29 May 2015

Manager
International Investment & Trade Unit
Foreign Investment & Trade Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: ForeignInvestmentConsultation@treasury.gov.au

Dear Sir/Madam

Australia's Foreign Investment Framework: Modernisation Options

The Australian Financial Markets Association welcomes the opportunity to comment on the Options Paper for modernising Australia's foreign investment framework.

In particular, AFMA welcome the government's intent to update the foreign investment framework to improve the transparency of the framework and alleviate the administrative and compliance burden on foreign investors and the vendors of Australian assets arising from the operation of this framework.

It is important that Australia's foreign investment framework does not deter foreign investment that would otherwise be welcomed by the Australian government because of the operation of the administrative and other arrangements underpinning that framework and their associated compliance burdens.

It is also important that Australia's foreign investment framework is focussed on those investments that are most likely to give rise to 'national interest' or other policy concerns and that foreign investment welcomed by the Australian government is not subject to unnecessary or costly scrutiny.

AFMA's comments on the modernisation options canvassed in the Options Paper are made with a view to improving the operation of the foreign investment framework and should not be seen as necessarily endorsing specific elements of the government's foreign investment policy.

Australian Financial Markets Association
ABN 69 793 968 987
Level 25, Angel Place, 123 Pitt Street GPO Box 3655 Sydney NSW 2001
Tel: +612 9776 7907 Email: secretariat@afma.com.au Web: www.afma.com.au

AFMA comment on specific items as follows:

Item 1: A legislated framework supported by guidance

AFMA support the incorporation of Policy only notification and prior approval requirements in relation to foreign government investors, the media sector and heritage listed developed commercial property under Australia's Foreign Investment Policy into the legislative framework.

As the Options Paper notes, incorporating these requirements into legislation would improve the transparency with which the framework operates and increase certainty for foreign investors. These policy only requirements have been the subject of criticism domestically and internationally for being imposed by ministerial statement rather than by statute, detracting from perceptions of the quality of Australia's foreign investment framework.

AFMA note that as a general principle, Australia's foreign investment framework is best established through legislation rather than by way of unlegislated policy considerations announced by the minister. In practice, unlegislated policy requirements may add to uncertainty on the part of foreign investors by expanding the range of factors the government may take in to account in considering a foreign investment application but without providing increased certainty about how these factors might influence a decision on the application.

Incorporating policy requirements into legislation may lead to some loss of flexibility, but increase legal certainty and transparency. The process of legislating Australia's foreign investment framework also imposes greater discipline on government in defining the policy, ensuring that it operates as intended and receives appropriate parliamentary scrutiny.

Item 3.1: Increase the substantial interest (control) threshold for a single foreign person from 15% to 20%

AFMA support the proposal to increase the substantial interest (control) threshold for a single foreign person from 15% to 20% to better align the foreign investment framework with the takeover rules in the *Corporations Act*. As the Options Paper notes, the provisions of Australia's takeovers regime are better understood and are well supported by an established body of law. The proposed changes could be expected to reduce compliance costs for both foreign investors and the government and better focus the foreign investment framework on acquisitions that may raise policy concerns. The increase of the substantial interest threshold to 20% will not materially diminish FIRB's ability to screen transactions that are likely to have a control effect on Australian businesses. This would also allow the importation of selected exemptions from Australia's takeover rules into Australia's foreign investment framework.

An investor with 19.9% interest in a company does not have significantly more control compared to an investor with 14.9% interest. Both investors have a blocking stake with respect to potential takeovers; both have sufficient interest to materially influence but

cannot otherwise ensure the passing of any ordinary resolution. No additional legal rights are granted to a shareholder with 19.9% interest.

