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# Submission – Implementing Foreign Investment Reforms Exposure Draft

17 July 2015

PROPERTY COUNCIL of Australia

PROSPERITY | JOBS | STRONG COMMUNITIES

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Dear Mr Earl,

Thank you for the opportunity to provide comment on the Exposure Draft and explanatory material to the *Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015* (the Bill) relating to foreign investment reforms.

Foreign investment has been a critical factor in the development of the Australian economy and will be an important determinant of Australia's future prosperity and the standard of living enjoyed by all Australians.

While we welcome the increase in the substantial interest threshold to 20%, we are disappointed to see that despite previous submissions and engagement, many of the very serious concerns raised by the Property Council and industry have not been addressed. In fact, a number of areas of the Exposure Draft will see significant adverse impacts on the Australian property and construction sector – the largest sector in our economy. It is critical that these issues be addressed before this legislation and the associated fees come into effect.

The comments provided in our previous submission remain relevant (attached as Appendix B and Appendix C for reference), however the following provides further detail on those areas the Property Council considers must be addressed as a matter of urgency:

1. Currently, the definitions suggest that 'Australian' companies and trusts that are Australian domiciled and controlled can be deemed to be 'foreign persons' as a result of a greater than 40% foreign share register. This is an issue of great concern for major Australian listed companies and trusts whose share registers are continuously changing. Capturing these types of entities under the definition of 'foreign persons', thereby subjecting them to the additional reporting and application requirements, creates an additional administrative burden and undue complexity for both the entity and FIRB/ATO.

The largest Australian based and ASX listed development companies and property investment trusts that have operated in Australia for decades have seen an increased share in ownership from offshore since the Global Financial Crisis. Consequently, under the proposed definitions they could be treated as foreign entities and be liable for the proposed new fees each time land is purchased for development. The cost of these fees will not only impact the feasibility of a particular project, but will in all likelihood be passed on to the end purchaser. This is particularly important for residential developments, where the costs will be directly added to the end price of a house, serving only to increase the cost of housing in Australia.

In the event that a full exemption for Australia companies and trusts cannot be established, we recommend that there be a mechanism by which a declaration can be obtained that a company or trust whose share register is subject to continual change is a "Significantly Australian Corporation or Trust". This is similar to the approach already applied under the *Airports Act 1996*, and would ensure that Australian listed, managed and controlled companies and trusts would not be caught by these rules merely because more than 40% of their share register is foreign, where no single person, including associate holdings, exercises control or has a significant shareholding.

2. In the interests of modernising and simplifying the foreign investment framework in Australia we reiterate our recommendation that a register process be implemented in place of the current cumbersome approvals approach, for commercial investment applications that have no "national interest" issues. Simultaneously, the codification of investments that are considered counter to the "national interest" or those deemed "sensitive" will ensure that there is a transparent decision making process that will serve to both simplify the process for investors, and diffuse criticism of government decisions.

3. Additionally, reforms to the requirements that listed entities require FIRB approval before acquiring an interest in urban land, and are therefore subject to recently announced additional fees and charges is of concern to the Property Council. These provisions limit the ability of listed Australian Real Estate Investment Trusts (A-REITS) to transact in the property market, and present a real barrier to investment. The provisions cause increased compliance costs and administrative burdens for both the listed A-REITS and FIRB, with no substantial policy benefit.

4. The changes proposed that expand the definition of foreign person to include a foreign government, and thereby entities such as Sovereign Wealth Funds (SWFs), will jeopardise Australia's $670 billion property investment industry that relies on international capital.

Since the GFC, Australia's property industry has increasingly relied on international capital to support projects and infrastructure that domestic investors do not or cannot fund. In particular, Australia's property market relies heavily on patient, long-term global capital to finance major investments, including world-class office buildings and regional shopping centres.

While Australia is only 2% of the world economy, it accounts for 5% of global property investment activity. Australia has been an attractive destination for global capital because of our relatively solid and stable economic growth since the GFC and the transparency of our markets and legal system. Without global capital, Australia will be unable to realise its infrastructure and city building ambitions.

This submission (attached as Appendix A) contains further detail on the above issues, as well as some commentary on additional areas of the Exposure Draft we believe will have significant adverse outcomes, and will jeopardise Australia's attractiveness as a destination for foreign capital.

We urgently seek a meeting with you to discuss these issues in person, and work to create a simpler, fairer and more transparent framework for foreign investment in Australia.

Yours sincerely,

**Andrew Mihno**
Executive Director – International and Capital Markets
Property Council of Australia

# Appendix A

**1.4 (pg. 4) – "The question of whether a particular investment is contrary to the national interest is a matter for the Treasurer".**

It is not practically feasible to monitor every transaction or leave the decision of what falls within the national interest to the Treasurer or his delegates. Nor is it necessary given the Government concerns this legislation and policy seek to address are quite specific.

Although FIRB has made considerable inroads to reduce approval times, the system can be streamlined further. Any reforms that strip out unnecessary red tape will shorten delays and help investors make timely investment decisions.

A clear unintended consequence of the rules as they are proposed is that they will capture transactions the Government may have no concern with whatsoever. For example, FIRB is currently forced to review all commercial investments even when the property has no national interest implications.

This not only delays investment decisions and creates uncertainty, it also impacts the industry's ability to finance and deliver projects. Furthermore, instead of streamlining the operation of Australia's foreign investment framework it creates additional layers of complexity, and ultimately increases the administrative costs for government.

From another perspective, leaving the determination of these decisions to the Treasurer expose that office and the Australian Government more broadly to widespread public and politically driven criticism both domestically and internationally.

A register approach will serve to simplify and streamline the process for current applicants, provide certainty and clarity for investors, and depoliticises the decision making process. If implemented appropriately, there should continue to be the opportunity for the exemptions to be granted at the discretion of the Treasurer.

By clearly defining what is and is not in the national interest, greater alignment between government policy and agency data collection will be achieved, which will ultimately lead to better policy outcomes in the future.

It is the most logical step to be taken if the foreign investment framework is truly to be modernised and made more transparent, efficient and fair.

**2.10 (pg. 12) – Definition of "foreign person"**

We recommend that the definition of 'foreign person' in the Bill should be amended such that Australian individuals, companies and trusts are not brought within these provisions. The same applies for the definition of 'foreign person' in the *Register of Foreign Ownership of Agricultural Land Bill 2015* (RFOAL Bill). Furthermore, Rules should be made under the RFOAL Bill creating exemptions which align with those made under the FATLA Bill 2015.

***Companies and trusts*** – As they currently stand, the rules will result in companies and trusts that are Australian domiciled and controlled being deemed 'foreign persons' through the interests of numerous unrelated passive foreign shareholders exceeding the 40 per cent aggregate ownership threshold (that applies where no foreign person holds 15 per cent or more). This is a significant issue for major Australian listed companies and trusts, as well as for unlisted entities such as trusts, whose share registers are continuously changing.

These entities are domiciled in Australia; they pay tax in Australia to all levels of government and contribute to the prosperity of the Australian economy.

In these situations, the time and cost associated with an Australian publicly listed entity even assessing if it is a foreign person based on its share register can be considerable with the mechanisms available to them meaning the assessment may not be accurate.

There are numerous impracticalities and complexities associated with the use of the share register as the baseline measure of foreign ownership. The share register should be treated with caution if it is to be considered the determinant of nationality for this purpose, particularly given the practical difficulties for listed entities determining whether their securities are held by foreign persons on a regular, cost efficient and timely basis.

It is important to note that the securities registry of a listed company or trust does not necessarily reflect the beneficial owners of the securities, e.g. securities are often held by nominees or custodians. Although provisions of the *Corporations Act, 2001 (Cth)* enables entities to trace ownership through a chain of nominees or custodians, the recipient of a beneficial tracing notice has two days to respond to the notice. By that time the beneficial owners of the securities may have changed. This makes it potentially impossible for a listed entity to determine with any certainty as to whether it is foreign at a particular point in time.

We recommend that the definition of 'foreign person' is amended such that Australian companies are not brought within these provisions.

Australian listed, managed and controlled companies and trusts should not be caught by these rules merely because there are more than 40% foreigners on their share register, where no single foreigner (including associate holdings) exercises control or has a significant shareholding.

Failure to exempt these entities will mean that this proposed legislation is not aligned to current provisions that the ASX operates within, current Company Law provisions, and current Australian corporate law provisions more broadly.

In the event that such an exemption is unpalatable, we propose that a mechanism be established whereby a declaration can be obtained that an Australian domiciled and controlled company/trust whose share register has more than 40% foreigners is a "Substantially Australian Corporation or Trust". This would be similar to the provisions of the *Airports (Ownership – Interests in Shares) Regulations* that already exist.

We suggest the criteria for defining a "Substantially Australia Corporation or Trust" could include the following:

- The corporation or trust be incorporated/established in Australia;
- No individual foreign person holds an interest of more than 15%;

- No single foreign person is in any position of control;
- The company, or the trustee of the trust, has its registered office in Australia;
- The majority of the board of the company, or the trustee of the trust, are Australia citizens or permanent residents;
- The majority of the board meetings of the company, or the trustee of the trust, are held in Australia;
- Directors nominated by foreign persons represent less than 15% of board members of the company, or the trustee of the trust.

***Individuals*** – Australian citizens should not be treated as foreign persons, regardless of their place of residence. Requiring non-resident citizens to seek FIRB approval for investment in property in Australia makes the system more complicated to administer, adds red tape and unfairly increases costs to Australian citizens. The definition of 'foreign person' may be simplified by removing references to place of residence. States such as Queensland and Victoria have adopted a definition of 'foreign person' which excludes expatriate citizens. Changes should consider the interaction of this definition with other Rules, particularly taxation law (including things like FATCA and the impending Common Reporting Standards from the OECD).

If for any reason this suggestion is not acceptable, the exemption relating to land should extend to such individuals indirectly investing via a trust or subsidiary and should also extend to business investments. Alternatively, Australian non-resident citizens should not be treated any worse than nationals of USA, New Zealand and Chile which have a $1,094m threshold.

***Foreign governments*** – The Property Council proposes that Sovereign Wealth Funds (SWFs) are excluded in the schedules with an exempt status. SWFs are a major source of investment in Australia, particularly in real estate trusts, and, being long-term passive investors, provide a longstanding source of diversification that has protected Australian investors and companies in prior periods of major economic upheaval.

Moreover, SWFs are the equivalent of the Future Fund in Australia, and whilst they may technically be considered to be under government control in their local jurisdiction, they are structured most commonly with a form of governing body or board that has an equivalent structure and charter to that used here.

Such mutual acknowledgment of governance and compliance arrangements is not without precedent, given it is a core tenet of IOSCO and currently used for cross-border investment flows in financial services.

**2.12, 2.13 & 2.14 (pg. 13) – "Substantial interest"**

The Property Council recommends including a specific cut-off and commencement for the revised Rules to ensure that listed and unlisted entities have sufficient time to attain waivers and compliance without triggering disposal orders. This cut off should ensure that the rules are not retrospectively applied.

