



Law Council  
OF AUSTRALIA

*Business Law Section*

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The Treasury  
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Via email: [ForeignInvestmentConsultation@treasury.gov.au](mailto:ForeignInvestmentConsultation@treasury.gov.au) 30 October 2015

Dear Sir or Madam,

### Foreign Investment Reforms – Draft Regulations

Attached is a submission prepared by the Foreign Investment Committee of the Business Law Section of the Law Council of Australia ('**Committee**') in response to:

- . the exposure draft Foreign Acquisitions and Takeovers Regulation 2015; and
- . the exposure draft Foreign Acquisitions and Takeovers Fees Imposition Regulation 2015.

If you have any questions in relation to this submission, please contact either:

- . the Committee Chair, Malcolm Brennan, on 02 6217 6054 or via email: [malcolm.brennan@au.kwm.com](mailto:malcolm.brennan@au.kwm.com); or
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Yours faithfully,

**John Keeves, Chairman**  
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**FOREIGN INVESTMENT COMMITTEE OF THE BUSINESS LAW SECTION  
OF THE LAW COUNCIL OF AUSTRALIA**

**SUBMISSION ON FOREIGN INVESTMENT REFORMS – DRAFT REGULATION**

This is a submission prepared by the Foreign Investment Committee of the Business Law Section of the Law Council of Australia (“**Committee**”), in response to:

- the exposure draft Foreign Acquisitions and Takeovers Regulation 2015 (“**Draft Regulations**”); and
- the exposure draft Foreign Acquisitions and Takeovers Fees Imposition Regulation 2015 (“**Draft Fees Regulations**”),

(“**Submission**”).

The Committee has previously made submissions:

- on 17 July 2015 in relation to the exposure drafts of the Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015 and the Register of Foreign Ownership of Agricultural Land Bill 2015 (“**Agricultural Land Register Bill**”) and the July draft of the regulations (“**Draft Legislation Submission**”); and
- on 30 September 2015 in response to the draft agricultural land and agribusiness provisions of the draft Foreign Acquisitions and Takeovers Regulation 2015 provided to us on 21 September 2015 (on a confidential basis) (“**Draft Agricultural Definitions Submission**”).

Unless specified, section references are to sections in the amendments to the current Foreign Acquisitions and Takeovers Act 1975 (“**Act**” or “**FATA**”) attached at Schedule 1 (“**Draft Act**”) of the Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015 (“**FATA Amendment Bill**”) and regulation references are to sections in the Draft Regulations.

Below are our comments and recommendations on the proposed regulations in the order of their numbering. Due to the short consultation period, not all areas have been addressed as yet. Supplementary submissions will be provided shortly. Further, we will comment separately on the proposed Guidance Notes.

As a general comment we are compelled to state that the drafting of the FATA and the Regulations is overly complex. This is legislation that is used on a daily basis, not just by lawyers and advisers, but by ordinary people. The current FIRB file numbers have exceeded 40,000 for the first time. The vast majority of those are individuals acquiring residential property for their personal accommodation. The revised FATA and Regulations are not drafted in a way that make it easier for such individuals to comprehend the law or the process. The fact that extensive Guidance Notes will be required to explain the process is a clear indication that what has been developed is too complex. We will simply end up in the same current difficult position of having a Policy (Guidance note) that is applied in preference to the legislation.

## **PART 1 – PRELIMINARY (REGULATIONS 1 – 10)**

### **1 DEFINITIONS (REGULATION 5)**

#### **1.1 “Acquire”**

This definition refers only to a “business”.

Is the intent that “acquire” cover interests in entities (corporations and trusts) and land?

The word “acquire” is used in many contexts within the regulations. This definition does not work with all of the contexts given its reference to business.

The definition does not appear to be needed in its current form. It refers to Draft Regulation 6 and that regulation can stand on its own.

In the alternative, “acquire” can be expanded to definitively state when an acquisition occurs. That is, reflect the fact that an acquisition will complete when the provisions giving effect to the acquisition become binding.

## **1.2 “Australian media business”**

To avoid confusion, the definition should state clearly that internet only forms of media are not included.

## **1.3 “Interest”**

Again this definition refers only to a business.

It would be clearer if it referred to an entity, business or land so that the definition reads as follows:

*interest: a person holds an interest of a specified percentage in an entity, business, or Australian land if the value of the interests in the shares or units of the entity, assets of the business, or the land held by the person, alone or together with one or more associates, is that specified percentage of the value of the total shares or units of the entity, total assets of the business or of the land.*

## **1.4 “Mining, production or exploration tenement”**

Consistent with other submissions regarding exploration tenements being treated separately to mining or production tenements, a separate definition of “exploration tenement” is required.

The current definition of mineral right excludes exploration tenements. This should be continued and made clear that exploration tenements are not interests in land.

## **1.5 “Vacant”**

This definition is used in Draft Regulation 48 in the context of “commercial land that is vacant” (or not).

If agricultural land is not used wholly and exclusively for a primary production business then, in addition to being agricultural land, it will be commercial land. A reason agricultural land is commercial land is because some of the land is used for another purpose (e.g. a quarry) or for no purpose. It then follows under this definition that all the land may be classified as vacant, even though most of it is used for a primary production business, because of the absence of substantive permanent buildings on the land. As a result, Draft Regulation 48 will apply and the land will have a zero dollar threshold. This appears to be an anomalous result.

