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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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