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31 August 2020

Manager
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Dear Sir/Madam

Major Reforms to the Foreign Investment Review Framework – Phase 1 Consultation Submission

We write in response to the call for views and feedback on the exposure draft of the *Foreign Investment Reform (Protecting Australia's National Security) Bill 2020* (**Bill**) that was released on 31 July 2020. Its purpose is to amend the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**) in a number of significant respects.

Part A Opening Comments

1 What is good about FATA

1.1.1 We recognise the important role that FATA and the Foreign Investment Review Board (**FIRB**), supported by the Treasury, play in securing community acceptance of foreign investment. The benefit of foreign investment to Australia is incontrovertible, but a default suspicion of foreign investment is part of the national psyche. There remains a role for FATA and FIRB to help overcome suspicion through being seen as effective tools to protect the national interest. The message to the Australian community is that national interest concerns will be considered and addressed.

1.1.2 However, others are listening – our foreign investment laws, and how we administer them, are messages that we send to foreign investors. Our message should be that we welcome you, will treat you fairly, and expect that you will treat us fairly.

1.1.3 There is an important aspect to FATA that we always highlight to new foreign investment clients. It is that, as Australians, we do not expect you to prove to us your worth. Other countries, for example Canada and New Zealand, set potential foreign investors to the task of proving that their investment will benefit the country. The default position under FATA is that foreign investment is in the national interest with a proposed investment only blocked, or conditions imposed, in response to specific national interest concerns.

1.1.4 We welcome the retention of this non-discriminatory position – a free country that relies on open markets should not put foreign investors to proof, nor treat foreignness as a less favourable outcome to domestic investment. Were FATA to be structured otherwise, it would tell the Australian community that foreign investment is to be suspected and foreign investors that they are, at best, welcomed grudgingly.

1.1.5 Another important aspect to FATA is flexibility. As the world changes, foreign investment changes. Today, the Australian Government is dealing with threats to our national interest that

may not have been imagined a decade ago. In a decade, the Australian Government will be dealing with threats to our national interest that are not imagined now. FATA needs to be sufficiently flexible to give the Australian Government the powers it needs to respond effectively to both old and new threats to the national interest.

1.1.6 We are aware of complaints that FATA decisions are political and that this creates uncertainty for foreign investors. From time to time, there are calls for FIRB to become an independent decision-making agency, and for the national interest to be defined.

1.1.7 In our view, an assessment of the national interest is, inherently, a political decision. Political decisions ought to be made by politicians, properly advised, because politicians are answerable to the community for their decisions. Defining the national interest would be a backward-looking exercise and risk reducing decision-making to a defensive check-the-box exercise without the flexibility to respond to new concerns and events. Australian Courts are not appropriate forums in which to adjudicate the national interest as has occurred in New Zealand.[1] On rare occasions, the national interest may be best served by not articulating the full reason for an adverse decision.

1.1.8 We welcome the retention of flexible decision-making and the Treasurer as the decision-maker. In particular, the Treasurer's role underscores the economic important of foreign investment.

1.1.9 We also welcome amendments to FATA that enhance the Australian Government's powers to safeguard Australia's national security interests including through being able to co-ordinate with Australia's allies on foreign investment matters.

2 Problems with FATA

2.1.1 Unfortunately, we consider that many aspects of FATA and its administration are contrary to the national interest. We have set out our reasons for this below.

2.2 Complexity and drafting

2.2.1 FATA is overly complex and not well drafted. This makes it difficult to interpret to the point where, akin to tax legislation, only a narrow group of specialist lawyers are in any sort of position to understand what the law actually requires.

2.2.2 There are too many different monetary thresholds (nil, $15 million, $50 million, $60 million, $275 million and $1,192 million), different percentage thresholds (any, 5%, 10%, 20% and 40%) and different official fees. There are a multiplicity of special circumstances and exemptions. Lawyers must navigate four separate acts and regulations, 52 guidance notes, and various unwritten FIRB policies and preferences that can only be learned through experience.

2.2.3 Drafting is not a new issue. Prior to December 2015, many aspects of the legislation were absurd. Land in the middle of a desert could be 'urban land'. The associates test was not content with one, two or even six degrees of separation, but associated people on the basis of infinite chains of association. Many aspects of the legislation were open to divergent interpretations with the result that savvy clients would engage in opinion shopping, particularly if it meant the difference between having to make a notification and not having to make one.

2.2.4 When the Australian Government announced its intention to revise FATA in 2015, we hoped that its various problems would be fixed. Many were. Unfortunately, the revisions were rushed with insufficient time afforded for meaningful consultation. Important concepts were pushed into the *Foreign Acquisitions and Takeovers Regulation 2015* (Cth) (**FATR**).

[1] *Tiroa R and Te Hape B Trusts v Chief Executive of Land Information* [2012] BCL 389.

2.2.5 Unfortunately, the result was that the 2015 variations created as many problems as they fixed.

(a) Developed commercial land was considered sensitive and, therefore, subject to lower monetary thresholds, simply because it was located in a city that had a major airport.[2] A limited partner in a limited partnership is not associated with the other partners but only if the limited partnership does not have a general partner (an impossible requirement).[3] Submerged land used for aquaculture has been defined to the point of no longer being Australian land.[4] Some land on which no dwellings can be reasonably built is defined to be residential land.[5]

(b) Until the problem was addressed in 2017[6], many of Australia's top listed companies and their subsidiaries had become foreign persons simply because an HSBC subsidiary held 20% or more of their shares in a custodial capacity.

(c) Some foreign investment is forced (inadvertently) into being classified as notifiable actions but not significant actions. Such actions must be notified to the Treasurer but the Treasurer has no power to prohibit them or to even impose conditions. It is a problem that is now being corrected through the addition of proposed section 40(7).

(d) A person can be considered to control a corporation simply because it is one of two or more persons, not being associates, who happen to hold an aggregate interest in the corporation of 40% or more. According to FATA, until the Treasurer determines otherwise, the author's 0.00003% shareholding in Commonwealth Bank of Australia gives him control. Refer to paragraph [*] for our recommendation to address this anomaly.

2.2.6 FATA is important legislation and, as such, should not be the subject of a rushed legislative process. We intend no criticism of the drafters, problems occur when the process of drafting and consultation are rushed, and the Government does not commit to addressing problems as they are identified.

2.3 Inappropriate use of conditions

2.3.1 The Treasurer has the power to impose a condition on a foreign investment proposal if he is satisfied that the condition is necessary to ensure the investment, if made, will not be contrary to the national interest (FATA s 74(2)(a)).

2.3.2 There was a time when it was unusual for the Treasurer to impose conditions through the FIRB process. Conditions are now regular. In 2018-19, around 48% of approvals were subject to conditions.[7]

2.3.3 Conditions impose ongoing compliance burdens on both the foreign investor (to comply) and the Australian Government (to ensure compliance).