The definition should be amended as follows:

*land is vacant if it is not used for an Australian business (other than a business of selling land) and there is no substantive permanent building or other man-made structures on the land that can be lawfully occupied or otherwise used by persons, goods or livestock.*

## **2 MEANING OF NATIONAL OF A COUNTRY (REGULATION 8)**

Draft Regulation 8(1)(b) uses the term “entitled to live indefinitely” when referring to a national of a country.

Draft Regulation 8(3) also uses “live” when referring to New Zealand nationals.

“Live” is not defined.

The Act uses ordinarily resident. In the US national definition at Draft Regulation 8(2)(b) the term is “permanent resident”.

We suggest that “entitled to permanently reside” be used in Draft Regulations 8(1)(b) and 8(3) in place of “live indefinitely” and “live” for clarity and consistency.

In the alternative, the term “live” as it relates to nationals of a country should be defined.

## **PART 2 – DEFINITIONS AND INTERPRETATION (REGULATIONS 11-23)**

### **3 FOREIGN GOVERNMENT INVESTORS AND DIRECT INTEREST (REGULATIONS 14, 15 AND 41(3))**

We continue to have a variety of concerns with the proposed application of the regime to foreign government investors.

We believe that the restatement of the legislation represents a missed opportunity to distinguish between different types of government investors by imposing reduced review thresholds – particularly sovereign wealth funds (“**SWF’s**”) and private equity funds or financial sponsors with SWF limited partners.

Our views on these issues are set out in section 4 of our Draft Legislation Submission. We urge you to reconsider these issues, particularly in light of the introduction of the fee regime which will have a disproportionate impact on financial sponsors as compared to other foreign investors into Australia.

We have the following key comments on the Draft Regulations:

#### **3.1 Associate reference extends too far**

The Draft Regulations have not addressed the automatic associate provision for foreign government investors from the same country. As noted in section 4 of our Draft Legislation Submission, the associate definition in the Draft Act that deems all foreign government investors of a country to be associates of each other (section 6(1)(l)) extends too far and is inconsistent with current FIRB policy which does not treat state-owned enterprises (“**SOE’s**”) or SWF’s of a particular country to be associates of each other. This deeming provision should be deleted as it applies to foreign government investors.

If it is not deleted, it is possible that a foreign government investor will fail to make an application in circumstances where it is required to do so as information regarding the holdings of other foreign government investors for the same country will not be available to it. In these circumstances, the foreign government investor may be in breach of the Act even though it did not have the information available to it to comply with the relevant provisions. In other circumstances, where the investor is otherwise required to lodge an application, it will make an application but will not take account of the holdings of its deemed associates and may again be in breach of the Act for failing to disclose the holdings of its associates as part of its application. Given the serious consequences of a contravention of the Act, it is unsatisfactory for the law to include these deeming provisions.

If the automatic associate provision concerning all foreign government investors of a country is retained, we recommend adding an exemption to Draft Regulation 41 so that foreign government investors of different levels of government within the same country are distinguished. For example, foreign government investors from different states (as between themselves) and from the federal government in the United States should not be treated as associates automatically. The same applies to foreign government investors from different provinces in Canada or China.

The associate exemption that excludes foreign government investors defined as such by investments that are aggregate substantial interests (Draft Regulation 41(3)) is too complex. An explanatory note would be helpful to clarify the intention of Draft Regulation 41(3). We assume that this is a technical exemption so that when determining whether an entity is a foreign government investor, aggregate substantial interest is not double counted. Accordingly, we assume aggregate substantial interest is calculated in accordance with section 17(2), i.e. with reference to two or more person who are not associates of each other, and aggregating interest held by each of those persons' associates, in each case disregarding the automatic associate provision for foreign government investors from the same country. However, there may be a technical drafting issue because a "separate government entity" (e.g. a SWF established by statute) is not defined as a foreign government investor under Draft Regulation 15. Whatever Draft Regulation 41(3) is intended to achieve, it would not have any effect on a separate government entity and the automatic associate definition under section 6(1)(l) will still apply to a separate government entity because it is not currently defined as a foreign government investor (see paragraph 3.2(f) below).

In addition to the above concerns, we also think that there are unintended consequences of extending the 'acting in concert' concept to the definition of associate. The effect of this is that any Consortium vehicle may be considered to be a foreign person for the purposes of the Draft Act and the Draft Regulations if any foreign person has an equity interest in the Consortium even if the Consortium has more than 80% Australian ownership. The Draft Regulations should be amended so that the 'acting in concert' limb does not apply in determining whether an entity is a foreign person.