For example, if the new law comes into effect from 1 December 2015 as suggested in the Exposure Draft, then all holdings that pre-date the commencement (existing members on registers, whether listed or unlisted property trusts) should be excluded from the Rules so long at the holdings were in place prior to 1 December 2015.

**2.33 (pg. 19) – "A person is considered to hold or acquire an interest in a security in an entity if the person is not the registered holder of the security, if the person is entitled to exercise or control the exercise of a right attached to the security".**

Under the proposed rules, FIRB approval may be required for certain acquisitions of an interest in a security. The proposed definition of interest in a security is extended to persons who are entitled to exercise or control the exercise of a right attached to the security.

It is common for Australian superannuation, wholesale and insurance funds to invest in Australian securities in the name of their custodian rather than that of the organisation directly. Therefore, the name on the register is that of the custodian, not the investment vehicle. This is common practice for these types of entities, and is well understood.

In the event that the rules come into effect as they are currently proposed and the custodian is considered the 'owner', all trusts or companies with substantial shareholdings by Australian superannuation, wholesale and insurance funds will reach, if not exceed, the threshold for foreign investment. This is because with the exception of two organisations that are domestic, every custodian in Australia is itself owned by a foreign company.

This is an entirely unacceptable outcome and highlights the absurdity of requiring Australian entities to continuously monitor their register to determine if they are "foreign persons".

This problem can be easily overcome by excluding Australian companies and trusts from the foreign persons definition (refer our submission above).

**3.15 (pg. 38) – "Kinds of entities"**

Under the proposed rules, a "significant action" can only arise if it relates to certain kinds of entities.

It is very common for a property group structure to involve a head trust, with underlying sub-trusts that hold different classes of assets. Interests will usually be acquired at the head trust level.

It is currently unclear how the proposed FIRB rules apply in these circumstances as investors do not actually acquire an interest in the vehicle that directly owns the physical asset.

This problem can be easily overcome by excluding Australian companies and trusts from the foreign persons definition (refer our submission above).

**3.16 (pg. 39) – "Change of control"**

Under the proposed rule, a "change of control" is one of the conditions that must be satisfied for there to be a "significant action" that could require FIRB approval.

The proposed change of control test is very broadly drafted and does not take into account "control tests" that currently exist under company law and ASX rules.

In particular, for company law and ASX purposes, an individual must acquire 51% for control to become effective, although there are earlier triggers and requirements for disclosure along the way. For trusts and schemes, the control is usually dealt with in the scheme of arrangement (trust deed or constitution) because it has a direct relationship to the single responsible entity provisions of the Corporations Act under Chapter 5C.

Under the proposed rules, there is no definite carve out for existing schemes and trusts. This would trigger a very wide-scale need for every constitution to be reviewed and likely amended, which would require the approval of the scheme members. There will potentially also be a change required to the Corporations Act, as it specifies what must be in a constitution for a managed investment scheme.

All of these changes will potentially force existing investors out of schemes, which could give rise to significant liquidity concerns for property trusts. Given the Exposure Draft proposes a 6 month time frame before the new rules are to take effect that is in essence a 6 month period for foreign investors to sell out of property funds. In the event that losses are taken, it is likely that the Government will be called on to compensate investors as the loss will be a direct result of the policy changes.

These problems can be easily overcome by making the change of control test consistent with existing trust law provisions for change of control. Alternatively, there should be a clear and definite carve out for existing trusts and schemes.

At the very least, engagement with the Australian Securities and Investment Commission is recommended to ensure the implications of the new rules have been fully considered and their negative impacts limited.

**5.2 (pg. 75) – "The imposition of fees will help… improvements in the collection of data about foreign investment in Australia".**

The Property Council has previously stated that a user-pays model for FIRB application fees would be appropriate, and that the fees currently proposed are not reflective of such a model. While we welcome changes to the fees charged for annual programs and off-the-plan certificates from the original unjustifiably high levels, we remain of the view that the fees are still higher than warranted. If there is scope to engage further on these charges, we would welcome the opportunity to work constructively with you to establish a more equitable framework, and ensure that the impact on house prices is limited.

In addition, we have been clear in stating that there is a dire absence of data currently being collected in a consistent way regarding foreign investment in Australia. While the Exposure Draft states that the fees collected will be used to collect data, there is no detail

on the type of data that will now be collected by the Government, the agency/agencies responsible, and whether this information will be made available to the public. Nor is there any indication of how this data will be collected and what additional burdens will fall on investors or industry.

It is important that this data collection is comprehensive and systematic, and that the data is made available to the public. There is no doubt that foreign investment plays a part in increasing the stock of housing in Australia, as well as contributing to the development of commercial office buildings, shopping centres, industrial precincts and infrastructure. The extent of that impact needs to be fully understood by policy makers to ensure that future policy changes are evidence based and do not compromise Australia's ability to attract crucial investment flows.

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# Appendix B

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# Submission to the 2015 Options Paper – Australia's Foreign Investment Framework: Modernisation Options

29 May 2015

# Contents

## Introduction

The Property Council welcomes the opportunity to provide further feedback on the reform options presented for consideration.

The comments provided in our previous submission remain relevant (attached for reference), however the following provides further detail on those areas the Property Council considers must be addressed as reform priorities.

In particular, in the interests of modernising and simplifying the foreign investment framework in Australia we reiterate our recommendation that a register process be implemented in place of the current cumbersome approvals approach, for commercial investment applications that have no "national interest" issues. Simultaneously, the codification of investments that are considered counter to the "national interest" or those deemed "sensitive" will ensure that there is a transparent decision making process that will serve to both simplify the process for investors, and diffuse criticism of government decisions.

The implementation of a register, codification of "national interest" or "sensitive" investment types and a fast-tracked process for regular and trusted investors are among the recommendations we outline in further detail later in this submission which present equitable and simple solutions to modernise the foreign investment framework in Australia.

Additionally, reforms to the requirements that listed entities require FIRB approval before acquiring and interest in urban land, and are therefore subject to recently announced additional fees and charges is of concern to the Property Council. These provisions limit the ability of listed Australian Real Estate Investment Trusts (A-REITS) to transact in the property market, and present a real barrier to investment. The provisions cause increased compliance costs and administrative burdens for both the listed A-REITS and FIRB, with no substantial policy benefit.

This submission also contains further detail on the reform options the Property Council supports, including policy solutions that will achieve the government's desired outcomes without jeopardising Australia's attractiveness as a destination for foreign capital.

We look forward to engaging further with government to create a simpler, fairer and more transparent framework for foreign investment in Australia.

## Priority reform areas

The following are opportunities to simplify and enhance the foreign investment framework in Australia that should be considered for reform as a priority. Adopting the proposed recommendations would simplify and streamline the foreign investment framework in Australia significantly, and ultimately be more beneficial than a range of smaller reform areas.

| PRIORITY REFORM AREAS – NEW AND PROPOSED IN OPTIONS PAPER | |
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| **Issue** | **Comments** |
| **Implementation of a register rather than an approval approach for commercial applications that have no 'national interest' implications.**<br><br>The Property Council suggests all projects not captured by "national interest" screening are automatically logged in a register, rather than being required to seek individual FIRB assessment and approval.<br><br>For all commercial property that falls outside the exemption reform proposed at 4.4 above, we consider this to be a critical area for reform. Implementing this reform will significantly reduce the cost and administrative requirements for government – making the system more efficient whilst still collecting the information government requires. | The Property Council proposes the register would operate in conjunction a list of types of investments deemed contrary to national interest (see next point).<br><br>It would provide certainty for prospective investors in the identified investment types, thereby reducing both time and cost impacts for investors and the industry, and further reducing the administrative and cost burden on government by not requiring individual assessment of applications for ventures that are not categorised as national interest. |
| **Codify or create register of types of investments that are contrary to "the national interest".**<br><br>In particular, investors would welcome a clear definition of "sensitive" and "non-sensitive" investments. | "Sensitive" is mentioned in several contexts (for example, options 1.3, 3.8 and 4.4 of the Options Paper). Hence it is critical that Treasury provides clarity to investors on what this term means, as this will affect decision making.<br><br>As with points 4.3 and 4.4 of the Options Paper, the important concept with regard to commercial real estate should be to specify what is deemed "sensitive", and make such information publicly available. This would improve compliance by investors and reduce the cost burden for government. It would also create operational efficiencies for both parties.<br><br>The definition of investments deemed "sensitive" and/or in the "national interest" could typically cover:<br>• State (or national) significant projects<br>• Critical infrastructure<br>• Vacant land next to critical infrastructure (for example, vacant land next to an airport, seaport, toll-road)<br>• Real estate designated for government use (for example, military installations, |

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| | munitions manufacturing, intelligence services)<br><br>Utilising clear definitions will improve alignment between government policy and data collection by agencies. Additionally, it de-politicises the decision process and creates a framework that is transparent and easily understandable by all. |
| **Implement a streamlined 'VIP' process for regular FIRB applicants.**<br><br>Where there are well known and regular FIRB applicants that represent low-risk to the Australian economy, time and complexity of the approval process should be reduced. In these circumstances, it is no longer necessary to scrutinise the investor. Streamlining the process avoids duplication of effort for each subsequent application, resulting in reduced costs and administrative burden for both the government and investors. | It is not practically feasible to monitor every transaction, nor is it necessary given Government concerns are quite specific. However, an unintended consequence is that the rules catch out transactions the Government may have no concern with what so ever.<br><br>FIRB is currently forced to review all commercial investments even when the property has no "national interest". Equally, there are types of residential development government wants to encourage, for example to boost housing supply, and FIRB processes are an impediment to the process.<br><br>This not only delays investment decisions and creates uncertainty, it also impacts the industry's ability to finance and deliver projects. Furthermore, it increases the administrative costs for government.<br><br>Although FIRB has made considerable inroads to reduce approval times, the system can be streamlined further. Any reforms that strip out unnecessary red tape will shorten delays and help investors make timely investment decisions. |
| **From Options Paper**<br><br>**3.2 Allowing certain interests to be disregarded when applying the foreign person definition**<br><br>'Australian' companies that are Australian domiciled and controlled, can be deemed to be 'foreign persons' through the interests of numerous unrelated passive foreign shareholders exceeding the 40 per cent aggregate ownership threshold (that applies where no foreign person holds 15 per cent or more).<br><br>This is or has been an issue for some major Australian listed companies as at different times their foreign ownership levels have neared or exceeded the 40 per cent threshold. The latter makes them foreign persons required to comply with the foreign investment framework (and under the screening framework they can be subject to less favourable treatment than | The Property Council strongly supports this option and would appreciate the opportunity to work with Treasury on specific policy reform options beyond those outlined here.<br><br>There are numerous impracticalities and complexities associated with the use of the share register as the baseline measure of foreign ownership. The share register should be treated with caution if it is to be considered the determinant of nationality for this purpose, particularly given the practical difficulties for listed entities determining whether their securities are held by foreign persons on a regular, cost efficient and timely basis.<br><br>It is suggested that the definition of 'foreign person' is amended such that Australian companies are not brought within these provisions. |