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[2] The effect of FATR, r 52(6)(c)(v) until it was repealed by the *Foreign Acquisitions and Takeovers Amendment (Exemptions and Other Measures) Regulations 2017* (Cth).

[3] The effect of FATR r 45(4).

[4] The effect of excluding land from being "commercial land" under FATA s 4 if it is used wholly and exclusively for a primary production business but then excluding land from being agricultural land if aquaculture is the only primary production business that the land is or could reasonably be used for (FATR r 44(13).

[5] The effect of paragraph (a)(ii) of the definition of "residential land" in FATA s 4, and FATR r 19.

[6] Schedule 1, section 6 of the *Foreign Acquisitions and Takeovers Amendment (Exemptions and Other Measures) Regulations 2017* (Cth).

[7] Foreign Investment Review Board, *Annual Report 2018-19*, p 18.

2.3.4 The over-use of conditions first became apparent in 2016 when the then Treasurer, Scott Morrison, announced:

> The Turnbull Government will apply new requirements on foreign investment applications to ensure multinational companies investing in Australia pay tax here on what they earn, Treasurer the Hon. Scott Morrison announced today.
>
> "The Government is committed to ensuring companies operating in Australia pay tax on their Australian earnings. Where companies fail to do so I will have powers to take action, including ordering divestment of Australian assets," Mr Morrison said.[8]

2.3.5 Australia already had tax laws that required companies, foreign or otherwise, to pay tax. Non-compliance with those laws was already an offence. The use of what has now become "standard tax conditions" (now extending beyond simply paying taxes to requiring compliance with all obligations imposed under Commonwealth taxation laws) creates an additional offence for infractions that are already offences and empowers the Treasurer to impose divestment orders in response to non-compliance.

2.3.6 The Commissioner of Taxation has a range of available options to address non-compliance with taxation laws including interest charges, administrative penalties, garnishee orders and criminal prosecutions. Forcing divestment on a foreign investor for non-compliance with taxation laws seems to be a fairly extreme measure. Yet we now see standard tax conditions applied to modest foreign investment proposals almost as a matter of routine. We are not aware of the Treasurer ever having made a divestment order in response to non-compliance with the standard tax conditions.

2.3.7 The regular imposition of standard tax conditions imposes compliance burdens. Foreign investors need personnel and advisors to prepare annual compliance reports, and the Treasury needs personnel to receive and review the reports, deal with extension requests and address non-compliance. It seems completely futile to impose this burden on so many foreign investors on the chance that one day there may be a foreign investor whose non-compliance with Commonwealth taxation laws is so egregious that interest charges, large fines and the prospect of imprisonment are not sufficient.

2.3.8 Aside from the standard taxation conditions, we are seeing conditions imposed on foreign investment proposals that could not possibly have a bearing on the national interest. As we write, Treasury officers have proposed a condition that would require an ASX-listed client to continue to use land comprising less than one-third of an acre in the industrial precinct of a small country town as a staff carpark, in perpetuity. The Treasury resources being devoted to this are Treasury resources that are not being used to assess real national interest concerns. Also, while time is wasted on the staff carpark, commencement of a $15.3 million proposal to upgrade the industrial facility next door is delayed and new regional jobs with it. This is a clear example of conditions working against the national interest.

2.3.9 Aside from the futility of many conditions, we also think they promote policy inertia. Agencies ask FIRB to recommend conditions to address acknowledged deficiencies in their powers to regulate issues that threaten the national interest. Conditions are an easy lever to pull because they do not require scrutiny from the public or the Parliament – in most cases, they are imposed confidentially. However, we think they create a false sense of security that lessens the impetus to pursue proper legislative protections. To that end, we endorse the criticism by the Productivity Commission that "too many conditions are being imposed" and their limited effectiveness in mitigating risk.[9]

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[8] Morrison, S., *Turnbull government makes paying tax in Australia a condition for foreign investment* (Media Release, 22 February 2016).

[9] Productivity Commission, *Foreign Investment in Australia* (Commission Research Paper, 2020), p 86.

2.4 Too many minor transactions are subject to review

2.4.1 Even before the COVID-19 emergency measures reduced all monetary thresholds to nil, FATA swept up far too many minor transactions. Consider the following examples.

(a) In 2019, it took a farming client over nine months to obtain FIRB clearance for a land swap with a neighbouring farmer. Our client was giving up nearly 10 times the area and value of land as it was receiving. The total value of the subject lands was $40,000.

(b) We have worked on, or are aware of, FIRB notifications for a bicycle locker, a shed to store some maintenance equipment, a cupboard for some telecommunications equipment, and small office leases.

(c) Currently, we are waiting on a FIRB clearance for a client to invest $900,000 in a wind farm proposal, and are preparing a FIRB notification for another client who is proposing to purchase, for $50.00, a 50% interest in a financial advisor with two employees.

(d) Last year, we were informed by FIRB that a notification would be required by our client to purchase a 4.5m^2 plot of land used as a staircase because it was "vacant" commercial land notwithstanding that the staircase was attached to a commercial building on a larger plot.

(e) A client with an overall foreign government investor interest of 4% is classified as foreign government investors because of the artificial magnification of foreign government investor interests through the tracing rules in FATA s 19. With this classification, it is subject to a nil monetary threshold on all of its investments proposals, even the acquisition of dormant Australian companies with no assets.

(f) Offshore transactions are regularly delayed because FIRB clearance is required for a tiny Australian sales subsidiary with a couple of employees.

2.4.2 Lawyers are the only winners here. Clients are wasting time and resources preparing notifications, and the Treasury is wasting time and resources clearing proposals that could not possibly give rise to national interest concerns. Resources are not unlimited – there are more productive uses for them on both sides. Clients should be devoting more of their time and resources to carrying on business and the Treasury should be devoting more of its time and resources to dealing with actual national interest concerns.

2.4.3 It is inevitable that any notification system will catch some foreign investment proposals that do not have the potential to cause national interest concerns because monetary thresholds and the various other measures on which notification requirements turn are imprecise indicators of national interest concerns. We think the current measures catch too many. However, the other problem is that all notifications are more or less subjected to a formal clearance process. Even minor proposals undergo a truncated review process that can take three to r four weeks. In our view, this is gumming up the works with Treasury devoting too may resources on consulting and reviewing proposals that are not going to give rise to national interest concerns.

2.5 Inconsistent messaging to foreign investors

2.5.1 Just about any time the Treasurer or the Chairman of FIRB says anything about foreign investment, the speech or media release includes the words "Australia welcomes foreign investment". But a lot of the Australian Government's actions on foreign investment are not particularly welcoming.