### **3.2 Other technical comments relating to foreign government investors**

We also have the following technical comments on the drafting of the Draft Regulations:

- (a) The definition of direct interest as it relates to an interest of 5% and the entry of a legal arrangement (Draft Regulation 14(b)) is overbroad. As with the existing policy it should be the existence of influence or control of the entity that enlivens a lower threshold. For example, if an Australian entity conducting a resources business was to enter an offtake agreement on arm's length terms with an SOE that should not reduce the review threshold. The concept of "legal arrangement" has no materiality content or reference to influence or control. We instead suggest a similar concept of influence to the existing section 21 in the existing Act (proposed new section 54 in the Draft Act).
- (b) The definition of direct interest as it refers to the ability to influence or participate in policy of the entity (Draft Regulation 14(c)(ii)) is overbroad. As currently expressed the term could be considered to extend, for example, to situations where the Australian entity and the foreign government investor have entered into arm's length arrangements concerning the business of the Australian entity (again, for example, the offtake agreement referred to above). Again we suggest a similar concept of influence to the existing section 21 of the Act (proposed new section 54 in the Draft Act).
- (c) The definition of foreign government investor refers to the trustee of a trust where a foreign government or separate government entity has the required interest (Draft Regulation 15(c)). The definition should also focus on the beneficiaries of a trust. In that regard compare the focus of the Draft Act on the beneficiaries of a trust (section 11 definition of interest).
- (d) The definition of foreign government investor as it applies to a partner of a limited partnership (Draft Regulation 15(d)) is overbroad. Limited partners in a typical limited partnership are passive investors that have no capacity to influence the management or control of the limited partnership. Management and control is exercised through the general partners. As noted above, we believe that limited partnerships that have SWFs as passive investors should not be the subject of foreign government investor enhanced regulation. We see this issue as a serious practical problem under the

existing regime that should be relaxed as it imposes hair trigger approval requirements on non-government owned financial sponsors and other general partners in pursuing investments in Australia. In our experience such investors are not subjected to such intrusive regulation in other jurisdictions. We recommend:

- (i) That this limb of the definition be deleted as it applies to foreign government investors.
- (ii) If, however the limb is retained, it should be augmented with a further requirement so that it is only enlivened if the foreign government or separate government entity is also able to influence or control the entity.
- (iii) Further, if the limb is retained, the definition of “limited partnership” should be amended as follows:

***general partner*** means a partner in of a limited partnership whose liability ***for the liabilities of*** ~~relating to the partnership~~ is not limited.

***limited partner*** means a partner in of a limited partnership whose liability relating to the partnership is limited ***and who may not take part in the management of the partnership.***

***limited partnership*** means an association of persons that:

~~(a) has a legal personality separate from those persons];~~ ***and [Note: this is not correct unless the LP is an incorporated LP]***

(a) was formed ***between the partners in accordance with the applicable law*** solely for the purposes of ***carrying on business in common with a view to a profit, becoming a partnership where the liability of at least one partner relating to the partnership is limited is a limited partner and at least one partner is a general partner;*** and

(b) is recognised under a law of the Commonwealth, a State, a Territory, a foreign country or a part of a foreign country as such a partnership.

***partners means the general partners and the limited partners.***

- (e) We question if the restriction on a foreign government investor taking action by acquiring a direct interest in an Australian entity or Australian business (Draft Regulation 52(1)(a)) has a potential lacuna in that the question of acquiring an interest in a corporation that is a relevant entity that carries on an Australian business is not addressed.

The existing policy provides that a direct investment by a foreign government investor includes “any offshore acquisition providing [potential influence or control] over an Australian business or asset(s)”. No clear reference to offshore acquisitions involving Australian business similar to section 40(4)(a) of the Draft Act is contained in the regulation (other than the limited mining category in Draft Regulation 52(1)(c)(ii)).

It appears via a rather tortuous route that a combination of regulations 44, 52, the definition of direct interest and sections 19 and Part 2 Division 2 of the Act that offshore acquisitions by foreign government investors may be required to be notified. This reform package is supposed to bring clarity to the process and unfortunately it fails in this regard. If the process is intended to apply to offshore acquisitions (with underlying Australian assets) then this should be made clear.

If the regulations are intended to cover offshore acquisitions by foreign government investors, there should be some limits around the types of offshore acquisition covered by these regulations – for example a foreign government acquiring shares in

an LSE or NYSE listed multinational with immaterial Australian activities or assets should not be the subject of review. It is necessary that there be specificity over this issue going forward if it is sought to be addressed in view of the penalties that would now apply for failing to comply with approval obligations concerning the notifiable action.

- (f) There is a significant gap in the new definition because a separate government entity (which is a defined term) is not included as a foreign government investor under Draft Regulation 15. This would mean that a SWF established by statute (for example) would not be required to comply with the significant action and notifiable action requirement for foreign government investors under Draft Regulation 52, so long as it enters into the transaction directly and not through an intermediate holding company or SPV. We assume this is a drafting oversight.
- (g) We welcome the clarification in Draft Regulation 10(2) that a foreign government investor does not start an Australian business merely by establishing a new subsidiary in the circumstances specified in Regulation (10). It should also be clarified in Regulation 52 that incorporating a new subsidiary in these circumstances does not constitute a 'direct interest' for the purposes of Draft Regulation 52.

#### **4 ACCOUNTING AND VALUATION ISSUES (REGULATIONS 17-21)**

We set out below our comments on the accounting and valuation issues.

##### **4.1 Double counting of total asset value of consolidated group**

We note that Draft Regulations 17(2) and (3) largely reflect section 13B of the current Act. However, to the extent these provisions refer to the “aggregate value” of the assets of each entity that is a member of a consolidated group, they potentially lead to double counting errors. For example, if a holding company raises capital (say \$100m), lends that to a subsidiary (Sub 1), which on-lends it to another subsidiary (Sub 2), which then buys an asset, each of the three members of the group has an asset of \$100m – an aggregate value of \$300m. However, in truth, the group only has consolidated total assets of \$100m.