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| investors from some of Australia's trade agreement partners). This may also be an issue for widely held unlisted entities.<br><br>In these situations, the time and cost associated with an Australian publicly listed entity even assessing if it is a foreign person based on its share register can be considerable with the mechanisms available to them meaning the assessment may not be accurate.<br><br>**Option proposed:**<br><br>**Consider options to reduce the regulatory burden for substantially Australian entities** | Any proposed changes in this area should give consideration to the policy currently contained in FATA.<br><br>Any proposed changes should also ensure that external verification for the purpose of proving that an entity is not foreign does not place additional onerous administrative burdens on either investors or government.<br><br>While much attention has focused on the treatment of listed entities and their exemption from the foreign persons definition, consideration must also be given to the treatment of unlisted entities such as trusts. Unlisted entities are just as robust and also generate a positive economic impact.<br><br>It is also important to consider the implications of any changes to this area and the alignment of this policy with the tax system. |
| **From Options Paper**<br><br>**4.1 Broaden coverage of annual programs**<br><br>Annual program arrangements are designed to minimise compliance costs for frequent foreign investors (a single approval every 12 months rather than potentially many spread over the period). In applying for an annual program foreign investors are required to specify the type of property acquisition they propose to make, the reason for the acquisition and location(s) where the acquisitions will be made. If granted, the program will specify an annual monetary limit for the acquisitions that an investor can make during the period. Where the limit has been used or the foreign person wants to purchase other types of property, the normal notification arrangements apply. Investors are required to report on acquisitions made through an annual program, as well as their compliance with any other conditions.<br><br>Annual Programs currently only apply to acquisitions of direct interests in urban land. This has limited their usefulness to investors and the Government. The business environment and practices have evolved since the introduction of the annual programs and it is now common for properties to be acquired indirectly by acquiring the property holding entity (the seller may also dictate at which level the sale takes place for their own commercial interests). Widely held (listed and unlisted) real estate investment vehicles are also now common. However, as | The Property Council considers this to be a priority area, with opportunities for reform that go beyond those listed in the Options Paper.<br><br>In order to improve the operation of the foreign investment framework in Australia, and to avoid the unintended negative outcomes of recently announced policy changes, we make the following recommendations:<br><br>• Extend the timeframe of annual programs to a 2-year program, with a capped investment value and do an annual review of investment within threshold granted.<br><br>This would decrease the administrative burden on the investor and FIRB, provide greater certainty, and still accomplish the same intent.<br><br>Moreover, the value of investment dealt with under the annual programs is such that a longer period can be applied and monitored without impacting the integrity of its purpose.<br><br>• Relax conditions that are commonly stipulated in annual programs where the conditions clearly do not impact the national interest. For example, annual program requirements that development commence within a short period of time |

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| there is no obvious policy rationale to differentiate, it is proposed that annual programs be extended to cover acquisitions of indirect interests in urban land (for example, shares or units in Australian urban land corporations or trusts).<br><br>While reducing compliance costs for both the investor and Government, annual programs assist in levelling the playing field between foreign and non-foreign persons.<br><br>What land types this should be made available to will be considered.<br><br>**Option proposed:**<br><br>**Allow annual programs to cover indirect acquisition of interests in land.** | (2 years) post acquisition, otherwise the land must be sold.<br><br>• Remove indirect interests from requirements to be dealt with under the FIRB rules as these are already covered under the ASX Rules (substantial holding notices for example); elsewhere in the Corporations Act; and through FIRB rules for managed investment schemes that are unlisted.<br><br>• There are issues with the purchase of agricultural land which would benefit from an extension of coverage of these provisions to all forms of urban real estate (whether developed or not) that are not "national interest".<br><br>• Clarify land types. For example, treatment (exemption or otherwise from annual programs or FIRB applications) of agricultural land purchased for rezoning and residential development. Can it be inferred that agricultural land should be subject to a 1% application fee? Similarly, how will land purchased for retirement village development be treated?<br><br>• Consider expanding the exemptions for substantially Australian based corporations to exceed $1billion of annual program purchases without incurring fees of 1% of the value on each additional purchase. |

## Additional reform areas

The following are opportunities to simplify and enhance the foreign investment framework in Australia that go beyond those contained in the options paper. The represent opportunities to further simplify and streamline the foreign investment framework in Australia and should be considered as part of any reform process.

| PROPOSED NEW MODERNISATION REFORM OPTIONS | |
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| **Issue** | **Comments** |
| **Simplify reporting process**<br>Shorten FIRB application response time to potentially 5-10 business days instead of 40 days. In the case that Departmental resourcing is an issue, this could be supported through the allocation of a portion of the proposed new administration fees on applications. | Under the *Foreign Acquisitions and Takeover Act 1975*, the Treasurer has 30 days to consider an application and make a decision, with potential for an extended 10 days. Currently the experience of Property Council members indicates it generally takes 40 days to for an investor to be informed of the outcome. Simpler and improved reporting processes would be a welcome outcome. |
| **Exemptions for equity issues that do not significantly change percentage holdings.**<br>In cases of new equity issues such as rights issues, dividend reinvestment or other pro-rata offer and the full allotment is taken up by investors, there are immaterial changes in ownership. In these situations, an exemption should be granted from providing compulsory notification of all security issues. | Further consideration of this issue should be included in the consultation process.<br>In cases of no material changes, no mischief is created. Further, this proposed initiative alleviates the financial and administrative burden for both the Government and FIRB applicants. |
| **Exemptions for intra-group transfers**<br>Intragroup transfers should be exempt from sections 18 and 26 of FATA in circumstances where the ultimate controller or net foreign investment does not change. | This proposal is consistent with the foreign investment policy concern as to the identity and character of an investor. As FIRB will have approved the initial investment into Australia and accordingly assessed the character of the ultimate beneficial owner, no further assessment should be required to protect the national interest. |
| **Clearly define Rural Land**<br>If the new concept of "agricultural land" is adopted as proposed, the legislation must clarify that if an acquisition of rural land is made for the primary purpose of property development, the "low" threshold for rural land acquisitions should not apply and the land will be treated effectively like urban land. | This recommendation will enhance FIRB's aim of adequately scrutinising the acquisition of land used for primary production. Additionally, it provides developers with clarity as to when a separate FIRB application will be required. |
| **Off-the-plan apartment sales**<br>There are a number of issues that remain unresolved regarding the operation of off-the-plan sales of apartments to foreign buyers. There is considerable scope to simplify this process beyond the reforms that have previously been proposed. | The reforms announced by the Prime Minister and in the 2015-16 Federal Budget have created additional reporting and administrative requirements for both FIRB and developers with respect to the six-monthly consolidation of sales of apartments. Further reforms are required to improve the efficiency of the framework in this area while ensuring the government's objectives |

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| | are met. |
| **Implement regular red tape reduction review processes**<br><br>Many of the current red tape issues relate to outdated references to defunct institutions and processes. This can and should be avoided to ensure the legislation remains relevant to Australian interests. | Regular review will ensure consistency of practice and minimal excuses for non-compliance with rules. |
| **Modernise the *Foreign Acquisitions and Takeovers Act 1975* (FATA)** | FATA requires modernisation to ensure that it is accessible and the obligations of foreign investors can be readily and easily understood. A lack of understanding can result in poor compliance outcomes. A plain English rewrite of the legislation, in accordance with the Office of Parliamentary Counsel's guidelines on legislative drafting should be undertaken. |

## Responses to Treasury Options Paper Modernisation Proposals

| Issue | Option | Property Council Comments |
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| **ITEM 1: A LEGISLATED FRAMEWORK SUPPORTED BY GUIDANCE** | | |
| **1.1 Incorporate the foreign government investor rules into the legislative framework**<br><br>All direct investments, new businesses and acquisitions of any interests in land by foreign government investors generally require prior notification and approval, regardless of the value.<br><br>Legislating the requirements would increase legal certainty for foreign government investors, legal advisers and the Government. | **Incorporate the foreign government investor rules into the legislative framework** | The Property Council supports this option. |
| **1.3 Abolish or legislate the special screening requirements for heritage listed commercial developed property**<br><br>Commercial developed property that is heritage listed is subject to a lower non-indexed threshold ($5 million). The historical requirement dates back to when each level of government did not have regimes to protect heritage values and there may have been instances when Commonwealth intervention was warranted in exceptional circumstances. This aspect of the regime is also fragmented as the requirement does not apply to relevant trade agreement partners whose investors have access to the higher monetary screening threshold of $1,094 million for acquisitions in non-prescribed sensitive sectors and of commercial developed property. | **Abolish this requirement** | The Property Council supports this option.<br><br>In addition, there is scope to amend the rules around heritage property to remove references to obsolete legislation. In particular, the exemption at FATR 3(p) refers to an acquisition of land which is entered in the Register of the National Estate. This register no longer exists. |
| **ITEM 2: UPDATE THE LEGISLATION TO REFLECT CORE ADMINISTRATIVE PRACTICES** | | |
| **2.1 Update the legislation to reflect core administrative practices such as the no objections validity period, information sharing, screening timeframes and conditions**<br><br>Administratively, workarounds or administrative guidance has been in place for a significant period. These include:<br>• on information collection, appropriate uses, and sharing;<br>• withdrawal and resubmission by an applicant to extend the review period | **Update the legislation to reflect core administrative practices** | The Property Council supports this option, however there remain a number of issues that require resolution.<br><br>More definitive alignment between legislative instruments, agencies collecting data and the procedural controls should also minimise the need for Ministerial decisions. This has the benefit of de-politicising the decision process, and affords greater transparency and certainty for transactions. |

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| without the use of an Interim Order that is publicly gazetted;<br>• a default 12 month validity period for approvals;<br>• applying requirements that do not have full legislative backing;<br>• not proceeding with compliance action so long as the foreign person complies with certain requirements; and<br>• waiver of conditions in certain circumstances (for example, condition no longer in the national interest due to changes in circumstances such as economic conditions, residency, or citizenship).<br>Such changes would better support or allow:<br>• appropriate information sharing amongst relevant Departments and agencies;<br>• applicants to voluntarily agree to extend the screening period on a confidential basis;<br>• the Treasurer to issue exemption certificates under a common framework;<br>• the Treasurer to impose conditions if a foreign person initially failed to notify;<br>• the Treasurer to vary enforceable conditions (but only in a manner not to the foreign person's detriment); and<br>• updating of the notification requirements. | | |
| **ITEM 3: CLOSER ALIGNMENT WITH OTHER COMMONWEALTH LEGISLATION** | | |
| **3.1 Increase the substantial interest (control) threshold for a single foreign person from 15 to 20 per cent**<br>Foreign persons generally require approval if acquiring a stake of 15 per cent or more (depending on the relevant monetary threshold).<br>Aligning the Act control threshold with the 20 per cent in the takeovers rules in the *Corporations Act 2001* would align non-government investor business acquisitions being notified to those where Australia's takeover rules consider that parties should generally make a takeover offer as control can change.<br>This increase will automatically flow | **Increase the substantial interest (control) threshold for a single foreign person from 15 to 20 per cent** | The Property Council supports this option.<br>This enables streamlining of common rules and broad application of a consistent legal framework.<br>Streamlining the rules will make it easy for investors to understand.<br>Applying it to ALL parties also simplifies the administrative processes for FIRB and other data collection points. Consideration should be given to removing the distinction between "persons" and foreign government investors. |

