

# Response to Options Paper on Strengthening Australia's Foreign Investment Framework

## “Foreign Person”

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### 1 Introduction

This submission is made on behalf of Scentre Group, and is supported by Stockland Group and GPT Group. It is made in response to Section 8 of the Strengthening Australia's Foreign Investment Framework Options Paper February 2015.

This submission addresses the Government's request for feedback on options to modernise and simplify the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (“**FATA**”), *Foreign Acquisitions and Takeovers Regulations* and Australia's Foreign Investment Policy (“**Policy**”). This submission proposes amendments to the definition of “foreign person” for the purposes of the FATA and Policy.

#### 1.1 Summary

This submission sets out alternatives as follows:

- (a) The definition of a “foreign person” corporation or trust in the FATA be amended so that the threshold for:
  - (i) individual foreign ownership is amended to 20%; and
  - (ii) aggregate foreign ownership is amended to 49%; or in the alternative
- (b) A new regulation under which a declaration would be obtained from the Treasurer that an entity is a “substantially Australian corporation or trust”. Once declared, the regulation would provide that the FATA does not apply to a substantially Australian corporation or trust, save for annual reporting of acquisitions that would otherwise have been notifiable under the FATA.

The first proposal would require amendment of current legislation and the second proposal would require adoption of a new regulation. The second proposal is an approach designed to reflect other Commonwealth legislation.

Definitions of foreign persons are provided in Schedule 1.

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### 2 Alternative1 - Amending the Proportionate Thresholds

It is proposed that the proportionate thresholds for determining whether an entity is a foreign person be amended as follows:

- 15% to be increased to 20% for individual ownership interests; and
- 40% to be increased to 49% for aggregate foreign ownership.

It follows that the definition of “substantial interest” will rise from 15% to 20%. This is consistent with the takeovers threshold under the *Corporations Act 2001*.

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### 3 Alternative 2 - Substantially Australian Corporation or Trust Regulation

Should an increase to the proportionate threshold not be agreed, then it is submitted that a new regulation is required to address the adverse impact that being foreign has on Australian companies / trusts that are “foreign” simply as a result of their shareholders / unitholders comprising aggregate foreign ownership in the range of 40% to 49%.

It is submitted that a declaration ought to be able to be obtained that a company / trust in that position is a “Substantially Australian Corporation or Trust”. Whilst it would be foreign for the purposes of the regime, the effect of the declaration would be to remove the separate notice requirements and replace them with an annual report to FIRB for acquisitions that would have otherwise been reported under the FATA or Policy.

A similar approach already applies under the *Airports Act 1996*. The *Airports Act 1996* limits the ownership by foreign persons of interests in airport operator companies to 49% as an aggregate maximum. The *Airports (Ownership - Interests in Shares) Regulations* provide assistance to fund managers with levels of foreign ownership that would exceed a single holding of 15% but not the aggregate 40% holding. In that circumstance, the fund may apply to the Secretary of the Department of Infrastructure for declaration of the fund as a “substantially Australian investment fund”. The interests of a substantially Australian investment fund are not included in the assessment of whether the 49% aggregate foreign ownership limit is met.

We suggest this alternative for an otherwise Australian company or trust under the foreign investment regime. That is, we suggest that the Government adopt a regulation to the effect that interests held by a “substantially Australian Corporation or Trust” be disregarded for the purposes of the FATA. The approach would require an application to be made to the Treasurer (through FIRB) to allow a company / trust to make acquisitions without the need for prior approval. The application would be for a declaration together with an ongoing obligation to monitor the aggregate foreign ownership position and an annual report.

Whilst there has been reluctance to interfere with the 15% and 40% thresholds in the legislation, we nevertheless suggest, provided the other criteria are met, a 49% threshold may be considered.

We suggest the criteria for a substantially Australian Corporation or Trust declaration be as follows:

- the corporation or trust be incorporated/established in Australia;
- no individual foreign person holds an interest of 15% or more;
- the aggregate of interests held by foreign person does not exceed 49%;
- 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 Australian citizens or permanent residents;
- the majority of 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.

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The benefit of a substantially Australian Corporation or Trust declaration would be to assist an otherwise Australian company / trust not only in its acquisitions and not having to notify under FATA but also the downstream effect in which entities that otherwise Australian company or trust holds a 15% or more interest would not then be considered to be foreign persons as well.

Treasury may find this option attractive as control over the issue of the declaration is retained by Treasury thereby limiting the scope for abuse.

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## 4 Reasons for Concern

The entities supporting this submission are recognised as Australian both in Australia and abroad, they have strong Australian history and connection. They are Australian incorporated / established and publicly listed on the ASX.

Each proponent meets the suggested criteria above.

However each of these “Australian” entities is a “foreign person” for FATA and Policy purposes subject to notice requirements and the delays imposed on deals by the regime.