2.5.2 As advisors, we have moved beyond the point of being able to explain away the inconsistency between the Australian Government's words and actions. This is not because transactions are

blocked on occasion – those decisions can generally be explained. Instead, it is the cumulative effect of pointless notifications, conditions and compliance burdens. Our sense is that it is starting to have an adverse effect on Australia's desirability as an investment destination.

2.5.3 Adding to the problem is how the Australian Government is communicating with foreign investors through its legislative and policy actions. We accept that, sometimes, there will be tension between community and foreign investor concerns. When that happens, it can be explained. What is more difficult to explain is when the Australian Government does not think through the consequences of what it says.

2.5.4 An example is the Treasurer's announcement of the temporary COVID-19 measures in March 2020.[10] The aspect of that announcement that riled up foreign investors was not the lowering of all monetary thresholds to nil. It was this statement:

> To ensure sufficient time for screening applications, the Foreign Investment Review Board (FIRB) will be working with existing and new applicants to extend timeframes for reviewing applications from 30 days to up to six months.

Most foreign investors and their advisors took the statement to mean that, but for urgent matters, FIRB notifications were going to take six months to clear. It is not an unreasonable interpretation based on what was said. As it turns out, what the Treasurer was trying to say is that FIRB would be asking investors to agree to a six month extension so as to free up Treasury officers from the time-consuming task of processing short extensions, and that most notifications would be dealt with in well under six months. Five months later, we are still hearing from foreign investors who think the process will take six months. To be fair, we have some fairly routine notifications that look like they will be taking at least that long.

2.5.5 Why did the Treasurer's media release even deal with this issue? All the Australian community was likely to be concerned about was the imposition of a universal nil monetary threshold, not the Treasury's administrative processes. These matters could have been communicated to a smaller audience in a more informative way.

2.5.6 Messaging like this has consequences. At the time the announcement was made we were advising on a number of offshore transactions that involved indirect acquisitions of small Australian subsidiaries. Parties were not willing to wait six months for a FIRB clearance and we did not have sufficient confidence in FIRB's processes to be able to assure the parties that it would not take that long. In some cases, the initial solution promoted was to simply shut the Australian subsidiary down with the termination of all local employees.

2.5.7 We have concerns about the messaging around the current reforms, particularly in respect of enforcement. We welcome a lot of the reforms, including the initiatives relating to protection of Australia's national security interests. However, in our view, there is an over emphasis on punishment with threats of infringement notices, fines and length imprisonment The context here is that we are supposed to be welcoming of foreign investment. Foreign investment is not in itself deserving of suspicion and threats of punishment.

Improving Compliance and Additional Enforcement Tools (Schedule 2)

3 Infringement notices and penalties

3.1.1 We do not support the proposed increases in civil and penal penalties, nor do we support extending infringement notices to non-residential investments.

3.1.2 Offences under FATA can be punishable by imprisonment, in some cases for up to three years. Yet, in its 45 year history, we are not aware of anyone having been imprisoned for an offence under FATA. Forgetting to file a notification or comply with a condition does not seem to us as an offence generally deserving of prison time. When FATA was amended in 2015, the

[10] Frydenberg, J., *Changes to foreign investment framework* (Media Release, 29 March 2020).

Australian Government explained that imprisonment for up to twelve and a half years "would be disproportionate to the seriousness of the proscribed conduct".[11] This was in the context of a departure from the normal fine/imprisonment ratio recommended by the Commonwealth.[12] The Australian Government is now proposing imprisonment for up to ten years, very close to what it considered to be disproportionate in 2015. Nothing has changed since 2015. As was the case then, remains the case now – it is difficult to think what a person could do in respect of foreign investment that would call for any prison sentence let alone one for more than the current three-year maximum. It is unnecessary and will not be well received.

3.1.3 Similarly, the new financial penalties of up to $33.3 million for criminal prosecutions and as high as $555 million for civil prosecutions are far higher than we think can be justified. Remember, financial penalties are on top of the destruction in value that is likely to be caused by a foreign person having to comply with a divestment order at short notice.

3.1.4 If the Treasury's infringement notice powers are extended to non-residential investments, we are concerned that, inevitably, it will come under pressure to use those powers irrespective of whether they are the best means to ensure compliance and notwithstanding the damage over-use may have on Australia's reputation as a country that welcomes foreign investment.

Integrity Amendments (Schedule 3)

4 Change in control test

Our comments and recommendations in respect of the change in control test have been included in the submission prepared by the Foreign Investment Committee of the Business Law Section of the Law Council of Australia.

4.1 Commentary

4.1.1 Subject to our comments below, we support the addition of proposed sections 40(7) and 41(6) to the Act as we believe that they will effectively address the following issues.

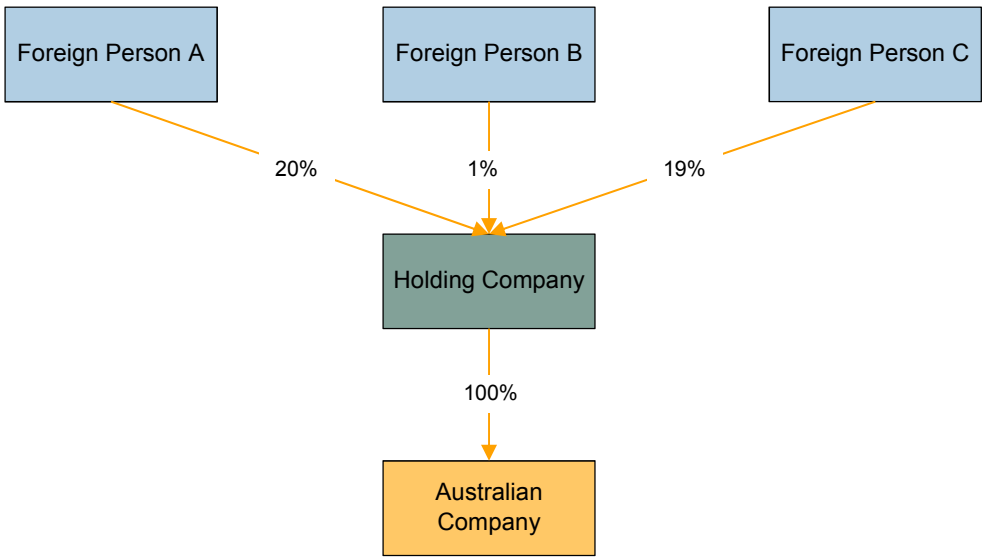
(a) In cases where there is no cessation of control by another person, the Treasurer has no power currently to prohibit a foreign person (other than a foreign government investor), who controls an Australian entity or business (other than an agribusiness), from increasing its interest in the Australian entity or business even if the increase is against the national interest.