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| through to the definition of a 'foreign person' (currently a company is a foreign person if a single foreign person with Associates owns 15 per cent or more in the company). It will also flow through to the definition of a foreign government investor which also uses the 15 per cent test (that is, foreign government investors includes entities in which governments, their agencies or related entities from a single foreign country have an aggregate interest (direct or indirect) of 15 per cent or more).<br><br>This will reduce compliance costs on investors and the Government as it will better focus the regime (both who is a foreign person and the proposals to be notified where control may change). It would also better align the framework with the more commonly understood takeovers regime, which is supported by an established body of law.<br><br>Under the takeovers rules, specified interests are disregarded when assessing if the 20 per cent is met (for example, bare trust trustees, certain directorships, and operators of clearing and settlement facilities). The FATA also has provision to disregard certain interests. Incorporating some exceptions from the Corporations Act will also be considered as part of implementing this change. | | |
| **3.3 Simplifying the 'associates' definition without compromising integrity of the framework**<br><br>The 'associates' definition has been subject to criticism for being too broad, including that it deems associates to include any associate of an associate. It is not suited to the modern day where there are many listed entities and individuals who are directors on more than one board (including 'independent directors'), and greater cross border investment and mobility.<br><br>Possible models that have been raised include the associates definition under Australia's takeover rules and that in the *Broadcasting Services Act 1992*.<br><br>From an integrity perspective, it may be necessary to have a definition where additional limbs may apply for closely held entities investing in land. | **Consider options to simplify the associates definition to better align with modern practice** | The Property Council supports reforms in this area, however further detail and consultation on precise policy or legislative changes is required.<br><br>Currently, several definitions and a patchwork of legislative rules are being applied.<br><br>A single, uniform definition should be used in all instances. The form of entity investing in land should not make a difference here, per the suggested note from Treasury in the Options Paper.<br><br>Any reforms in this area should correlate to equivalent rules already in place for other legislative regimes. Unifying the rules will simplify the process for both Government and investors. In particular, we recommend that attention be given to the definition of 'associate' used under either the takeover rules or the |

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| | | existing Economic & Trade Sanctions provisions. If the latter is used as the basis, this would ensure that changes would align to screening checks being undertaken. and so would further reduce administrative compliance burden.<br><br>Alternatively, the Corporations Act has a definition of "associate" at Chapter 1, Part 1.2, Division 2.<br><br>Either approach is recommended. |
| **3.5 Exempt compulsory acquisitions and buy-outs following takeover bids**<br><br>Chapter 6A of the *Corporations Act 2001* 'Compulsory acquisitions and buy-outs' requires or allows a party with a 90 per cent or more interest to compulsorily acquire the remaining securities as per the prescribed rules (100 per cent of the securities required before compulsory buy-out of convertible securities). It represents an unnecessary regulatory burden when a party may be required to do something under one statute (the Corporations Act) but requires prior notification and approval under another before proceeding (the FATA). | **Exempt compulsory acquisitions and buy-outs following takeover bids** | The Property Council supports reforms that remove the need to obtain FIRB approval following a compulsory acquisition.<br><br>This is a matter beyond the control of the investor, and should be a matter dealt with by the offeror under the takeover rules (if necessary at all). |
| **3.6 Import selected exceptions from Australia's takeovers rules (subject to any necessary modifications)**<br><br>Australian businesses (both listed and unlisted) have mechanisms such as dividend reinvestment plans and pro-rata rights issues that assist in their ongoing capital management strategies. Investors in these businesses will often look to avail themselves of these opportunities as they arise as a means to maintain their stake, reinvest their earnings, or manage their stakes as part of their broader portfolio strategy. Such mechanisms are not considered means by which investors take control of Australian businesses.<br><br>The current framework for both direct investments and substantial interests works on the basis that acquiring once the applicable thresholds are met even one additional share or unit (irrespective of its price), requires prior approval. Those seeking approval on an annual basis generally reflect that they want the ability to make incremental acquisitions which are also of benefit to the Australian business. | **Import selected exceptions from Australia's takeovers rules (subject to any necessary modifications)** | The Property Council supports reforms in this area and suggests that they could go further than currently proposed, as outlined below.<br><br>This also aligns with the "Exemptions for equity issues that do not significantly change percentage holdings" mentioned earlier in this submission.<br><br>For certainty, this proposal should also take account of more than just pro-rata and dividend reinvestment type securities.<br><br>For instance, the takeover provisions specifically extend to managed investment schemes, partly-paid interests and listed bodies that are not companies.<br><br>There should be an alignment to the rules mentioned in the Corporations Act. This would provide certainty. Additionally, it encapsulates a single administrative regime for investors and entities. |

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| For most of these investors, their stake does not significantly increase, and they have no intention to seek control in their own right. With the announced introduction of fees, better targeting of applications is important to maintaining Australia's reputation as an attractive investment destination.<br><br>Chapter 6 of the *Corporations Act 2001* 'Takeovers' provides that certain acquisitions do not trigger a requirement to make a takeover offer (once a 20 per cent holding is reached). Each exception is premised on differing factors (for example, not triggering a change in control, or preapproval by non-related parties in the target). It is proposed to import the following exceptions which are not considered to change control (with potential modifications):<br><br>1. Rights issue (pro-rata): nil modifications proposed (an exemption to compulsory notification of shares already exists in the FATA and it is proposed that this is extended to all securities issues in all circumstances); and<br><br>2. Dividend reinvestment etc.: there will only be negligible changes in percentage holdings unless an investor already holds a significant stake. It is proposed that this exception will be modified so that it is only applicable where the target has their primary market listing in Australia. | | It is also worth considering that convertible notes also be granted an exemption – unless there is a conversion trigger, that form of security is a debt interest (and is dealt with differently for both taxation purposes and under insolvency). This should be specifically excluded under this part of the rules as it has no effect on ownership or control. |
| **3.9 Refine the foreign person definition**<br><br>Since the introduction of the framework, its 'foreign person' definition has been incorporated into other Commonwealth legislation, as well as some State and Territory legislation, as is, or in a modified form. It includes all natural persons not ordinarily resident in Australia and thus can include Australian expatriates who are no longer considered ordinarily resident in Australia. It does not include foreign governments or body politics. | **Consider refinements to the foreign person definition** | The Property Council supports reforms in this area.<br><br>Australian citizens should not be treated as foreign persons, regardless of their place of residence.<br><br>There is no clear policy justification for requiring non-resident citizens to seek FIRB approval for investment in property in Australia. If anything, it makes the system more complicated to administer, adds red tape and unfairly increases costs to Australian citizens.<br><br>States such as Queensland and Victoria have adopted a definition of 'foreign person' which excludes expatriate citizens. We recommend the federal government consider simplifying the definition of 'foreign person' by removing references to place of residence. |

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| | | However, any changes must consider the interaction of this definition with other rules, particularly taxation law (including things like FATCA and the impending Common Reporting Standards from the OECD). |
| **ITEM 4: EXEMPTING PROPOSALS THAT ARE UNLIKELY TO IMPACT THE NATIONAL INTEREST AND INCREASING THE CONSISTENCY OF THE EXEMPTIONS AVAILABLE ACROSS THE DIFFERENT ACQUISITION TYPES** | | |
| **A: Acquisitions of interests in Land including urban land and new land concepts**<br>*Note: In light of the announced changes to the framework for land, existing exemptions and carve-outs will be consolidated and simplified, and their suitability assessed for extension to other land types.* | | |
| **4.2 Fix and update the exemption for passive investments in urban land trusts**<br>The exemption for passive investments by foreign persons in Australian public urban land trusts is no longer operational as a result of obsolete references in the regulation. An interim solution where no action will be taken when a foreign person acquires a passive interest (10 per cent threshold for listed; 5 per cent for others) in a real estate investment trust or property trust in certain circumstances is in place. It is proposed to legislate this subject to any required minor amendments.<br>It is not being proposed to legislate the 15 per cent threshold of the obsolete exemption as the percentages for passive investment and (potential) control do not need to be mutually exclusive. As the framework also deals with collective control, the passive ceiling proposed is lower than the single person control threshold to reduce risks to the national interest arising from any collective foreign control. | **Legislate the interim arrangements for passive investments in land trusts (subject to any required minor modifications)** | The Property Council supports consultation on this issue in principle.<br>Passive investment in unlisted entities is the most common form of foreign investment in Australia.<br>The majority of these investments are made by pension funds and sovereign wealth funds, with long-hold strategies to deliver income return on portfolios – in effect, these investors are the foreign equivalent to Australia's superannuation funds and the Future Fund.<br>This is a critical source of investment, and typically has non-redemption periods of 5-7 years (if not longer) and are designed specifically for passive investment.<br>Alignment needs to occur on any rule for passive investment in property trusts with the rules for illiquid schemes in the Corporations Act, including thresholds for "control". For certainty, the same % should in fact be specified in this context to provide certainty (capped at 20% to be consistent with the remainder of these rules). |
| **4.3 Broaden the scope of exemptions for Australian urban land corporations and trusts**<br>Some acquisitions of interests in urban land corporations and trusts would be exempt if the interest was acquired directly.<br>• For example, exemptions such as the $55 million developed commercial property threshold do not flow through.<br>• Pro-rata unit issues are not exempt. | **Broaden the scope of exemptions for Australian land corporations and trusts** | The Property Council believes there is significant merit in further consideration of the exemptions being broadened, as there are limited circumstances (if any) where commercial property is "sensitive"; and further, it is noted that there have been very few foreign investments into commercial real estate not approved by FIRB during the immediate prior 15 years. |

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| There is no discernible policy rational to distinguish between some direct and indirect acquisitions. It is proposed to extend the current exemptions to interests acquired indirectly through urban land corporations and trusts. | | Further reforms are also required to:<br>• Clearly specify what is defined as "sensitive" and create list of these interests, rather than creating exhaustive list of exemptions (see 4.4). This will provide certainty to investors, decrease compliance costs, free up valuable time and resources for FIRB (not needing to maintain a register of exemptions) and focus the due diligence process more cohesively for future developments, investment and decisions.<br>• Consider the exemption of a change of legal ownership (rather than beneficial) of property owned by an Australia urban land trust. |
| **4.4 Raise the developed commercial real estate screening threshold for some (non-sensitive) commercial real estate from $55 million to $252 million (indexed)**<br>The higher $1,094 million (indexed) threshold applies to developed commercial real estate for relevant trade agreement partners (non-government investors from Chile, Japan, Korea, New Zealand and the United States). For all other non-government investors a $55 million (indexed) threshold applies. Until December 2006, this threshold was aligned with the general business threshold.<br>While developed commercial real estate is not defined in the Act, it is taken to be accommodation facilities (or parts thereof) and non-residential commercial land. It can include operational mines and infrastructure that may be considered sensitive or critical such as power stations or toll roads. It is proposed that the $252 million threshold would apply to accommodation facilities, office and industrial buildings, but not mines and critical infrastructure.<br>Definitions of various land types such as | **Raise the developed commercial real estate screening threshold for non-sensitive commercial real estate from $55 million to $252 million (indexed)** | The Property Council supports further consideration of an increase in the threshold for developed commercial real estate, and supports indexation of the threshold to enable change over time.<br>This initiative is welcomed by the sector.<br>As per 4.3 above, a list of the types of commercial real estate defined as sensitive, rather than complex exclusions for non-sensitive real estate, would improve compliance by investors, and reduce the cost and administrative/operational burden for government.<br>The property industry considers there would be very few (if any) sensitive commercial real estate transactions categories.<br>It also improves the alignment between government policy and data collection by agencies. In doing so it also provides clear and impartial justification for decisions made on a case-by-case basis – thereby removing much of the perceived basis |