Also for example when determining whether a corporation is an Australian land corporation or agricultural land corporation under Draft Regulation 11, while the potential for double counting in the denominator is eliminated by Draft Regulation 17(3), there remains the potential for double counting in the numerator. This is because an interest in Australian land of a holding entity will include the shares in its subsidiaries if they are Australian land corporations or Australian land trusts.

Under accounting standards, this issue is dealt with by eliminating in full intra-group assets and liabilities in consolidated financial statements – see for example paragraph B86 of AASB 10. In our view, Draft Regulation 17 should be amended to reflect this.

The amendment should apply equally in respect of stapled entities and entities operating on a unified basis since intra-group investments are just as likely to exist in these forms of consolidated group.

##### **4.2 Difficulties in determining total issued securities value of consolidated group**

A similar issue arises in relation to Draft Regulation 18 to the extent Draft Regulation 18(3) will aggregate the value of the issued securities of the holding entity and each of its relevant subsidiaries. In our view, it is very rare for an entity's total issued securities value (a measure reflecting its net assets) to exceed its total asset value (a measure reflecting its gross assets) so this provision is of limited relevance. However, if it is to be retained, we submit it should refer to the total issued securities value of the parent entity alone (which will automatically reflect the value of the holding company's investments in its subsidiaries).

As regards Draft Regulation 18(4), we note this formula implicitly assumes that all issued securities are of the same class. To the extent securities may have different rights (and values), it may either overstate or understate the total issued securities value of an entity. The formula should instead refer to securities in the same class, and the result obtained using the formula should be aggregated with the value of the issued securities of all other classes – where such 'value' should be the higher of book value and the price last paid for a transfer of securities in that class.

Given Draft Regulations 17(6) and (7) deal with the total asset values of stapled entities and entities operating on a unified basis, we query whether similar provisions should also apply under Draft Regulation 18. One corollary of this is would be that, in working out the percentage interests a person may have in a group of entities operating on a unified basis, the denominator in the formula should be the total issued securities of all of the parent entities in the unified group.

#### 4.3 Technical accounting and valuation issues

We make the following technical comments on a number of accounting and valuation issues:

- (a) **Reasonable value impractical and too vague.** When it comes to ascribing a value of an asset generally by reference to its book value, there is an exception where the value shown is not reasonable value (Draft Regulation 19(3)). We do not think that the carve out is satisfactory especially as the foreign person may not have the information to make that assessment, or indeed the basis for which the original valuation was made. Also, the reference to “reasonable value” is too vague. In any case, it is unclear what valuation would be ascribed should the exemption be applicable. More specific guidance should be provided if this concept is retained.
- (b) To determine the value of an asset, Draft Regulation 19(1)(a) only allows use of the most recent financial statement, in the absence of a subsequent event affecting the asset’s value. Otherwise, Draft Regulation 19(1)(b) requires the use of the value shown in the accounting records. Either approach will likely prove unworkable for non-negotiated transactions, as the financial statements and accounting records may not be publicly available and even if the financial statements have been lodged with ASIC/ASX it would be difficult to determine whether a subsequent event affect the asset’s value has occurred.

#### 5 AGRIBUSINESS DEFINITION (REGULATION 22)

Our principal concerns in relation to Draft Regulation 22 are:

- **Higher percentage of 50% (not 25%) of business should be agribusiness.** The definition of an ‘agribusiness’ should require that at least 50 per cent of the business be ‘agribusiness’ (up from 25 per cent). We understand this is not supported by the Agriculture Department, however, there is a practical issue with compliance as the information is often simply not available. Further:
  - As a matter of principle, the more restrictive foreign investment regime applicable to agribusinesses should not extend to diversified businesses whose agribusiness operations constitute a small proportion of their overall operations.
  - At a more pragmatic level, the higher threshold would help address the considerable challenges that are likely to arise in applying the proposed definitions to diversified businesses that are not predominantly engaged in agribusiness operations.
- **The treatment of agribusiness activities outside Australia.** An Australian entity may be deemed to be an agribusiness if it has subsidiaries that carry on agribusiness activities outside Australia even though the entity and its subsidiaries do not carry on any agribusiness activities in Australia. This is because the earnings and assets

included in the numerator of the relevant formulae do not appear to be limited to earnings derived in, or assets used in, Australia. There is no evident policy justification for this and the formulae should be adjusted accordingly.

- **The failure to take account of all non-agribusiness activities.** An Australian entity that is the holding company of a corporate group may be deemed to be an agribusiness even though the earnings of the group derived from agribusiness activities are much less than 25% of the total earnings of the group. This is because the definition of “total earnings” for the purposes of the denominator of the relevant formula may omit a significant proportion of the group’s total earnings (disregarding the earnings of all subsidiaries that are not engaged in agribusiness). This may significantly overstate the real contribution of the group’s agribusiness activities and result in an entity being classified as an agribusiness when that is not appropriate. The definition of “total earnings” should be corrected to avoid this outcome.
- **Acquirers will have no ability to make an assessment of the status of an entity in which they proposed to invest.** While an entity may report information about its business and geographic segments, that will rarely (if ever) reflect the specific definitions proposed to be used in the proposed regulations. In these circumstances, a prospective acquirer will not be able to determine whether an entity is an agribusiness on the basis of publicly available information. As a consequence, a prospective acquirer may have no means of knowing whether the acquisition of an interest of more than 10% but less than 20% in the entity will constitute a significant action or notifiable action. Given the serious consequences of a contravention, it is unsatisfactory that the law should define the constituent elements of a significant offence in this way.
- **Inadequate apportionment of mixed earnings and mixed-use assets.** The provisions dealing with the apportionment of mixed earnings and mixed-use assets are likely to prove unworkable because there will typically be no “publicly available information” that can be used as a basis for apportionment. And there appears to be no scope to use any other information to make an apportionment no matter how reliable it may be. In these circumstances, it is unclear how any effective apportionment can be made.