(b) The meaning of "control" in FATA s 54(4) exacerbates this regulatory gap because, in relation to the acquisition of interests in securities in an entity or an issue of securities in an entity, a person will "control" an entity with an interest of 20%. Further, the effect of FATA s 54(4)(b)(ii) appears to be that a person will control an entity even with one share simply by virtue of being one of a number of shareholders, with whom it is not associated, who collectively hold an interest of at least 40% in the entity.

(c) Through the operation of the tracing rules in FATA s 19, each of the foreign persons in the diagram below is considered to hold a 100% interest in the Australian Company: Foreign Person A because it holds a substantial interest in the Holding Company and Foreign Persons B and C because, together with Foreign Person A, they hold an aggregate substantial interest in the Holding Company.

[11] Explanatory Memorandum, *Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015* (Cth), s 4.24.

[12] *A Guide to Framing Commonwealth Offences, Infringement Notices And Enforcement Powers*, September 2011.



When coupled with FATA's meaning of control, the result is that any of Foreign Persons A, B and C can acquire additional interests in the Holding Company:

(i) without triggering a notifiable action, even if they are foreign government investors or the Australian Company is an agricultural land corporation or an Australian land corporation (all situations where the tracing rules were intended to trigger a notifiable action); and

(ii) provided that no-one ceases to control the Holding Company as a result of the increase, without triggering a significant action and, therefore, the Treasurer's powers to prohibit the action or unwind it.

4.1.2 A change will also eliminate an existing lacuna in FATA whereby an action involving the acquisition by a foreign person of a substantial interest in an Australian entity may be a notifiable action but not a significant action where the acquisition does not cause a change in control because the foreign person already held a substantial interest in, and no person ceases to control, the Australian entity. Actions that are notifiable actions only must be notified to the Treasurer but the notification is pointless because the Treasurer has no powers to prohibit the actions or to give no objection notifications in response to them.

4.2 Recommendations

4.2.1 There are three additional changes that we recommend be made in connection with a change in control.

(a) Amend FATA ss 40 to 43 (as appropriate) to provide that any action that is a notifiable action is also a significant action.

There are two benefits to doing this.

(i) It could simplify the drafting of Division 2 of Part 2, for example, by allowing for FATA ss 40(2)(a), 41(2)(a) and 43 to be omitted on the basis that the relevant actions are addressed in FATA s 47.

(ii) It would assist readers to understand that there are no actions that can be notifiable actions only.

(b) Omit FATA s 54(4)(b)(ii).

It is not appropriate for a person to be considered to control an entity simply because it is one of two or more persons, who are not associates and happen to hold an

aggregate interest in the entity of 40% or more. Refer to paragraph 2.2.5(d) for an example of what this leads to. Protection of the national interest is not advanced by this section – the remaining parts of FATA s 54 and the definition of "associate" in FATA s 6 are sufficient to capture circumstances where there is potential for real aggregated control to be exerted over a target entity.

(c) Currently, there is debate about whether the rights issue exemption in FATR r 41(2)(a) applies to wholly-owned entities, particularly if the relevant entity is offering a new class of securities[13]. We recommend that the rights issue exemption be modified to expressly provide for its application in the case of wholly-owned entities. While not relevant to the change in control test, we also recommend that the exemption be modified to expressly provide for an offer of a new class of securities.

5 Buy-backs of securities and capital reductions

Our comments and recommendations in respect of buy-backs of securities and capital reductions have been included in the submission prepared by the Foreign Investment Committee of the Business Law Section of the Law Council of Australia. However, sections 5.1.25 and 5.2.12(i) include new commentary and a new recommendation, respectively.

5.1 Commentary

5.1.1 Buy backs and other forms of capital reduction are used regularly by entities as an efficient means to manage their equity capital. We have identified 183 ASX-listed entities that engaged in buy-back activities alone during the period 1 January 2020 and 24 August 2020. Add to this number the many buy-backs undertaken by unlisted entities and other forms of capital reductions undertaken by both listed and unlisted entities.

5.1.2 In the case of companies with limited liability, company law has regulated buy-backs and other forms of capital reduction as part of the doctrine of capital maintenance. For example, an Australian company may only buy-back its shares if the buy-back does not materially prejudice its ability to pay its creditors and certain procedures are followed: Corporations Act s 257A. Subject to limited exceptions, buy-backs require shareholder approval. One relevant exception is for on-market buy-backs within the "10/12 limit" i.e. the number of votes attaching to voting shares in a company that are bought back within a 12 month period does not exceed 10% of the smallest number, at any time during that period, of votes attaching to the voting shares in the company: Corporations Act ss 257B(4) and (5).

5.1.3 Although buy-backs and other forms of capital reduction can be used to effect a change in control of an entity, a more common use is as an efficient and flexible means for a company to return excess capital to its shareholders.

5.1.4 Another common use is where collective investment funds, such as unit trusts and limited partnerships, use a redemption process to facilitate the exit of investors from the fund. In an unlisted fund, a redemption process may be used because a secondary market – through which existing interests in the fund could be bought or sold – has not developed. Further, the fund sponsor may wish to restrict secondary market activity in order to control new entrants into the fund. In an exchange-traded fund (i.e. a listed fund that invests in listed shares or other liquid assets), a redemption process may be used by a market maker to help manage a divergence between the value of the fund's assets and the value of the fund as implied by the trading price of its interests.

[13] The meaning of rights issue in s 9A of the *Corporations Act 2001* (Cth) (**Corporations Act**) contemplates the offer of securities in a particular class to every person who holds securities in that class: s 9A(1)(b)(i). Therefore, an offer of a new class of securities cannot be a rights issue.

5.1.5 A buy-back, or capital reduction involving the cancellation, of securities in an entity will increase the interests held by non-participating securityholders in the entity. However, there is some doubt at present as to whether these transactions can trigger a significant action.

5.1.6 For there to be a significant action there must be an acquisition of interests in securities in an entity (FATA s 40(2)(b)).[14] In our view, a buy-back of securities cannot involve an acquisition of interests in the securities[15] and there is certainly no acquisition of interests in securities in a capital reduction involving their cancellation. FATA s 20(1) does not assist because it is directed to interpreting the acquisition of a direct interest or substantial interest in an entity, not specifically the acquisition of an interest in the securities of an entity.

5.1.7 We have mentioned in section 4 of this submission the lacuna that exists when a notifiable action is not also a significant action. We support reforms that will ensure the Treasurer has the power to regulate an increase in interests from a buy-back or capital reduction that may be contrary to the national interest. We do not think it is sufficient to simply rely on the Treasurer's anti-avoidance powers in FATA s 78 because those powers are only available if the Treasurer is satisfied that the sole or dominant purpose of the buy-back or capital reduction was to avoid a FATA provision – a bona fide buy-back can still result in an increase in interests that is contrary to the national interest.