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| developed commercial real estate are subject to further consideration. | | of criticism of Ministerial decisions. |
| **B: Foreign Government Investors** | | |
| **4.5 Adjust definition of 'foreign government investor' to reflect the proposed new single foreign person control threshold of 20 per cent**<br><br>Currently, foreign government investors include entities in which governments, their agencies or related entities from a single foreign country have a 15 per cent interest (40 per cent for multiple foreign countries).<br><br>It is proposed that the 15 per cent threshold be increased to 20 per cent to maintain alignment with the 20 per cent threshold proposed for foreign persons generally (see 3.1). This may provide some relief to entities that are currently captured, but are not controlled by foreign governments.<br><br>As part of modernisation options, further consideration will be given to disregarding specific interests when applying the percentage tests. | **Adjust definition of 'foreign government investor' to reflect the proposed new single foreign person control threshold of 20 per cent** | The Property Council supports reforms in this area, however for certainty, this needs to address whether sovereign wealth funds (SWFs) should be included in this definition.<br><br>The Property Council proposes that SWFs are included in this definition. SWFs are a major source of investment in Australia, particularly in real estate trusts, and, being long-term passive investors, provide a longstanding source of diversification that has protected Australian investors and companies in prior periods of major economic upheaval.<br><br>Moreover, SWFs are the equivalent of the Future Fund in Australia, and whilst they may technically be considered to be under government control in their local jurisdiction, they are structure most commonly with a form of governing body or board that has an equivalent structure and charter to that used here.<br><br>Such mutual acknowledgment of governance and compliance arrangements is not without precedent, given it is a core tenant of IOSCO and currently used for cross-border investment flows in financial services. |
| **4.6 Extend some existing exemptions to foreign government investors**<br><br>Some existing exemptions for non-government investors could be extended to foreign government investors. For example:<br>• pro-rata capital raisings; and<br>• clarify that acquisitions of securities in Australian urban land corporations and trusts only need approval if the acquisition constitutes a 'direct investment' (that is, 10 per cent or more, or the ability to control).<br><br>Exemptions would not be extended where they may raise national security concerns. | **Extend some existing exemptions to foreign government investors** | The Property Council supports this option. |

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| **4.7 Annual program facility for interests in land for foreign government investors (but case-by-case issue)**<br><br>Currently, all foreign government investors must get prior approval before acquiring an interest in land. Pre-approval has been provided to varying degrees over time on a case-by-case basis depending on who the investor is and their intended purchases. Under an explicit power to allow for annual programs, a certificate could limit the transactions covered and impose legally enforceable conditions.<br><br>While reducing compliance costs for both the investor and the Government, annual programs assist in levelling the playing field between foreign and non-foreign persons. Reductions in investors costs can also be significant if investors undertakes many small acquisitions.<br><br>In addition to item 4.6, it is proposed that an annual program (pre-approval) facility be formalised to minimise the compliance burden arising from certain land acquisitions (for example, interests acquired for pipelines) on the understanding the issue of such annual programs will be considered on a case-by-case basis. | **Introduce an annual program facility for interests in land for foreign government investors** | The Property Council supports reforms in this area, however it should be limited to instances of new development, and exclude acquisition of interests in developed land.<br><br>There are significant rules already dealing with developed real estate. With 20% caps on holdings and the correlating requirements for notices for listed securities (covering trusts and company structures on ASX), this seems unnecessary unless it focusses on new development (urban land), rural land investment and anything in the infrastructure greenfield or brownfield development space.<br><br>Further, as per the comments provided at 4.1, there should be a single, aligned approach to the operation of annual programs.<br><br>There is also a lack of clarity about how this might be administered. For example, what is meant by "case-by-case"? Investors, albeit foreign governments, require certainty. Further details and consultation should be provided if there are to be particular criteria.<br><br>There must be consideration of the Ministerial case-by-case decision process, as this can be seen by foreign investors in a negative light – including being politicised by incumbent political party, inequitable treatment based on nationality, culture, language, religion, etc.<br><br>The case-by-case consideration should deal with decisions that are focussed on national security issues. "National interest" matters should be known prior to application, as government (federal or state) will have made an announcement about major projects and infrastructure works far in advance of any potential investment structure needing consideration. |

| ITEM 5: FRAMEWORK TO APPLY EQUALLY IRRESPECTIVE OF TRANSACTION STRUCTURING<br>• **Reflective of the framework's age, it is unduly focussed on shares, rather than equally dealing with other securities such as units.**<br>• **The framework also results in inconsistent outcomes between some direct and indirect acquisitions, with no strong discernible policy rational for such differences (for example, exempt if direct but requires approval if not).** | | |
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| **5.1 Framework to apply equally irrespective of transaction structuring**<br><br>Due to its age, the Act focusses on share acquisitions. While the Act addresses units in the urban land framework legislated in 1989, and there have been some ad-hoc changes since then, the issue has not been comprehensively addressed. It is proposed that this package will address this issue in a manner that would simplify the framework through greater consistency, while also ensuring the legislation cannot be easily avoided.<br><br>The intention is that exemptions will also apply equally irrespective of the transaction structuring, unless there is policy or administrative rationale to discriminate (for example, see also 4.1 and 6.2). | **Framework to apply equally irrespective of transaction structuring** | The Property Council supports this option. Greater consistency and simplicity are certainly welcome. |
| **ITEM 6: OTHER ISSUES** | | |
| **6.1 Remove investments in financial sector companies from the foreign investment framework for all investors**<br><br>Foreign investors can require the Treasurer's approval under both the *Foreign Acquisitions and Takeovers Act 1975* and the *Financial Sector (Shareholdings) Act 1998* for the same investment (with both decisions made on national interest grounds). However, non-government investors from Chile, Japan, Korea, New Zealand and the United States do not need to obtain foreign investment approval for investments into financial sector companies because of trade agreement commitments (the *Financial Sector (Shareholdings) Act 1998* still applies). The current double-up for non-trade agreement investors adds cost, time and additional red tape. | **Remove investments in financial sector companies from the framework (the *Financial Sector (Shareholdings) Act 1998* would still apply)** | The Property Council supports this option. Removing the double-up for non-trade agreement investors avoids unnecessary costs, time and red tape. |
| **6.2 Tidy-up the legislation and Policy**<br><br>A general tidy-up is proposed to remove obsolete provisions and provide more clarity. Examples covered by this item include:<br><br>• Legislate some existing administrative | **Tidy-up the legislation and Policy** | The Property Council supports this option. Bringing the legislation up to date ensuring a consistent approach will provide investors with greater clarity. |

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| approaches (for example, approval validity, impact of change in residency/citizenship on conditions);<br>• Have 'foreign person' defined once (there are numerous instances of a foreign person definition for a specific provision in the Act that has been supplemented elsewhere in the Act so that it is the same definition of foreign person throughout the Act), unless there is a strong policy rationale to do otherwise;<br>• Remove potential double counting of subsidiary assets when determining access to the higher threshold;<br>• Remove unintended consequence of 2010 amendments that it is possibly now an offence not to notify offshore transactions;<br>• Ensure consistent use of terms such as interests in shares and units; and<br>• Align definitions with whole-of-government definitions (for example, charity definition), unless there is a strong policy rationale to do otherwise. | | |

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# Submission to the 2015 Options Paper – Strengthening Australia's Foreign Investment Framework

## A foreign investment regime that supports housing construction and jobs

20 March 2015

# Contents

# Introduction

## Property: a major contributor to the Australian economy

The property industry creates prosperity, jobs and strong communities.

The industry is a major driver of the Australian economy:

- While Australia is only two per cent of the world economy, it accounts for five per cent of global property investment activity.
- Property and construction employs 1.3 million Australians, more than mining and manufacturing combined.
- It supports the wealth and prosperity of over 11.5 million Australians through direct and indirect property investment and superannuation.
- It accounts for 11.5% of GDP, one ninth of the country's total economic activity and adds about $148 billion dollars per year to Australia's economic bottom line.
- Property is the nation's largest collective taxpayer, contributing $34 billion in real estate specific taxes alone (before counting our share of corporate tax and GST).
- The industry also creates about $219 billion in flow on work to supporting industries each year.
- Each dollar created by property and construction feeds capital to 40 other sectors and recirculates around the economy several times, driving activity related to the initial project.

In the wake of the sharp downturn in mining investment and falling commodity prices, property and construction is a shining light of economic activity. It is critical that this continues.

Property plays a unique role in the lives of everyday Australians. It forms a major part of the household balance sheet, whether through the family home, an investment property, the individual superannuation allocated in commercial investment, or those who invest directly in real estate investment trusts.

The property industry is the vital enabler of Australia's growing population and economic expansion. Australia's fast growing population further highlights the central importance of a strong property and construction sector positioned to meet the nation's needs.

## Executive summary

The Property Council of Australia believes the new fees proposed in the Federal Government's Options Paper – Strengthening Australia's Foreign Investment Framework (the Options Paper) – undermine the Government's own policy of encouraging foreign investment into new housing construction, are completely unjustified in relation to commercial property investments, and are set to raise far more revenue than required.

The policy risks undermining Australia's current strong housing construction sector, which is currently a major driver of national economic growth and employment.

The Options Paper proposes a fee structure that:

- will in effect impose a tax or tariff on foreign investment, negatively impacting investor confidence in the Australian market;
- at the minimum rate of $5000 will be detrimental to foreign investment in new housing construction, the majority of which occurs in the price sensitive $600,000 to $800,000 range. The fees should be pared back to between $500 and $1500 as proposed by the Parliamentary inquiry;
- will undermine housing affordability by restricting foreign investment that currently provides valuable capital for the development of new housing supply – supply that still lags far behind demand in key markets;
- has no justification in relation to investment in commercial property, where the Government acknowledges there are no compliance concerns;
- will directly impact Foreign Investment Review Board (FIRB) approved off-the-plan projects by increasing the development administration and may result in less developments using this approach, thereby hindering supply;
- could flow through to up to the 97 per cent of Australian homebuyers in greenfields as developers are charged fees on applications to purchase land for development; and
- will raise revenues of over $200 million – way beyond what is required for the stated purpose – more than the budget of the ACCC ($180m) and half of ASIO's budget ($435 million) and cannot be justified by the costs of administration, enforcement or compliance activities.

The Property Council fully supports a properly regulated market that polices illegal foreign investment in residential real estate. However, it is critical that investment which facilitates new housing supply is not compromised, and that a key focus of Government is resourcing better collection of data on foreign investment into Australia.