## 5.1 Agribusiness earnings should be limited to those derived in Australia

An Australian entity may have operations outside of Australia that would fall within the classes of business set out at Draft Regulation 22(4), possibly making the entity an “agribusiness” under the Draft Regulations. The Draft Regulations are not clear as to how agribusiness operations outside of Australia should be taken into account, but it appears that overseas operations are not carved out of the definition.

We submit that agribusiness earnings should be limited to earnings derived in Australia, and not overseas. The policy rationale for imposing tighter regulation of foreign investment in agribusiness is absent where the relevant agribusiness activities are conducted outside Australia.

The same issue arises for agribusiness assets. These should be limited to those used in carrying on an Australian agribusiness.

## 5.2 Total earnings should be for entire group

For the purposes of the formula in Draft Regulation 22(2)1(b), “total earnings” are defined as the total of all “earnings before interest and tax derived in Australia” by the relevant Australian entity (the “target”) and “any subsidiary of the entity that carries on business of a kind mentioned in subsection (4)”.

This definition has two profoundly important limitations:

- (a) First, where the target has subsidiaries that do not carry on business of a kind mentioned in subsection (4), the earnings of those subsidiaries will not be included in “total earnings” of the target. This is likely to significantly understate the denominator of the formula in Draft Regulation 22(2)1(b) – potentially leading to an entity being classified as an agribusiness when that should not be the case. For example, if the target were to be a non-operating holding company with five subsidiaries (all with identical earnings) – one engaged in agribusiness activities and four engaged in non-agribusiness activities – the target should not be classified as an agribusiness (only 20% of its total earnings will be derived from agribusiness). But the proposed test would lead to the opposite result by totally ignoring the earnings of the four non-agribusiness subsidiaries (notionally, and inaccurately, deeming 100% of the target’s earnings to be derived from agribusiness).
- (b) Secondly, “total earnings” only includes earnings derived in Australia while it does not appear that earnings derived from agribusiness activities are so limited (see 1.1 above). This asymmetry should be corrected. As noted above, we submit the appropriate way to do this is by only counting earnings derived in Australia in both the numerator and the denominator of the formula.

### **5.3 Impossible to value proportion of assets, EBIT attributed to agribusiness**

The comments we made at paragraph 3.5 of our Draft Legislation Submission still apply to the current Draft Regulations.

While earnings before interest and tax (EBIT) is a measure that is commonly disclosed in segment reports, as highlighted in our Draft Legislation Submission, operating segments will rarely align with Australian and New Zealand Standard Industrial Classification Codes. Accordingly, most acquirers will have no basis for making a meaningful assessment of the EBIT derived from, or the assets used in, the classes of business referred to in Draft Regulation 22(4).

Providing for apportionment of earnings and assets on the basis of “publicly available information” under Draft Regulations 22(5) – (6) is unlikely to be of much assistance because the real problem will often be the lack of available public information. Apportionment on the basis of the target’s books and records would be a better alternative, but this would only be workable if the acquirer were to have access to them.

### **5.4 Problems with using tests based on historical earnings or asset values**

There are a range of circumstances where the use of historical earnings or asset values may be inappropriate. Two notable examples are:

- A target may have bought or sold businesses subsequent to the end of the most recent financial year for which financial accounts have been prepared. This may have increased or reduced the significance of its agribusiness activities, but the tests used in Draft Regulation 22 will take no account of this.
- Where a foreign acquirer is buying a business from a corporate group but is not acquiring the entire group, there may be a significant restructuring of the business as part of the transaction (which could include the business being transferred into newly formed entities before being acquired). It is far from clear how the historical earnings tests used in Draft Regulation 22 can be applied in these circumstances.

It is also notable that tests based on the results of a single financial year may lead to one-off items having a significant distorting impact. For example, a major impairment could materially reduce earnings from one entity in a particular year and result in it becoming or not becoming an “agribusiness” when that would not otherwise be the case.

Being able to use half-year figures would be of some assistance but would still not eliminate these issues.

## 5.5 Earnings measure for biological assets

It is not clear whether the earnings measure in 22(2) 1(b) will force people to use numbers based on the accounting standard for biological assets (AASB 141). We understand that analysts typically back out the mark to market adjustments this requires in evaluating relevant businesses and, as a consequence, many companies give much greater weight to a measure of underlying earnings. If the regulations require use of an earnings measure that does not have commercial currency, this is likely to give rise to considerable uncertainty and confusion.

## 5.6 Potential to use revenue rather than EBIT as a measure

In light of the issues above, the Australian government may wish to consider whether revenue, as opposed to EBIT, might be a less volatile number for the purpose of these calculations, though revenue would still be difficult to determine.