5.1.8 Notwithstanding our support for reform, we have the following concerns about the effect of proposed FATA s 15A.

5.1.9 **Overreach** – In our view, the proposed section is disproportionate in terms of the administrative burdens it will impose compared to the national interest risks that it seeks to manage. There is a real possibility of this proposed section causing dislocation in Australia's capital markets. For example, widely-held entities may take the view that it is no longer practical for them to engage in buy-backs because of the administrative burdens that the transactions will impose on their foreign investors. Some institutional investors may limit or cease their investments in Australian capital markets because they are concerned about their ability to manage this compliance risk.

5.1.10 The following aspects of the proposed section are, in our view, particular causes for concern.

(a) The compulsory nature of notification and the potential for it to be triggered against a foreign person for not participating in a transaction.

(b) Some entities may trigger compulsory notification for their investors on a regular basis. For example, widely-held collective investment funds that provide redemption facilities on a regular basis, in some cases daily. Also, listed entities that conduct on-market buy-backs as these generally involve a number of separate purchases of relatively small parcels of securities over an extended period and, where buy orders are made, are offers made to everyone.

(c) Tiny increases in interests will trigger compulsory notification.

(d) A single event may trigger multiple notifications by different foreign persons all relating to the same entity.

[14] This does not include cases involving Australian entities that are agribusinesses or foreign government investors. In those cases, the test for a significant action is the same as the test for a notifiable action: FATA ss 40(2)(a) and 47(2) and FATR r 56(1)(a).

[15] Refer to Clark, M. and Wong, A., *Foreign Investment in Australia*, Thomson Reuters, [4.40] for relevant case law and analysis. In essence, there can be no acquisition of an interest in a security in the case of a buy-back because the relevant focus in FATA s 9(1) is on a person having a legal or equitable interest in a security (i.e. what the person acquires, not on what the transferor gives up) and an entity cannot hold a legal or equitable interest in its own securities.

5.1.11 Many foreign investors may consider it very unfair that a buy-back or redemption over which they have no control can trigger a compulsory notification for them or, in the case of a buy-back, force them to sell. It also exacerbates an existing problem for foreign government investors in the sense that they are unlikely to have oversight of the investment activities of other foreign government investors in relation to the same country (each of whom is its associate). Whereas, currently, the problem only manifests when securities are acquired, the problem will now arise when an investor is simply looking to hold an existing position.

5.1.12 **Exempt capital reductions** – The proposed section does not recognise the following specific capital reductions that the Corporations Act permits as exceptions to the controls that usually apply.

(a) *Cancellation of forfeited securities* – A common ground for forfeiture of securities is when a security holder fails to pay a call on partly paid securities. Following a forfeiture, typically, the entity can elect to either re-issue the securities to another person or cancel them. In the case of shares, pending a decision on re-issue or cancellation, forfeited shares have been held to exist "in abeyance" with no dividend or voting rights.[16] Failing to pay a call on partly paid securities is a very different circumstance to a security holder electing not to participate in a buy-back or capital reduction offered to it. Often, the security holder will continue to have personal liability for the unpaid call.

(b) *Cancellation of returned securities* – The Corporations Act recognises the following situations where a company may cancel shares that are returned to it.

(i) The company issues shares as consideration under a takeover bid, later offers a new form of consideration and a person who has taken up the shares elects to take the new form of consideration (s 651C).

(ii) The company issues shares under a prospectus or other disclosure document that contains a misleading or deceptive statement or is subject to a condition that is not satisfied (ss 724(2) and 737).

(iii) The company issues shares offered in breach of the securities hawking prohibition (ss 736 and 738).

(c) *Court order* – Section 1325A of the Corporations Act empowers a Court to make orders that it considers appropriate in response to breaches of takeovers laws (Chapters 6, 6A, 6B or 6C of the Corporations Act). If an order is made to cancel shares, the resulting capital reduction is permitted under section 258E(3) of the Corporations Act.

5.1.13 **Terminology** – The proposed section uses the term "entity", which is defined in FATA s 4 to mean "a corporation or a unit trust". However, the terms "buy-back" and "capital reduction" are terms more commonly associated with corporations through the doctrine of capital maintenance.[17] The term "redemption" (not used in the proposed section) is an analogous arrangement commonly associated with trusts. Further uncertainty as to the application of the proposed section to trusts arises from the fact that proposed section 15A(1)(a) refers to an entity buying back a security or otherwise reducing its capital – as a trust does not have a separate legal existence, it would be the trustee of a trust that effects a buy-back or other capital reduction in respect of the trust.

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[16] *Pennington's Company Law* (6th ed, pp 173–4) cited in *Bundaberg Sugar Ltd v Isis Central Sugar Mill Co Ltd* (2006) 62 ACSR 502 at 513.

[17] Albeit, there is some recognition of buy-backs in the context of listed managed investment schemes – eg, *ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/1159* (Cth).

5.1.14 **Buy-back as capital reduction** – Proposed section 15A(1)(a) refers to a buy-back as a form of capital reduction. This is generally correct for an Australian company because of the requirement that shares be cancelled immediately after the registration of a buy back: Corporations Act s 257H(3); however, it is not the case in other jurisdictions (e.g. the United States of America) where a corporation that has bought-back its shares may elect to either hold them as treasury shares or cancel them. Treasury shares can be reissued and, until reissued, typically carry no dividend or voting rights.

5.1.15 **'Entity'** – Another consequence of the use of the term "entity" is that proposed section 15A does not address an increase in interests in a relevant entity that may occur as a result of a redemption of interests in a trust (that is not a unit trust) or in an unincorporated limited partnership. This could lead to an anomalous outcome given that FATA s 19 provides for the tracing of interests through trusts generally and there is a proposal to amend that section to provide for the tracing of interests through unincorporated limited partnerships.

5.1.16 **Buy-back acceptance exception** – For a buy-back to trigger a significant action, proposed section 15A(1)(c) section requires that the entity make a buy-back offer to the relevant person. We have the following concerns with this provision.

(a) To the extent an on-market buy-back occurs as a result of the entity placing buy orders, the entity is making an offer to all of its securityholders but there can be only one acceptance of that order.

(b) We cannot think of a justification for treating offers under a buy-back differently to offers under other forms of capital reductions.

(c) The exception appears to be open to easy avoidance through the simple expediency of excluding a foreign person from the offers made under the buy-back.

