasurer under the Act in which the client's parent company is taking security over land in respect of which a no-objection notification has already been given by the Treasurer under the Act, on the basis of the same relationship.

(2) To avoid an unnecessary burden on foreign persons and on FIRB, we suggest that there be an exemption in these circumstances.

6.4 **Development conditions on vacant commercial land purchases**

(1) We understand that a no-objection notification for the purchase of vacant commercial land will usually be given by the Treasurer under the Act subject to conditions that the purchaser must develop the land and must not sell the land for a particular period of time.

(2) We suggest that FIRB publish guidance on seeking a waiver of these conditions from the Treasurer, as there is currently no guidance on what the Treasurer will consider.

Thank you for the opportunity to make submissions on the Consultation Paper. We would welcome the opportunity to discuss any of these issues in further detail with FIRB.

Yours faithfully

Norton Rose Fulbright Australia
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