## 5.7 Higher threshold of 50% gives greater margin for error

All of the problems outlined above apply at any percentage threshold. However, these issues would apply to a smaller population of entities if the agribusiness threshold was raised to 50% rather than 25%. As raised at paragraph 3.5 in our Draft Legislation Submission, increasing the threshold to 50% would give a greater margin for error, and there would be a much greater likelihood that an acquirer would be on notice that a target may be an agribusiness if more than half of its value is tied up in Australian agribusiness operations.

## 5.8 Acquisition of substantial interest rather than direct interest in agribusiness

As we noted at paragraph 3.4 of our Draft Legislation Submission, it is not clear why acquisitions of 5%/10% or more (direct interest) in an agribusiness is the relevant notification threshold, rather than 20%, being the proposed threshold for acquiring a substantial interest in an Australian entity.

We submit that the threshold of an investment in agribusiness for non-foreign government investors should match the 20% interest.

The definitions of agribusiness and agricultural land result in certain entities being caught by one or both definitions. We assume this was intended. If so, this should be clearly stated.

# PART 3, DIVISION 2 – MONEYLENDING EXEMPTION (REGULATION 25)

## 6 DEFINITION OF MONEYLENDING AGREEMENT (REGULATION 5)

A moneylending agreement under the Draft Regulations is defined as:

- (a) *an agreement entered into in good faith, on ordinary commercial terms and in the ordinary course of carrying on a business (a **money lending business**) of lending money or otherwise providing financial accommodation, except an agreement dealing with any matter unrelated to the carrying on of that business.*
- (b) *for a person carrying on a moneylending business - an agreement to acquire an interest arising from a money lending agreement (within the meaning of para (a)).*

### 6.2 Issue 1

It is unclear what the new requirement that a moneylending agreement be “on ordinary commercial terms” means. In this context the words “on ordinary commercial terms” could be read to apply a commercial terms test to the business of lending money or otherwise providing financial accommodation. If an examination of the commercial terms of a particular loan or other financial accommodation is not intended we suggest this additional requirement is deleted.

### 6.3 Issue 2

Paragraph (b) introduces a permission for a person carrying on a moneylending business to enter an agreement to acquire an interest in a moneylending agreement through secondary trading.

However, paragraph (b) remains limited to persons carrying on a moneylending business and we suggest this is extended to members of the same group of entities by changing paragraph (b) to read:

- (b) *for a person carrying on a moneylending business **or a subsidiary or holding entity or a subsidiary of a holding entity of that person** – an agreement to acquire an interest arising from a money lending agreement (within the meaning of para (a)).*

Also, it should be considered whether it is appropriate that an agreement to acquire an interest under a moneylending agreement appropriately captures secondary debts. The proposed drafting specifies that in these circumstances it will be the agreement to acquire the interest rather than the acquired moneylending agreement (within the meaning of paragraph (a)) which will be the moneylending agreement.

This raises two questions.

First, is that paragraph (b) will not capture transfer mechanisms other than contractual agreements, such as statutory transfers of obligations for example. While security interests acquired by statutory transfers may be excluded by Draft Regulation 27 (Will or devolution), there remains a question of whether the enforcement of a security interest acquired through devolution would obtain the benefits of the moneylending exception as enforcement would presumably not have the benefit of the devolution exemption.

Second, does the designation of an agreement to acquire an interest as a moneylending agreement achieve the desired outcome when read in connection with Draft Regulation 25(1)? We suggest that in respect of a bank acquiring a secured loan through a secondary market trade its interest may arguably not be held solely by way of security for the purposes of the agreement to acquire the interest but instead solely by way of security for the purposes of the moneylending agreement (within the meaning of paragraph (a)) which it acquires.

## 7 SECURITY FOR MONEYLENDING AGREEMENTS (REGULATION 25(1))

*This section applies in relation to an interest in a securities, assets, a trust, Australian land or a mining, production or exploration tenement if:*

- (a) *the interest is:*
- (i) *held solely by way of security for the purposes of a moneylending agreement; or*
  - (ii) *acquired by way of enforcement of a security held solely for the purposes of a moneylending agreement; and*
- (b) *the entity that holds the interest is:*
- (i) *the entity (the **lender**) that provided the money or financial accommodation under the moneylending agreement; or*
  - (ii) *a subsidiary or holding entity of the lender; or*
  - (iii) *a person who is (alone or with others) in a position to determine the investments or policy of the lender; or*
  - (iv) *a security trustee on behalf of the lender; or*

- (v) *a receiver, or a receiver and manager, appointed in relation to a person mentioned in any of subparagraphs(i) to (iv).*

## 7.2 Issue 1

The interaction of Draft Regulation 25(1)(b)(i) with limb (b) of the definition of moneylending agreement is unclear. If the intention is that a “lender” under this Draft Regulation could be an acquirer of an interest arising from a moneylending agreement (for example under a secondary trade) then we suggest this could be clarified by changing paragraph (b)(i) as follows:

*the entity (the **lender**) that provided the money or financial accommodation **or acquired an interest** under the moneylending agreement; or*

## 7.3 Issue 2

We suggest clarifying paragraph (b)(ii) to include other subsidiaries of a shared holding entity. This could be achieved by changing the paragraph to read:

- (ii) *a subsidiary or **holding entity or a subsidiary of a** holding entity of the lender; or*

## 8 RESIDENTIAL MORTGAGE LENDING (REGULATION 25(2))

*The Act does not apply in relation to the interest if:*

- (a) *the interest is in residential land; and*
- (b) *all of the following apply in relation to each holding entity of the entity that holds or acquires the interest:*
  - (i) *there are at least 100 holders of securities in each of those holding entities;*
  - (ii) *each of those holding entities are listed for quotation in the official list of a stock exchange (whether or not in Australia);*
  - (iii) *each of those holding entities are ADIs or otherwise licensed as financial institutions.*

### 8.2 Issue 1

We maintain our submission that the exemption in this Draft Regulation 25(2) should only be relevant to lenders who are foreign government investors, because we submit below that Draft Regulation 25(4) should exempt other lenders.