(d) The inclusion of the words "where the result mentioned in paragraph (b) occurs other than by the person accepting an offer to buy back securities in the entity" is confusing. We cannot think how the acceptance of a buy-back offer by a person could ever result in an increase in the proportion of the total voting power, total potential voting power or interests in issued securities that the person controls or holds. There may be a scenario where a buy-back results in such an increase because variable offers were made and other securityholders accepted a higher portion of their variable offers but the increase would still not result from the person's acceptance of the offer that was made to it.

5.1.17 **'as a result of the buy-back or capital reduction'** – FATA s 17 provides the meaning for when a person holds an interest of a specified percentage in an entity. It would be simpler to simply apply that concept to proposed section 15A(b) rather than introduce new drafting concepts. Also, the focus of proposed section 15A(1)(b)(ii) is placed on an increase in the proportion of interests in issued securities that a person holds whereas it should be on an increase in the proportion of issued securities that a person holds interests in.

5.1.18 **'Security'** – Proposed section 15A uses the term "security", which is defined in FATA s 4 to mean "a share in a corporation or a unit in a unit trust". This does not catch various rights that are convertible into, or exchangeable for, unissued shares in a corporation or units in a unit trust. For example, convertible debentures, and share warrants and options. A buy-back or cancellation of these rights by an entity may have the effect of increasing a person's potential voting power in the entity.

5.1.19 **Inaccurate drafting note** – Proposed section 15A(2) refers to a person, whose proportion of voting power, potential voting power or securities is increased, as a result of a buy-back or capital reduction, as being taken to have acquired an interest in securities in the entity. This picks up one of the conditions to a significant action (FATA s 40(2)(b)). There is a proposed

note which says "As a result of this subsection, the buy-back or capital reduction might amount to the taking of a significant action or a notifiable action".

5.1.20 We do not agree with the conclusion in this drafting note that proposed section 15A(2), as far as it relates to a notifiable action. A notifiable action may be triggered by the acquisition of a direct interest or a substantial interest in an entity. The focus is on the acquisition of an interest of a specified percentage in the entity rather than the acquisition of interests in a security. FATA s 20(1) already provides that a person can acquire an interest of a specified percentage in an entity other than through an acquisition (e.g. if the person becomes in a position to control more of the voting power or potential voting power). Proposed section 15A (2), as drafted, has no impact on whether an action is a notifiable action.

5.1.21 **Non-voting securities** – Following on from our analysis in sections 5.1.19 and 5.1.20, based on the current drafting of FATA s 20(1) and proposed section 15A(2), a buy-back, or capital reduction involving the cancellation, of non-voting securities may not trigger a notifiable action because none of the criteria in FATA s 20(1)(c) would be satisfied. In particular, a person could not be said to start to hold "additional interests in the issued securities in the entity" as a result of a buy-back or other capital reduction.

5.1.22 **Anomalous treatment** – FATR s 41 exempts a number of other important capital markets transactions from compulsory notification including rights issues, dividend/distribution reinvestment plans, bonus share plans and switching facilities. In common with buy-backs and redemptions, the exempted transactions have the potential to increase an investors interest in an entity but are not commonly undertaken for a control purpose. It will be anomalous to have a routine buy-back or redemption trigger compulsory notification while these other types of transactions do not.

5.1.23 **No acquisition of interests in securities by entity** – For the reasons we explained in section 5.1.6, we do not think that a buy-back of securities involves the acquisition of interests in the securities. Were it to be otherwise, there would be no need for proposed section 15A because the necessary elements for a significant action would be present, noting that the necessary elements for a significant action do not require that the acquisition is made by a foreign person.

5.1.24 While the inclusion of paragraph (3) contradicts the need for proposed section 15A, we do not object to its inclusion if that promotes more certainty. However, we are concerned that the inclusion of paragraph (3) will cause uncertainty for transactions that are analogous to a buy-back because including paragraph (3) implies that a buy-back (and, therefore, transactions analogous to a buy-back) does involve an acquisition of interests in shares. The analogous transactions that we are concerned about include security forfeitures and returns (refer to section 5.1.12 for more details).

5.1.25 **Application of amendment** – The commencement in the application of proposed section 15A differentiates between "buy-backs" and "capital reductions". We do not think there is a justification for treating a buy-back of securities differently to a capital reduction involving the cancellation of securities – both will involve offers.

5.2 Recommendations

5.2.1 **Voluntary notification regime** – As a starting point, we recommend that, where a buy-back or other form of capital reduction causes a foreign person to increase its interests in an entity, this be a significant action only.

5.2.2 The benefit of this approach is that it will give the Treasurer the power to address increases of interests caused by these transactions that gives rise to national interest concerns without imposing compulsory notification burdens in the 99.9% of transactions that do not give rise to national interest concerns.

5.2.3 **Additional safeguards** – If our recommendation for a voluntary notification regime is accepted, there are two additional safeguards that could be adopted.

(a) Implement the voluntary notification regime via a FATR exemption. This would make it easier to adjust or eliminate the regime if concerns arose that it was being misused.

(b) Consider requiring compulsory notification for a foreign person who aids, abets, counsels or procures an entity to undertake a buy-back or other capital reduction for the sole or dominant purpose of effecting a change in control of the entity. Whereas, the anti-avoidance powers in FATA s 78 place the onus on the Treasurer to initiate action, this feature would place the onus on the foreign person to notify the Treasurer (or otherwise commit an offence).

5.2.4 **Empower target entities to clear transactions** – We recommend that entities, who propose to undertake a buy-back or other capital reduction, be given the option to notify the transaction to FIRB and obtain clearance for it. The clearance could be in the form of a special exemption certificate similar to the new (and near-new) dwelling exemption certificates that developers can apply for. The benefits of this approach include the following.

(a) Buy-backs and other forms of capital reduction are controlled by the target entity (or its trustee if the entity is a trust). As such, the target entity will be in a position to make a notification earlier than affected investors and will have an interest in doing so in order to better ensure the success of its buy-back or other capital reduction proposal.

(b) In most cases, the target entity is also likely to have access to more complete information about its overall ownership and activities than individual investors.

(c) A single clearance by a target entity can replace the need for notifications by multiple foreign investors of multiple individual transactions.

5.2.5 **De minimis exemption** – We recommend that an exemption be provided which would permit an increase in interests of a certain percentage before a notification was required. By way of analogy, Australian takeover rules include a 'creep' exemption that permits the acquisition of not more than a 3% interest in any six month period outside of a takeover bid.[18]

5.2.6 In the context of FIRB, we do not think it would be appropriate to adopt an evergreen exemption similar to the creep exemption under Australian takeover laws. This is because the exemption could be used to effect a change in control of an entity over time.