It is imperative that the Federal Government strike the right balance between a data compilation, monitoring and compliance regime that penalises non-compliance with

Australia's foreign investment laws but does not act as a disincentive to the flow of legitimate foreign capital into the market.

We submit that a Residential Investment Data Repository needs to be established to provide far more effective insight into housing investment and supply issues. It could be funded by an administrative fee on foreign investment applications, set at more modest levels (by way of comparison, the former Housing Supply Council cost $2 million and provided valuable unique national data on actual and forecast housing supply). This would provide the Government, RBA, regulators and the community with a broader set of housing related information at a time when this is critical to the economy.

An analysis of key data and market trends show that even the lowest proposed fee of $5,000 will have an impact on the market due to:

- the reliance of multi-residential apartment projects on offshore capital, particularly through pre-sales of up to 20-25 per cent, without which developments may not proceed;
- reducing the growing market share of multi-unit development, particularly in the larger cities, which has grown as a proportion from around 20-30 per cent to as much as 50 per cent[1]; and
- slowing the efficiency of growth in multi-residential in infill areas, which maximise the use of existing infrastructure and proximity to jobs, to the benefit of generations to come.

The Property Council supports the principle of a modest fee regime to fund better data collection and monitoring. Subsequent compliance and enforcement activities should be targeted to allow the effective policing of any illegal foreign purchases of existing residential properties.

However it is important that any fees reflect the true cost of administration, as recommended by the Parliamentary Inquiry into these issues, rather than the proposed seemingly arbitrary levels.

We strongly urge the Government to abandon the proposed fee and compliance structure in favour of sound, evidence-based policy. Failing to do so will, we believe, have significant negative impacts on a sector that is delivering crucial economic growth, employment and housing affordability.

Sydney is already on track to have 190,000 less homes than will be needed in the next 10 years[2]. The policy proposal, as it currently stands, will see that figure climb and more Australians locked out of the housing market.

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[1] HIA Economics, The Changing Composition of Australia's New Housing Mix, March 2015 - http://hia.com.au/~/media/HIA%20Website/Files/IndustryBusiness/Economic/discussion%20papers/ChangingCompositionAustraliasNewHousingMix.ashx

[2] Missing the Mark: An audit of Housing Targets by MacroPlanDimasi commissioned by the Property Council of Australia February 2015, http://www.propertyoz.com.au/nsw/library/NSWHOUSINGTARGETREPORT_0.pdf

It is critical that we sustain strong levels of construction activity, particularly in the residential sector if we are to have any hope of meeting increasing demand, ensuring affordability and reaping the economic, social and employment benefits this sector provides for the nation.

This submission provides a raft of recommendations designed to:

- enable foreign investment in new residential real estate to continue to underpin record building activity in Australia;
- focus the monitoring, data analysis, compliance and enforcement capabilities of FIRB and the ATO on foreign investment in existing residential real estate;
- establish an appropriate and balanced application fee framework that reflect the cost of funding the monitoring, data analysis, compliance and enforcement capabilities of FIRB and the ATO in existing stock; and
- streamline the efficiency of foreign investment application arrangements.

# THE ECONOMIC CASE - FOREIGN INVESTMENT BOOSTS HOUSING SUPPLY

## The Treasury Submission to the Foreign Investment Inquiry 23 May, 2014

Treasury noted an absence of data, however provided the following general observations on the overall economic impacts of foreign investment in residential real estate:

- Foreign investment from non-residents increases the demand for, and supply of, housing stock.
- In the short-term, any increase in demand, is likely to put upward pressure on dwelling prices and the cost of services related to the construction sector (including, at the margin, higher wage levels). The extent of the price rise attributable to foreign demand is difficult to isolate from other factors.
- This increased demand for housing stock should encourage higher levels of housing supply, albeit with a lag, with benefits for the construction industry, employment and growth. As dwelling completions catch up to demand, the addition of new supply would be expected to have a moderating influence on dwelling prices.
- In the medium-term, there is a likelihood of downward pressure on housing rental costs from the increase in properties available for rent, which may help address tightness in the rental market (the rental vacancy rate is very low and has averaged 2.3 per cent over the last decade).
- Foreign purchases also increase government revenues, in the form of stamp duties and other taxes, and from the overall higher economic growth that flows from the additional investment.

Treasury Analysis –

***"While Australia has recently experienced rising real estate prices due to strong demand, this follows a period where real house prices in Australia did not experience significant increases, notwithstanding strong population growth. Some of the longer-term benefits of this increased demand are beginning to become apparent with the translation of higher building approvals into increasing building commencements."***

## ABS Building Approvals release - March 3 2015

ABS Building Approvals set a new record for the year ending January 2015 with total national approvals climbing to 203,182 in seasonally adjusted terms, up 30,000 approvals on recent years.

Property Council analysis-

> ***"Outside of the ACT and NT, there was a positive upswing across the states in trend terms. NSW and Victoria continue to be the stand out performers for new approvals, however there has been across the board improvements in most regions. We are witnessing record activity in terms of approvals, and this points to 2015 being a year of high activity in residential construction. This translates into more jobs and increased economic activity."***

## Reserve Bank of Australia Statement - 3 March 2015.

The RBA provides an update and support to the Treasury submissions in its most recent statement:

> ***"The current strength of housing construction and the increase in housing prices were expected to provide a measure of support for consumption. Housing price growth remained strongest in Sydney and to a lesser extent Melbourne, while price rises in other parts of the country had been more modest and prices had even declined in some cities recently. A range of indicators, including residential building approvals, suggested further strong growth of dwelling investment in the near term."***

Connecting this effort to a broader residential supply monitor and data repository will help understand the trends, improve housing affordability and to grow the economy. It will also help support decisions that continue to see supply at required levels into the future.

## 1. Impact of fees on housing construction

Longstanding government policy is to encourage foreign investment in new housing construction to support Australian jobs and economic activity and to facilitate the supply of new housing for all Australians.

Residential building activity now sits at record levels, with actual 2014 housing starts at 193,000 (source: ABS cat. no.8452.0). This is around 40,000 homes above average yearly build levels and at least 30,000 homes above previous residential forecasts for 2014.

Foreign investment plays an important role in providing capital for the development of new housing, particularly in markets where demand still outstrips supply. Foreign investment into new residential development allows thousands of new homes to be delivered, going some way to reducing the increasing prices pressures and ensuring housing affordability for Australians.

Evidence tendered by Residential Development Council members, some of Australia's biggest developers, shows that on average, 20-25 per cent of new multi-residential dwellings are sold to offshore purchasers. This investment underpins new developments, and allows Australian purchasers access to housing supply that would otherwise not exist.

**Research by Investorist recently found that the majority of Chinese investors are seeking to purchase high yield properties for under $500,000[3]. Evidence from Residential Development Council members suggests that the majority of foreign investor purchases fall between $400,000 and $800,000.**

This data shows that:

- this customer base is likely to be sensitive to an additional fee of $5000 per application;
- any deterrent effect will most adversely be felt in this mid-price point range where new supply is most urgently needed;
- any fall of in supply in this price range, due to a drop off in the foreign capital required to get new projects off the ground, will adversely affect availability and therefore affordability for the first home buyer market in particular.

[3] Investorist.com, China 2015 International Property Outlook, http://info.investorist.com/china-2015-outlook-report/

As outlined in our submission to the House Standing Committee on Economics Inquiry into foreign investment in residential real estate, foreign investment plays a critical role in leveraging additional housing into the domestic residential market with every new home that a foreign investor purchases actually enabling up to four other homes to be built for Australians.

**Foreign capital provides the "critical mass" to get new developments of the ground and bring new supply to the market for all Australians.**

**The pre-commitment from foreign buyers shores up developments that potentially would not proceed if reliant on the domestic pre-commitment alone.**

A major driver of new build investment by foreign persons is demand for housing from international students.

International education is Australia's third largest export. Unbeknownst to many, Australia sits alongside the UK and Germany as a top three player in the Vocational Education and Training area. In cities such as Melbourne, international students are helping to redefine the reputations of Australian universities, and reposition this country as a destination for education excellence.

But each student needs a place to live and the increase in demand places increasing pressure on the existing stock.

Foreign purchases of new stock not only provide capital for development, but add to the rental stock, particularly in our major cities, which helps to keep downward pressure on rents and meet demand.

The construction boost provided by foreign investment is a substantial driver of economic activity and supports considerable employment across the construction and manufacturing sectors. It is also a source of significant additional tax revenue at federal and state levels.

At this level of activity there are Australian manufacturing plants that have to consider running additional shifts and firing up a second line or plant in order to meet demand. Scale activity provides the opportunity to increase profitability by maximising returns from fixed assets or even better, to upgrade to more efficient new plant, and provides considerable benefits to employment and economic activity.

Foreign investment boosts new housing construction, which in turn creates local jobs.

Every new home, especially in a subdivision project, provides work for up to 40 other trades and subcontractors, and is the lifeblood of small communities.

As outlined in our submissions to the Senate Inquiry, foreign investment plays a critical role in leveraging additional housing into the domestic residential market with every new home that a foreign investor purchases actually enabling up to four other homes to be built for Australians. The pre-commitment from foreign buyers shores up developments that potentially would not proceed if reliant on the domestic pre-commitment alone.

Foreign investment, be it from the UK, Canada or China, underpins new residential housing supply in Australia.

The proposed introduction of excessive new fees on foreign investment in new residential housing will jeopardise housing supply, thereby exacerbating existing shortages and driving up house prices. The proposed new tax will act as a deterrent to foreign investment and send the wrong signal to potential investors.

## 1.1 Fees for purchases of newly constructed housing

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| ***Recommendation*** | Implement a single, transparent, administration-only fee on foreign investment applications. Fees should not exceed $1000 per application for new residential stock, however can be higher for purchases of existing housing stock. |
| ***Why is this necessary?*** | The Government's Options Paper states that the introduction of fees for foreign investment applications is to be in line with a "user pays system". However the fees proposed are excessive, and will dissuade some foreign investment in new residential construction.<br><br>Similar fees, particularly at the levels currently proposed, have only been introduced in situations where Government has sought to limit the number of applications. These are not the actions of a government that is open to foreign investment.<br><br>The Property Council agrees with the need for better data collection regarding foreign investment to allow policy positions to be formed based on clear evidence (see section 5). We accept that there is a cost associated with this, and that given the Federal budget constraints, there may be a modest application fee required to ensure that this can be done in a sustainable way. We do not accept that the fees proposed in the Options Paper are appropriate and we are concerned with the impact of fees on new housing construction.<br><br>Equally, we have consistently stated that compliance with the FIRB rules is critically important and we support proper enforcement. However, compliance costs should not be used as a stalking horse for the introduction of large new fees that mirror our most inefficient taxes. |

## 1.2 Exemptions – annual program applications and vacant land purchases

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| ***Recommendation*** | Exempt annual program applications and the purchase of vacant land from the requirement to apply for FIRB approval or pay FIRB application fees. |
| ***Why is this necessary?*** | The Government's stated policy is that foreign investment into residential real estate should increase Australia's housing stock. The Property Council unequivocally supports this policy. Increasing housing supply is the most effective way to reduce the pressure on housing affordability, and creates benefits for the entire community through employment generation, taxation revenues and greater access to housing for Australians.<br><br>Under the proposed fees and current FIRB rule definitions, a situation is created whereby companies that are considered Australian for all other purposes could be liable to pay significant application fees when they purchase land for development of housing. These include the major developers of housing in Australia.<br><br>These developers purchase large land holdings, particularly in greenfield growth areas, and are currently required to submit applications to FIRB on the basis that they are considered 'foreign persons' under the FIRB definitions. The majority of these entities are able to access FIRB 'annual programs' which arguably streamline the process and reduce the administrative burden for both parties. There is no detail in the Options Paper of costs for applications made through 'annual programs', however the Property Council recommends the system be exempt from increased fees, and continue to operate as it currently does.<br><br>By doing so, the potential risk that Australian home buyers will be in effect paying foreign investment fees can be avoided.<br><br>Although greenfields developments that are delivered at the scale contemplated by annual program applications tend to have less than three per cent foreign investment component, the Options Paper fee proposal would result in an additional costs added to the project for the purchase of vacant land. These will ultimately be borne by the approximately 97 per cent of Australian purchases of greenfield housing stock, many of whom are first homebuyers, and could be as high as $750 per home.<br><br>Instead of increasing affordability, these fees, if implemented, will directly add to the costs for Australians purchasing a home. |

The focus of these charges should be on the ultimate ownership of residential property, and should therefore not be levied on vacant land that is purchased by developers, developed, and ultimately on-sold to purchasers.