Item 3.2 Applying the foreign persons definition

The options paper notes the compliance burden arising from the operation of the 40% aggregate ownership threshold for unrelated passive foreign shareholdings. This can be a problem for both listed Australian companies but also potentially for managed fund investors. Abolition of the 40% aggregate ownership threshold would provide much needed certainty for widely-held entities and managed funds. The *Foreign Acquisitions and Takeovers Act 1975* (FATA) already includes a very broad definition of 'associate' that captures any arrangement between different foreign shareholders. Unless there is a specific need to govern general foreign ownership in an industry (which may be better dealt with under the relevant industry legislation), it is unclear what is the legislative purpose for requiring a diverse group of foreign shareholders to apply for approval or give notification under the FATA when none of them have any control over the operation of an Australian business.

Item 3.4 Moneylending exemption

The Options Paper proposes aligning the moneylending exemption with the approach taken in the *Corporations Act*. In addition to the money lending exemption under FATA, the Policy also contains an exemption which allows foreign banks (that have a substantial foreign government interest) that are regulated by APRA as authorised deposit-taking institutions to take security over assets and enforce that security as part of a normal lending agreement without having to seek prior approval. However, the Policy is silent on the application of the exemption on other foreign banks which are not registered as ADIs in Australia. This part of the Policy should also be clarified as part of updating the money lending exemption so that it is consistent with the money lending exemption as it applies under the takeovers law, which does not discriminate between ADI and non-ADI banks.

Item 3.7 Provide an exemption for underwriters

Foreign financial institutions in the business of underwriting may acquire a substantial but temporary shareholding as a result of their underwriting activities. This may require notification under the existing framework even though there is no intent to control.

AFMA would welcome the introduction of an exemption from notification for acquisitions by foreign financial institutions licensed by ASIC as underwriters similar to that provided for under Australia's takeover rules.

Item 3.8 Exemption from compulsory notification acquisitions where a majority owner is increasing their direct interest

As the Options Paper notes, there is no substantive reason to require notification and prior approval where a majority controlling owner is increasing their holding, although there may be situations in which FIRB has approved majority ownership subject to the

condition that some minority local ownership is maintained. If the government does not proceed with a complete exemption, an alternative option may be to consider aligning the notification requirements with those under the *Corporations Act* for majority owners so that no notification is required if the majority owner is increasing its interest in accordance with an exemption under s 611 of the Act (other than pursuant to a takeover bid, scheme of arrangement or shareholders' approval). This would be consistent with the theme of harmonising the requirements under the two Acts.

Items 4.5 Definition of foreign government investor

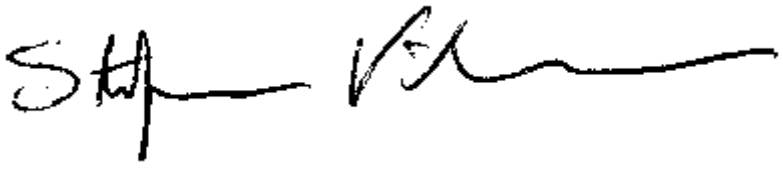
AFMA support the proposal to adjust the definition of 'foreign government investor' to reflect the proposed new single person control threshold of 20%. It makes sense to align the control threshold for foreign government investors to that proposed for foreign persons generally. The existing threshold may capture some entities that are not effectively controlled by foreign governments.

Item 6.1 Removing investments in financial sector companies from the foreign investment framework for all investors

Both the FATA and the *Financial Sector (Shareholdings) Act 1998* require approval from the Treasurer for investments in financial sector companies except for non-government investors under various bilateral free trade agreements. The relevant provisions of the FATA duplicate requirements under the *Financial Sector (Shareholdings) Act* 1998 for foreign investors from non-free trade agreement jurisdictions. The proposed changes would reduce the compliance burden for these investors.

In this context, it is worth noting that AFMA have previously indicated to government its support for the removal of market ownership restrictions from the *Corporations Act* once the current reforms to cross-border regulation of financial market infrastructure are complete. This was also recommendation 44 of the Final Report of the Financial System Inquiry.

Yours sincerely



Stephen Kirchner
Economist