5.2.7 Instead, we recommend the adoption of an exemption that would permit the acquisition pursuant to a buy-back or other capital reduction of a 5% interest above the following thresholds:

(a) if the foreign person has not had its acquisition of an interest in the entity cleared by FIRB, the applicable threshold for compulsory notification (i.e. a 5%, 10% or 20%); or

(b) if the foreign person has had its acquisition of an interest in the entity cleared by FIRB, the maximum interest cleared for acquisition (if a no objection notice is still active) or the interest acquired (if a no objection notice is no longer active).

5.2.8 The exemption would not apply to a foreign person who aids, abets, counsels or procures an entity to undertake a buy-back or other capital reduction for the sole or dominant purpose of effecting a change in control of the entity.

[18] Corporations Act, s 611 item 9.

5.2.9 The de minimis exemption would not apply to acquisitions outside of buy-backs and other capital reductions; however, increases of interests pursuant to certain other exemptions (i.e. rights issues, dividend/distribution reinvestment plans and bonus share plans) could be counted against the 5% tolerance.

5.2.10 The benefits of a de minimis exemption is that it will enable a foreign person to avoid multiple notification triggers as a result of small and frequent increases in its interests that are unlikely to give rise to national interest concerns.

5.2.11 **Exempt capital reductions** – We recommend that exemption from the application of proposed section 15A apply in the cases we have listed in section 5.1.12 of this advice as well as analogous cases under foreign laws. We think an exception is justified because of the relatively unusual circumstances and so as not to place constraints on an entity's ability to effectively enforce calls on partly paid securities and comply with statutory requirements relating to the return of securities and Court orders.

5.2.12 **Technical recommendations** – We recommend that the proposed section be amended to address the technical issues we have identified in sections 5.1.13 to 5.1.24 including by:

(a) clarifying whether redemptions are intended to be covered by the proposed section (refer to section 5.1.13 for analysis);

(b) remove the reference to 'otherwise' in proposed section 15A(1)(a) (refer to section 5.1.14 for analysis);

(c) consider extending the application of proposed section 15A where there is an upstream redemption by a trust (that is not a unit trust) or an unincorporated limited partnership (refer to section 5.1.15 for analysis);

(d) remove proposed section 15A(1)(c) (refer to section 5.1.16 for analysis);

(e) replace proposed section 15A(1)(b) with the following (refer to section 5.1.17 for analysis):

> (b) as a result of the buy-back or capital reduction, the percentage interest in the entity that the person holds increases; and

(f) consider supplementing the reference to 'security' with a reference to rights that are convertible into, or exchangeable for, securities (refer to section 5.1.18 for analysis);

(g) vary proposed section 15A(2) to read as follows (refer to sections 5.1.19 to 5.1.21 for analysis):

> (2) For the purposes of this Act, the person mentioned in paragraph (1)(b) is taken to acquire an interest in securities in the entity and to start to hold additional interests in the issued securities in the entity.

(h) vary proposed section 15A(3) to read as follows (refer to section 5.1.23 for analysis):

> ~~*Buy-backs of securities n*~~*No acquisition of interests* ~~*in securities*~~ *by entity in its securities*
>
> (3) Neither ~~T~~the buying-back or forfeiture of a security in an entity by the entity ~~does not~~nor the acceptance by an entity of the return of a security in the entity pursuant to a legal requirement or Court order constitutes an acquisition by the entity of an interest in a security in the entity.

(i) provide for a consistent application of proposed section 15A by recognising that capital reductions generally can occur following an offer (refer to section 5.1.25 for analysis).

6 Presumption of advancement

6.1 Commentary and recommendations

6.1.1 Subject to our comments below, we support the amendment of FATA s 12 through the addition of proposed paragraphs (4), (5) and (6) as reinforcing the integrity of the Australian Government's policies, particularly as they relate to the acquisition of interests in residential land.

6.1.2 **Leasehold interests** – Proposed paragraph (4)(a) should not exclude leasehold interests. Otherwise, there will be an inconsistency between acquisitions of freehold interests and acquisitions of leasehold interests with freehold characteristics. For example, most land within the Australian Capital Territory and many pastoral properties and foreshore properties are held under long-term leasehold interests.

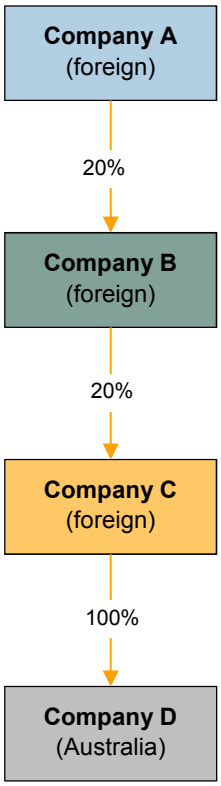
6.1.3 **Company title** – The presumption of advancement should apply to the acquisition of interests in Australian land contemplated by FATA s 12(1)(b).

7 Tracing interests through unincorporated limited partnerships

7.1 Commentary

7.1.1 We support a consistent approach to the tracing of interests under FATA s 19 so that interests can be traced equally through corporations, trusts and unincorporated limited partnerships. However, we do not support the current tracing methods.

7.1.2 Our first objection is that the current tracing methods are not reflective of economic interests. To illustrate, in the following example Company A will be considered, for FATA purposes to hold a 100% interest in Company D, whereas its economic interest in Company D is only 4%. One of the consequences of this is that Company A will be able to increase its interests in Company B without triggering a significant action provided that the acquisition does not result in an existing shareholder ceasing to control Company B.



7.1.3 Our second objection is the tracing of interests through the aggregation of interests held by persons who are not associates. As we discussed in section 4.2.1(b), it is not appropriate for a person to be considered to control an entity simply because it is one of two or more persons, who are not associates and happen to hold an aggregate interest in the entity of 40% or more. Similarly, it is not appropriate for a person, who may have a very modest interest in a company, to be taken to hold interests in all of the securities that the company may hold simply because the company has other shareholders.

7.1.4 **Interests in an unincorporated limited partnership** – Including proposed sections 11A(b), 17(2A)(b) and 17(2B)(b) will result in any person, who has subscribed to become a partner in an unincorporated limited partnership, being considered to hold an interest in the partnership even after it has transferred or redeemed its partnership interest. In our view, proposed paragraphs (a), (c) and (d) adequately describe an interest in an unincorporated limited partnership.

7.2 Recommendations

7.2.1 **Tracing methods** – We recommend that consideration be given to replacing the current tracing methods with tracing methods that better reflect economic ownership. For example, the tracing methods used in the *Airports Act 1996* (Cth) or the fractional tracing method used in Part 4 of Schedule 1 to the *Broadcasting Services Act 1992* (Cth).

7.2.2 **Aggregated tracing** – Section 19 should be amended to remove all references to tracing of interests through aggregated holdings by persons who are not associates.

7.2.3 **Interests in an unincorporated limited partnership** – Proposed sections 11A(b), 17(2A)(b) and 17(2B)(b) should not be included in FATA.