The Draft Regulation as currently drafted effectively excludes lenders who do not meet the tests in Draft Regulation 25(2)(b) – holding entities that are listed on a stock exchange with a spread of at least 100 holders – from participating in the residential lending market. Requiring clearance effectively excludes them from the market, because in order to compete they must be able to offer finance unconditionally and without the delay caused by the need to obtain clearance. It would also increase the timing, administrative and cost burden for routine secured financial accommodation from such financiers if they still chose to compete.

The scope of disapplication of the exemption in respect of interests in residential land seems to go beyond what is necessary to protect the retail residential mortgage market and will reduce competition and negatively affect the availability of finance to the Australian corporate debt market.

We submit:

- (a) Draft Regulation 25(2) should be the general exemption for banks or lenders who are foreign government investors and who are themselves ADIs or licensed as financial institutions, regardless of the status of their holding entities as being listed on a stock exchange or not (which is the current position under the Policy).
- (b) Draft Regulation 25(2) should not be limited to residential land. There is no distinction under the current Policy between lending on the security of residential land or other assets.

If this submission is adopted, to assist with any concern that loan security is improperly used in relation to residential land where interests would otherwise require approval, consideration could be given to bringing into the legislation a requirement regarding residential land that all interests acquired by way of enforcement of a security interest must result in a genuine attempt to dispose of the residential land or a separate approval be obtained against the usual criteria. Consideration could be given to whether such attempt must result in an actual disposal within a certain period.

### 8.3 Issue 2

If our submission in section 8.2 above is not accepted, we would make the following specific comments on Regulation 25(2). As currently drafted, Draft Regulation 25(2) appears to exclude financial institutions which satisfy all of the tests in sub-paragraphs (i) to (iii) but do not themselves have holding entities that are ADIs or licensed as financial institutions. It would be unusual for the holding entity of an international bank (many of whom have substantial government holdings) to itself be an ADI or licensed as a financial institution. The inclusion of the words “each holding entity” also implies that all entities in the ownership chain need to satisfy the tests in sub-paragraphs (i) to (iii) which is unlikely to be the case. We suggest this is altered so that only the entity holding the interest needs to satisfy the tests in sub-paragraphs (i) to (iii).

The Draft Regulation also appears to exclude security trustees and other entities referred to in Draft Regulation 25(1)(b).

We suggest that it is clarified that licensing as a financial institution may be in Australia or elsewhere if that is the intention.

These issues could be addressed by amending the drafting as follows:

- (b) *all of the following apply in relation to **the lender in respect of** the entity that holds or acquires the interest **in accordance with section 25(1)(b)**:*
  - (i) *there are at least 100 holders of securities in **it**;*
  - (ii) ***it is** listed for quotation in the official list of a stock exchange (whether or not in Australia);*
  - (iii) ***it is an ADI** or otherwise licensed as **a financial institution** (whether or not in Australia).*

## 9 FOREIGN GOVERNMENT INVESTOR LENDERS (REGULATION 25(3))

- (3) *The Act does not apply in relation to the interest if:*
  - (a) *the interest is held or acquired by a foreign government investor; and*
  - (b) *the interest is not in residential land; and*
  - (c) *if the foreign government investor is an ADI or a subsidiary of an ADI—either:*

- (i) 12 months have not passed since the acquisition of the interest; or
- (ii) the foreign government investor is making a genuine attempt to dispose of the interest; and
- (d) if the foreign government investor is not an ADI or a subsidiary of an ADI—the foreign government investor is making a genuine attempt to dispose of the interest.

## 9.2 Issue 1

Draft Regulation 25(3) seems to be seeking to formalise the current position under the Policy that “... the investor must notify the Government and get approval if the security is enforced, and the investor gains control over the asset(s) and retains it for more than 12 months.” We submit this is best done by modifying Draft Regulation 25(2) as noted above, and confining Draft Regulation 25(3) to the requirement that banks or other ADI lenders who qualify as foreign government investors must obtain clearance or dispose of their interests within 12 months of enforcement.

If this position is accepted Draft Regulation 25(3)(b) should be deleted.

## 9.3 Issue 2

In respect of the references to ADI in paragraphs (c) and (d) (and also in Draft Regulation 25(2)(b)(iii)) a number of banks which are ADIs often participate in financings for Australian businesses through foreign branches. If it is intended that banks which are ADIs but which participate in moneylending agreements through offshore branches would have the benefit of the provisions relating to ADIs we suggest it would be helpful to specify this (whether in the regulations or explanatory memoranda) as previous practice in relation to ADIs acting through foreign branches has varied.