By exempting vacant land purchases from the application process and fee requirements, the government will not be further taxing Australian homebuyers, developers will be able to continue to add to the housing stock and reduce affordability pressures, and the government will remain able to monitor foreign investment by requiring applications at the point at which genuinely foreign persons seek to purchase properties.

## 1.3 Refund of fees

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| ***Recommendation*** | Establish a framework whereby a full or partial refund of any application fee is provided to foreign investors when the purchase requiring the application does not go ahead. |
| ***Why is this necessary?*** | The issue of refunds on applications fees is particularly pertinent for developers applying for advanced off-the-plan certificates. The Options Paper proposes that the fee for such certificates be calculated by multiplying the unreasonably high rates for individual residential real estate properties by the number of units sold to foreign purchasers. Not only is the upfront cost of such a proposal excessive and likely to dissuade developers from using the scheme entirely, as proposed it is unworkable for situations where the volume of pre-sale contracts requiring approval (and subject to fees) do not reflect final settlements.<br><br>Ostensibly, the purpose of advanced off-the-plan certificates is to streamline the process for developers and foreign purchasers, however it has the added effect of reducing the administrative burden on FIRB of processing individual applications from purchasers. This means that the collection of a fee, for administration, compliance and enforcement on an application for a purchase which is never made is unjustified – there would, in effect, be nothing to administer, monitor or ensure is compliant.<br><br>Additionally, in many instances entities which are currently deemed 'foreign persons' under the FIRB rules make applications to FIRB for real estate which is ultimately then not purchased. For example, large development and urban renewal sites or commercial real estate will be of interest to many developers, most of whom will require FIRB approval for purchase and therefore will have lodged applications. However, ultimately, only one prospective purchaser will be successful, which renders the other applications void. |

Similar to the situation outlined above regarding advanced off-the-plan certificates, those applicants who did not purchase real estate would not be adding to FIRB's administration, monitoring or enforcement workload. Proof of purchase can easily be demonstrated, and therefore the application fees can be fully or partially refunded for those applications where purchases did not take place.

## 1.4 Advanced off-the-plan certificates

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| ***Recommendation*** | Do not impose fees on advanced off-the-plan certificate applications beyond a clear administration-only fee. |
| ***Why is this necessary?*** | Advanced off-the-plan certificates allow developers to access a critical source of funding for developments through pre-sales to foreign investors. Without this, it is possible that some projects may not be able to proceed, and many certainly would not proceed as quickly.<br><br>Importantly, the advanced off-the-plan certificate process also reduces the administrative burden on FIRB and streamlines processes for developers and foreign purchasers alike.<br><br>The proposal to charge what are excessive, up-front fees for developers is unjustified, and, in combination with the increased risk of penalties for non-compliance, will see developers be less likely to use this process.<br><br>However, developers will continue to market and sell a proportion of new stock to foreign purchasers. This will result in a significant increase in the number of applications made to FIRB by foreign purchasers, as each foreign purchase will require a separate application. It will also increase the delays faced by developers in concluding sales.<br><br>It may also alter the feasibility of projects and in some circumstances projects that otherwise would go ahead, may not – an outcome entirely at odds with the government's desire to improve housing supply and affordability.<br><br>For example, in an average development of 500 apartments, approximately 100 – 125 will be marketed and potentially sold to foreign purchasers. On average these apartments would be sold between $500,000 and $800,000.<br><br>Under the proposed fee regime, the developer would be required to pay a fee of $625,000 for the advanced off-the-plan certificates.<br><br>This is an excessively large fee, and as per the Options Paper would be required to be paid by the developer, in |

full, prior to them having commenced any sales.

The implications of such requirements for financing and feasibility of project may cause developers to no longer use the advanced off-the-plan certificate application process.

In 2012-13 there were 50 FIRB approved off the plan developments, and an expectation of around 75 for the 2013-14 year. With each 100 dwelling plus development having around 35 per cent of the development coming from streamlined FIRB approval and the sale of the dwelling, it would make sense to support rather than disincentivise this approach.

This approach has enabled many new dwellings to be built for Australians.

A more appropriate approach would be to charge developers a nominal application fee that is directly linked to the costs associated with processing the advanced off-the-plan certificate application. This would also ensure that the benefits to industry and government of a simplified and streamlined process are not lost.

## 2. No rationale for fees on commercial property purchases

Australia is in a prime position to capitalise on the opportunities open to us from the rapid growth and development in our region.

Surveys indicate that over the next three years Asian capital will increasingly look to developed economies in the region for long term property investment. This means that Australia is in direct competition with Singapore, Hong Kong, and Japan for capital to drive growth and prosperity.

Since the Global Financial Crisis, Australia's property industry has increasingly relied on international capital to support projects and infrastructure that domestic investors do not or cannot fund.

Australia's property market currently relies heavily on patient, long-term global capital to finance major investments, including world-class office buildings and regional shopping centres.

While Australia is only two per cent of the world economy, it accounts for five per cent of global property investment activity.

Australia has been an attractive destination for global capital because of our relatively solid and stable economic growth since the Global Financial Crisis and the transparency of our markets and legal system.

Australia has a $670 billion property investment industry that relies on international capital that is highly sensitive to Government sentiment.

**Without global capital, Australia will be unable to realise its infrastructure and city building ambitions.**

Government has previously stated that it is open for business and welcomes international capital, however, unjustifiably high fees send a conflicting message.

The proposed fee is without justification. In many economies around the world, similar tariffs, fees and taxes on foreign investment is used as a pricing signal that the government of the day wants to discourage international investment.

However, the official Australia Government policy remains to welcome such foreign investment with open arms. Indeed, the Government has made tremendous progress in negotiating vital new trade agreements to further open Australia to the world, and the world to Australia.

Given the Government has acknowledged that there is no material evidence of non-compliance or concerns around foreign investment in commercial real estate, the proposed fee of $25,000 per application is unjustifiable. It is in no way reflective of the costs required for administration. More importantly, it can also unfortunately be misconstrued by investors as a signal their money is not welcome.

The impact of such a charge will be to simply encourage investors to put an increased "risk premium" on Australian transactions. In effect, this erodes the value of commercial property investments across the economy.

Any administrative fee must be an actual administrative fee, transparent in its application, with a clear nexus to the cost of the services provided.

## 2.1 Quantum of fees for applications – commercial real estate

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| ***Recommendation*** | Exempt commercial real estate purchases from the requirement to pay FIRB application fees beyond clearly justified administrative cost recovery charges. |
| ***Why is this necessary?*** | In a highly competitive global market for foreign investment, it is important that the Government take an evidence-based approach to policy making in this area in order to maintain investor confidence in the Australian market, and to ensure that foreign trade obligations are met.<br><br>It is important that any fee structure is transparent and reflective of the cost of administering an application process. If not, it can be construed as a tax on foreign investment, and will serve to inadvertently discourage foreign investment<br><br>There is no justification for the quantum of fees proposed in the Options Paper, and there is also an acknowledgement from the Government that there is no material evidence of non-compliance regarding foreign investment in commercial real estate. The excessively high fees are therefore unjustifiable, and will limit Australia's competitiveness in the market for international capital investment. |

## 3. Residential investment data repository

The House of Representatives Standing Committee on Economics inquiry into foreign investment in residential real estate found significant gaps in the data available to policy makers on the levels of foreign residential property investment in Australia.

The Options Paper likewise acknowledges that there are limitations to the information currently recorded on foreign investment in Australia.

The Property Council supports these information gaps being addressed. We also believe this presents an opportunity to provide a broader array of housing related information to the Government, RBA, regulators and the community by broadening the ambit of this initiative. The lack of quality data, particularly in relation to housing supply, has been widely recognised. This information is of increasing importance as housing related issues feature increasingly prominently in the economy.

The Property Council recommends that these information gaps be addressed through a new residential investment and supply data repository. This repository would:

- track foreign investment if they come off record levels and the impact on supply alongside other variables such as international education;
- analyse the established housing market and the impact it has on the performance and development of new house and land product;
- analyse renter, first homebuyer, owner-occupier, senior and domestic activity in the residential market;
- encourage both private sector and government land activation to support residential development pipelines into the future;
- track Local Government land release strategic planning;
- support appropriate provision of urban infrastructure which grows the economy; and
- assist decision makers to understand market conditions for national greenfield corridors and the sub markets in which they operate.

The Residential investment data repository would work closely with existing bodies such as ABS, APRA, RBA, Productivity Commission, Australian Housing and Urban Research Institute (AHURI), State and Territory land registry offices, and any relevant private sector firms.

This additional information objective would come at a modest cost in the context of the revenues generated from FIRB application fees. By way of reference, the well-credentialed Housing Supply Council operated on a $2 million budget.

## 4. Compliance and enforcement

The Property Council supports strengthening enforcement of the existing FIRB regulatory system and backs the concept of bolstering FIRB resources for more effective data collection, compliance and enforcement activities.

However, it is important to keep these matters in perspective. On available FIRB data, the Residential Development Council forecasts that foreign investment will make up only a small proportion of all purchases of new Australian residential real estate, less than 10 per cent of all sales in the 2013-14 financial year.

Purchases by temporary residents are even smaller.

**Only 5,091 applications to purchase a property by a temporary resident were made in 2012-13. The forecasts expect purchases of existing stock by temporary residents to be around 7,200 for the 2013-14 period, which is still low. This represents less than 1.5 per cent of all property sales.**

**Greater monitoring of the sales of existing stock is where community concern is centred and resources are needed to monitor and enforce the rules.**

There has been much criticism of FIRB's history of compliance and enforcement activities. Almost all such criticism has been based on the purchase of existing homes by foreign persons, and this is where the majority of future monitoring, compliance and enforcement activity should be focussed, with the subsequent additional costs to FIRB and the ATO.