Technical Amendments (Schedule 6)

8 Interests acquired by entering agreements

Our comments and recommendations in respect of interests acquired by entering agreements have been included in the submission prepared by the Foreign Investment Committee of the Business Law Section of the Law Council of Australia.

8.1 Commentary and recommendations

8.1.1 Under FATA, a person holds or acquires an interest in a security or an asset if the person has any legal or equitable interest in that security or asset (ss 9 and 10). In many transactions involving the acquisition of a security or an asset, the purchaser will acquire an equitable interest in the security or asset ahead of the legal interest, which will be acquired at or shortly after completion.

8.1.2 FATA s 15(1) provides, for the purposes of FATA, that an interest is acquired at the point of entry into an agreement to acquire the interest, having or acquiring an option to acquire the interest, or having a right to have the interest transferred. In understanding the impact of FATA s 15(1), it is important to appreciate that, under FATA s 25, a person can be considered to have entered into an agreement to acquire an interest well before the point in time at which there might be any real prospect of it actually acquiring any relevant equitable or legal interest. This is because of the wide meaning FATA s 4 gives to 'scheme'. Based on that definition (and but for the exception we discuss below), FATA s 15(1) is likely triggered by the following events:

(a) a person entering into a non-binding memorandum of understanding, such as will often occur at a very preliminary stage in the commercial negotiation of a transaction;

(b) a person making a proposal, whether or not the proposal is accepted; and

(c) a person adopting a plan to do something, whether unilateral or otherwise.

8.1.3 There are a number of important consequences of FATA s 15(1), some sensible and some potentially unreasonable.

(a) A foreign person, who proposes to take an action, only needs to test its action against monetary thresholds on one occasion. As such, the potential for a person to be caught by an increase in valuation, after agreeing to purchase a legal interest but before actually acquiring the legal interest, is avoided.

(b) A corporation or trust that has no foreign securityholders could be considered to be a foreign person simply on the basis that a foreign person has proposed to acquire its securities even in circumstances where its securityholders have rejected the proposal.

(c) A person could be considered to have acquired interests that it never ends up acquiring.

(d) A person could be considered to have acquired interests that do not exist (e.g. an apartment in a building that has not been built, and may never be built).

8.1.4 To some extent the potential for unreasonable outcomes to arise is tempered by the exception in FATA ss 15(4) and (5), which currently provides that, for certain purposes, the time of acquisition is deferred until conditions precedent to relevant provisions to the agreement becoming binding are satisfied. Currently, there is no restriction on what the conditions precedent may be.

8.1.5 The proposed amendment to FATA s 15 (a new paragraph (4), which replaces the current paragraphs (4) and (5)) will only operate in respect of "a condition relating to the operation of this Act", not conditions generally. We are concerned that this will exacerbate many of the unreasonable consequences of FATA s 15(1).

8.1.6 For example, two parties may reach an in-principle understanding on a notifiable action. They specify that their in-principle understanding is non-binding and subject to legal documentation. They do not mention anything about FIRB (or even the need for regulatory approvals generally) because they are yet to consult with their respective legal counsel. Based on FATA s 15(1) alone, the notifiable action has been taken and an offence committed. However, as a result of the current exception in paragraphs (4) and (5), the notifiable action is deferred and the parties will have the opportunity to obtain legal advice and make provision for FIRB notification and clearance in a definitive agreement. In contrast, the new paragraph (4) will be of no assistance.

8.1.7 Consider another example: two parties enter into a definitive agreement on a notifiable action, which requires a number of conditions to be satisfied, including FIRB notification and clearance. The acquirer notifies FIRB and obtains a no objection notification. Under the new paragraph (4), the acquirer will have taken the notifiable action at that point even if there are other conditions that have not been satisfied and are never satisfied. This could have a number of unreasonable consequences depending on the nature of the notifiable action:

(a) a target entity may be treated as a foreign person as a result of an acquisition of securities that never occurs; and

(b) a foreign person may be treated as having acquired agricultural land for the purposes of the cumulative $15 million threshold that the foreign person never actually acquires.

8.1.8 We would like to see the new paragraph (4) operate based on the fulfilment of conditions generally, not just conditions relating to the Act. Any concerns that paragraph (4) could be

exploited through the use of contrived conditions to artificially defer the point at which an action should be considered to have been taken are, in our view, ameliorated by the fact that:

(a) at the time the Treasurer is ready to give a no objection notification, FIRB will be able to ask what conditions remain outstanding; and

(b) the Treasurer can use the anti-avoidance powers to annul the deferral achieved by a contrived condition.

8.1.9 If FIRB remains concerned about the potential for contrived conditions, a similar approach could be taken in paragraph (4) to that taken in the Australian takeovers law which, to paraphrase, prohibits conditions in takeover bids that depend on a bidder's opinion or the happening of an event that is within the sole control of the bidder (Corporations Act, s 629).

8.1.10 One aspect of the new paragraph (4) that we support is the move away from the requirement that a condition be a condition to the relevant provisions of an agreement becoming binding. Currently, concerns often arise because a condition is not clearly expressed to be a condition to the binding effect of the agreement. For example, the general approach of Australian courts is to interpret "subject to" conditions as not being conditions to a contract binding the parties but rather to the performance of contractual obligations.[19]

8.1.11 In a similar vein, it would be helpful if a drafting note could be included (or guidance otherwise given) that a condition can relate to the operation of FATA without having to refer to FATA expressly. This would address problems that we often experience with offshore transactions that include generic regulatory approval conditions.

8.1.12 The effect of proposed paragraph (4) does not extend to FATA s 95, which relates to the acquisition of interests in established dwellings. We support extending the effect of proposed paragraph 4 to FATA s 95 for the reasons given in the submission prepared by the Foreign Investment Committee of the Business Law Section of the Law Council of Australia.

9 Extension of decision period

9.1 Commentary and recommendations

9.1.1 We support the Treasurer having the right to extend the statutory decision period by up to 90 days subject to two objections.

9.1.2 The Treasurer should not be able to extend the statutory decision period by more than 90 days through the combined use of an extension power under proposed section 77A and the making of interim orders under FATA s 68.

9.1.3 To maintain an incentive for applicants to request voluntary extensions, the period of any voluntary extension requests accepted by the Treasurer should be subtracted from the maximum length of the extension available to the Treasurer.

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Please contact Marcus Clark (02 8274 9509 | Marcus.Clark@jws.com.au) if you have any questions concerning theses submissions.

Yours sincerely,

[19] For example, *Gange v Sullivan* (1966) 116 CLR 418 and *Sandra Investments Pty Ltd v Booth* [1983] 2 Qd R 233, both of which involved contracts for the sale of land that were subject to development approval conditions.