Some foreign corporations and foreign trusts are better off under the FATA than these “Australian” companies / trusts. Investors from the U.S., Japan, Korea, New Zealand and Chile have the benefit of much higher monetary thresholds for notifiable transactions. Investors from these countries may for example acquire Australian shopping centres valued at up to A\$1,094 million without notification under the FATA, compared to \$252 million for an Australian company / trust (such as the proponents) that is deemed a foreign person under the Act.

Being foreign and required to comply with the regime adds time and cost to the ordinary business activities of otherwise Australian companies/ / trusts and puts them at a commercial disadvantage.

The suggested amendments to the regime will address this anomaly.

## Schedule 1 - Background definitions

### 4.1 Summary of the FATA Foreign person definition

The definition of a **foreign person** is set out in section 5 of the FATA, to mean:

- (i) a natural person not ordinarily resident in Australia;
- (ii) a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest;
- (iii) a corporation in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest;
- (iv) the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or
- (v) the trustee of a trust estate in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.

#### Corporations

**Foreign corporation** is defined in section 5 of the FATA and means a foreign corporation to which paragraph 51(xx) of the Constitution is applicable or a corporation that is incorporated in an external Territory to which the FATA does not extend.

Section 9 of the FATA provides further explanation of terms used in section 5.

An aggregate controlling interest is taken to be held where (under section 9(2)(b)) 2 or more persons hold an aggregate substantial interest in a corporation.

For the purposes of the FATA (under section 9(1A)), 2 or more persons are taken to hold an aggregate substantial interest in a corporation if they, together with any associate or associates of any of them:

- are in a position to control not less than 40% of the voting power in the corporation; or
- are in a position to control not less than 40% of the potential voting power in the corporation; or
- hold interests in not less than 40% of the issued shares in the corporation; or
- would hold interests in not less than 40% of the issued shares in the corporation, if shares in the corporation were issued as the result of the exercise of all rights, including a right under an instrument, agreement or arrangement, whether the right is exercisable presently or in the future and whether on the fulfilment of a condition or not.

## Trust Estates

For the purposes of the FATA (under section 9A):

- a person shall be taken to hold a substantial interest in a trust estate if the person, alone or together with an associate or associates, holds a beneficial interest in not less than 15% of the corpus or income of the trust estate; or
- 2 or more persons shall be taken to hold an aggregate substantial interest in a trust estate if the persons, together with an associate or associates, hold, in the aggregate, beneficial interests in not less than 40% of the corpus or income of the trust estate.

## 4.2 Further 'foreign person' definitions under the FATA

The foreign person definition provided in section 5 (discussed above) is not consistently used throughout the FATA. Instead, the determination of to whom various sections apply is complicated through the use of other definitions within specific sections.

### Sections relating to the Treasurer's powers

Under sections 19 (Acquisitions of assets) and 21 (Arrangements relating to control of Australian businesses) **foreign person** is defined to mean:

- (i) a foreign corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest; or
- (ii) a foreign corporation in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest.

Under section 21A (Acquisitions of interests in Australian urban land) **foreign person** is defined to mean:

- (i) a foreign corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or
- (ii) a foreign corporation in which 2 or more persons, each of whom is a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.

Sections 4(3), (4), (5) and (6) (Additional operation of Act) respectively extend Sections 19, 21 and 21A to the effect they would have if references in sections 19, 21 and 21A to a foreign person were references to:

- (a) a natural person not ordinarily resident in Australia;
- (b) a corporation (other than a foreign corporation) in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest;
- (c) a corporation (other than a foreign corporation) in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest;

- (d) the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or
- (e) the trustee of a trust estate in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.

Sections 19, 21 and 21A are the sections empowering the Treasurer to make adverse orders with respect to an acquisition. The equivalent sections 18 (Acquisitions of shares) and 20 (Arrangements relating to directorate of corporations), however, do not have a separate foreign person definition, but refer to the defined term from section 5.

### Sections relating to Notification

Section 25 (Effect of notification of transactions) has effect where a person or a corporation submits a notice to the Treasurer. The broad use of “person” includes a foreign person.

Section 26 (Compulsory notification of certain section 18 transactions) and 26A (Compulsory notification of certain section 21A transactions) do not include a foreign person definition, but both define a ***person to whom this section applies*** to mean:

- (i) a natural person not ordinarily resident in Australia;
- (ii) a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest;
- (iii) a corporation in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest;
- (iv) the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or
- (v) the trustee of a trust estate in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.

That is, the definition replicates the section 5 definition. It is unclear why these separate definitions have been used in the clauses that make notification compulsory, rather than referring to the defined term available.

What is clear is that the effect is to widen the notification requirement. The regime seeks to capture for review as much foreign investment as it can and when viewed from this perspective, the additional width of the notice requirements makes some sense.