Indisputably, additional resources for FIRB and the ATO are needed to ensure complete and accurate data is collected, and to shed light on the temporary resident purchase volumes, (see section 4). If foreign purchasing of existing stock has been occurring in breach of FIRB rules, then these rules and their penalties need to be applied vigorously.

Property Council would submit that any issue with non-compliance of rules on the sale on existing residential real estate should not impact on investment in new residential real estate.

The investment in urgently needed new supply and new housing development should not be penalised.

Similarly, the Options Paper states that there is limited evidence to suggest non-compliance in the area of commercial real estate, and yet there is a proposal to expand the penalties and enforcement activities in this area too.

As it stands, the task of monitoring transactions and the enforcement of the FIRB rules is made that much harder and more expensive by the fact that the current rules are not sufficiently targeted to specific areas of concern.

Many commercial investments have no 'national interest' component and are valuable to Australia precisely because they are investments traded on the widest possible market. Similarly Government is clear in its desire to encourage investment in developments that increase new residential supply without adding to demand.

Both of these are examples where an alternative approach could be considered by Government, one that establishes a streamlined processes to 'register' a foreign investment transaction rather than the delays and costs associated with an essentially unnecessary 'approval' process.

There are also investors who are frequent FIRB applicants that represent a lower compliance risk for FIRB such as widely held listed trusts based in Australia that invest and develop for return and create supply.

Applications can be further streamlined by identifying these applicants and allowing an expedited application process for commercial and specific residential asset types that reduces administration and compliance for the FIRB.

Any reforms that strip out unnecessary red tape will shorten delays, help investors make timely investment decisions and help more efficiently target FIRB's monitoring and enforcement initiatives.

Importantly, Government can enhance compliance by creating clear, codified guidelines regarding the nature of investments that are and are not considered to be in the 'national interest'. Simple, transparent rules improve compliance, simplify monitoring and also diffuse potential criticism of Government that the rules are applied arbitrarily.

A simple solution that will aid compliance is an education campaign to ensure that potential applicants and their advisors know and understand the rules and implications of non-compliance.

## 4.1 Streamline and better target FIRB processes

***Recommendations***

1) Enforce the rules as they currently stand;
2) Implement a higher fee for applications by foreign persons to purchase existing housing stock compared to purchases of new stock, given the additional administrative and enforcement requirements posed;
3) Implement an automatic approval process for commercial investment applications that have no national interest component;
4) Codify the type of investments that are contrary to the national interest to make sure there is a clear and

transparent decision process;

5) In addition to existing annual approval limits, implement a streamlined “VIP” process for regular, low risk FIRB applicants that expedites the process.

6) Develop and deliver an education campaign to boost knowledge and understanding of the rules within advisor and agent circles.

# 5. Penalty regimes

The Property industry acknowledges that strong rules that are respected require consistent and equitable enforcement of those rules.

It is critical that the penalty regime:

1) is simple to apply and proportionate;

2) relates only to issues within the control of the applicant, rather than possible breaches caused by inadvertent errors; and

3) has a meaningful penalty that materially impacts applicants and any persons deliberately engaging in or aiding in activity that breaches FIRB rules.

The Property Council remains concerned that there is a lack of clarity regarding the requirements that will be placed on applicants to prove compliance, which will impact on annual program applications. However, there is a potential that in combination with the extremely high fees, the increased penalty regime will be a deterrent to developers utilising the advanced off-the-plan certificate application process. This will result in an increase in the number of individual purchaser applications that FIRB will be required to process, thereby increasing its administrative burden.

Government must have a better understanding about how the proposed penalties will apply in practical terms to residential and commercial property. It is crucial that demonstrating compliance does not become and onerous and costly process.

## 5.1 Residential real estate, including advanced off-the-plan certificates

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| ***Recommendation*** | Ensure compliance requirements do not place additional administrative or time delay burdens on developers beyond those currently in place. |
| ***Why is this necessary?*** | There is insufficient detail provided to enable industry to provide comment on the practical implications of increased penalties and compliance requirements. However, as a principle, any additional burden of demonstrating compliance should not be borne by developers. |

## 5.2 Commercial real estate

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| ***Recommendation*** | Consultation workshop with industry on the practical operation of the penalty regime. |
| ***Why is this necessary?*** | The Options Paper states clearly that there is limited evidence of non-compliance in the commercial real estate sector. |

Additional requirements for foreign persons will amount to nothing more than red tape, and will act as a deterrent to investment.

# 6. Modernising and simplifying the foreign investment framework

The Property Council congratulates Government for having the foresight to open up this consultation to broad reforms that will streamline and enhance the operation of the FIRB.

Australia's investment and regulatory environment has changed significantly since the FIRB rules were introduced in 1975, and there are numerous reforms that represent "low hanging fruit" that will immediately improve Australia's foreign investment framework.

As noted earlier in this document, it makes perfect sense to ensure Government targets areas of investment concern and only those areas, to improve compliance and make the rules easier to monitor and enforce.

Our recommendations thus far have included better targeting of the FIRB rules, identification of types of investments in the national interest and a streamlined VIP process for regular non-risky applicants.

This section focusses on other red tape and operational impracticalities that should be addressed as part of Treasury's review of the overall foreign investment framework.

Each of these reforms strip out unnecessary red tape which shortens delays, helps investors make timely investment decisions and removes the need for unnecessary monitoring and enforcement initiatives.

## 6.1 Remove approval requirement where no increase in shareholding percentage

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| ***Recommendation*** | FIRB approval should not be required where a foreign person acquires additional shares (or securities convertible into shares) in a company which does not result in a material increase in the person's shareholding percentage (or shareholding percentage assuming conversion of securities convertible into shares). |
| ***Why is this necessary?*** | Currently, approval is required for acquisitions of additional shares by a foreign person who already holds a substantial interest in a company, even if the acquisition does not result in an increase in the foreign person's shareholding percentage (see FATA ss26(6)(b)(ii) and (iii)).<br><br>It is burdensome with no apparent benefit – they don't impact overall holdings. |

## 6.2 Remove approval requirement for pro rata offers

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| ***Recommendation*** | FIRB approval should not be required for any acquisitions of shares or units that arise under a pro rata offer (e.g. rights issue or dividend reinvestment plan). A pro rata offer should include any offer where there is a separation between the institutional and retail offer and the offer is not made in certain jurisdictions due to illegality or cost. |
| ***Why is this necessary?*** | Currently, approval is required for acquisitions pursuant to pro rata offers of shares in companies and units in trusts, such as through rights issues or dividend/distribution reinvestment plans<br><br>There is no practical concern as acquisitions under pro rata offers are uncontroversial transactions. It is burdensome with no apparent benefit – they don't impact overall holdings significantly as there are additional units issued at the same time. |

## 6.3 Remove approval requirement for acquisitions of less than 15% of a regulated managed investment scheme

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| ***Recommendation*** | Lift the interim exemption thresholds for passive investment. FIRB approval should not be required for acquisition of interests of less than 15% in managed investment schemes regulated by Chapter 5C of the Corporations Act (or alternatively listed or other widely held managed investment schemes). |
| ***Why is this necessary?*** | This exemption currently refers to the Corporate Affairs Commission of a State or Territory, which no longer exists.<br><br>As an interim measure, FIRB has announced that no action will be taken when a foreign person does not notify and seek prior approval in relation to an acquisition of a passive interest in a listed or unlisted Australian urban land trust estate, by acquiring an interest in units that result in a holding (alone or with associates) of less than:<br>- 10% in a listed trust, with a predominantly non-residential property portfolio of office, retail, industrial or specialised properties, or a mix of these; or<br>- 5% in other public trusts with at least 100 unit holders and whose developed residential real estate assets that have been acquired from non-associates are less than 10% of the target trust's real estate assets. |

These interim exemptions should be lifted to 15% to be consistent with the "substantial interest" threshold in the regime.

## 6.4 Align the land valuation rules for companies with those provided for trusts

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| ***Recommendation*** | Confirm that a company can rely on an independent valuation when determining whether it is an Australian urban land corporation.<br><br>The valuation must be carried out by a suitably qualified valuer acting at arm's length in relation to the valuation, not more than 12 months before the particular time, where the value of the assets had not increased significantly between the time of the valuation and the particular time. |
| ***Why is this necessary?*** | Currently, in determining whether a company is an Australian urban land corporation, FATA s 13C(2) provides that if a reasonable value of a company's land assets is not shown in its last audited balance sheet, the reasonable value shown in the company's accounting records is used. However, the provision does not specify how "reasonable value" is to be determined.<br><br>In contrast, in determining whether a trust estate is an Australian urban land trust estate, FATA s13D(2) provides for the use of a valuation by a suitably qualified valuer not more than 12 months before the particular time. |

## 6.5 Update the moneylending rules to conform with the Corporations Act

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| ***Recommendation*** | Update the definition of moneylending agreement to conform to section 609(1) of the Corporations Act as modified by ASIC class order 13/520. |
| ***Why is this necessary?*** | The definition of moneylending agreement does not adequately deal with different kinds of lenders/arrangements that have proliferated since the FIRB rules were introduced. |

## 6.6 Update the heritage rules to remove references to obsolete legislation

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| ***Recommendation*** | Amend the Regulations (Reg 3(p)(B)) to clarify that the reference to "Register of National Estate" is to all heritage listings. |
| ***Why is this necessary?*** | The exemption at FATR 3(p) refers to an acquisition of land which is entered in the Register of the National Estate. This register no longer exists. |

## 6.7 Regular Red Tape Reduction review processes

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| ***Recommendation*** | Schedule regular red tape reduction review processes every 2 years. |
| ***Why is this necessary?*** | Many of the current red tape issues relate to outdated references to defunct institutions and processes. This can and should be avoided to ensure the legislation remains relevant to Australian interests.<br><br>Over time the process can become fragmented, misaligned and impractical to use.<br><br>Given the enhanced monitoring and enforcement rules, Government will open itself up to criticism or challenge if the rules are not kept current.<br><br>Regular review will ensure consistency of practice and minimise excuses for non-compliance. |

## 6.8 Streamline current review processes

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| ***Recommendation*** | Remove gazetting of interim orders to eliminate an unnecessary process.<br><br>Reduce time taken to review, by targeting only those transaction types of concern and shifting the rest to a register process.<br><br>Monitor review periods for approval and assess whether further changes are needed to ensure review timetables are met. |
| ***Why is this necessary?*** | International Investment is a commercial decision that has to be made in a timely manner. Australia competes with a number of other jurisdictions for long term capital to fund infrastructure and projects domestic investors won't or can't finance.<br><br>A streamlined approval process reduces risk for investors and ultimately ensures investors do not factor in additional |

cost that erodes value from the investments.

In its most extreme, lengthy delays would encourage investors to move investment to rival nations.

FIRB could reduce time for review by removing unnecessary steps in the process and focusing only on those transactions and investors of national interest.

This all helps to reduce review times by cutting the load on the FIRB.

Where reviews fail to complete within the review timetable it may be necessary to introduce further changes

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