## 9.4 Issue 3

In paragraph (d) a foreign government investor which is not an ADI must upon acquiring an interest through enforcement of a security interest immediately seek to dispose of that interest. Foreign government investors which are ADIs are allowed 12 months before seeking to dispose of assets recognising that an enforcing party may need to take some time to assess the market and disposal options before executing an enforcement sale. In most financings foreign government investors which are not ADIs will not be willing to make loans or otherwise advance financial accommodation without some certainty that some flexibility on disposal upon enforcement is permissible (as a lender will not wish to be in a position where an enforcement process is compromised due to lack of necessary approvals whether or not enforcement is currently contemplated). There is often a period of consideration of the most appropriate method of disposal or market testing and it is unclear whether the genuine attempt to dispose test would be satisfied in these circumstances. It is relevant to note that receivers have statutory duties in relation to any disposal process which will need to be satisfied before a disposal can proceed.

To address these issues we suggest extending the 12 months safe harbour to foreign government investors which are not ADIs.

## 10 OTHER LENDING (REGULATION 25(4))

- (4) *The Act does not apply in relation to the interest if the interest is not:*
  - (a) *an interest in residential land; or*
  - (b) *an interest acquired by a foreign government investor.*

## 10.1 Issue 1

Draft Regulation 25(4) should not refer to residential land. For the reasons set out above residential land should not be treated as a special case. Our submission is that Draft Regulation 25(2) should address additional requirements for foreign government investors and other foreign persons should not be affected by that Draft Regulation.

## 10.2 Issue 2

If it is intended that Draft Regulation 25(4)(b) is limited to interests acquired by way of enforcement of security and approval is not required for interests held solely by way of security by a foreign government investor this should be clarified. This could be achieved by changing paragraph (b) to read:

(b) *an interest acquired **by way of enforcement of a security interest** by a foreign government investor.*

## **PART 3, DIVISION 3, SUB DIV B – GENERAL EXEMPTIONS (REGULATIONS 27-29)**

11 We will address these provisions shortly.

## **PART 3, DIVISION 3, SUB DIV C – EXEMPTIONS FOR SIGNIFICANT AND NOTIFIABLE ACTIONS RELATING TO ENTITIES (REGULATIONS 30-32)**

### **12 CONVERTIBLE INSTRUMENTS THAT INCLUDE A REQUIREMENT FOR LOSS ABSORPTION IF ENTITY BECOMES NON-VIABLE (REGULATION 32)**

12.1 Para (b) – Does not work (it should be the forced conversion that is exempt).

12.2 We will provide further submissions in respect of these provisions shortly

## **PART 3, DIVISION 3, SUB DIV D – EXEMPTIONS FOR SIGNIFICANT AND NOTIFIABLE ACTIONS RELATING TO LAND (REGULATIONS 33-37)**

### **13 ACQUISITIONS BY PERSONS WITH A CLOSE CONNECTION TO AUSTRALIA (REGULATION 33)**

Para (b) and (c) – The reference to “only because” should be replaced with a “but for” concept. For example, an Australian corporation that is a foreign person because it is 35% owned by an Australian citizen who is not ordinarily resident in Australia and 6% by a foreign citizen not ordinarily resident in Australia should be able to rely on the exception.

Para (b) and (c) – The reference to “held directly” is unnecessary. It leads to an anomalous result of an Australian corporation being able to rely on the exception but its wholly-owned Australian subsidiaries (which will be foreign persons because the Australian corporation is still a foreign person) not being able to rely on the exception.

### **14 ACQUISITIONS BY FUNDS AND SCHEMES (REGULATION 34)**

14.1 Item 4 – The word “primarily” is vague. We suggest that consideration be given to tightening the drafting.

15 We will provide further submissions in respect of these provisions shortly.

## **PART 3, DIVISION 3, SUB DIV E – FTA EXEMPTIONS FOR AGRIBUSINESS AND AGRICULTURAL LAND (REGULATION 38)**

- 16 We have already raised with you the requirement to remove the heading from regulation 38(3).

Again clarity is required to expressly state what the provision applies to and what is intended to be achieved, in particular regulation 38(3). The limitation in the provision regarding land used “wholly and exclusively for a primary production business” is a departure from the other Agri concepts in the legislation where a lower usage qualifies for agricultural land.

## **PART 3, DIVISION 3, SUB DIV F – EXEMPTION CERTIFICATES (REGULATION 39)**

### **17 EXEMPTION CERTIFICATES FOR UNDERWRITERS (REGULATION 39)**

We support Draft Regulation 39. We believe the regulation as drafted provides sufficient flexibility for exemption certificates to be given to encompass customary underwriting arrangements entered by foreign persons in the Australian capital markets.

A minor drafting issue is that we would add “or Australian entities that are an agribusiness” after “land entities” in Draft Regulation 39(1)(a).

While it is a matter for the exemption certificate, we believe exemption certificates for this type of activity should be for indefinite duration.

We believe that the fee arrangements associated with this exemption are appropriate (Draft Fees Regulation 5(1)). In that regard we assume that a fee will only be paid once (see section 113(1), Item 1(a) of the Draft Act).

## **PART 3, DIVISION 4 – EXEMPTIONS FROM SPECIFIED PROVISIONS (REGULATIONS 40 – 45)**

### **18 AGRICULTURAL LAND – DEEMING TO NOT BE AGRICULTURAL LAND (REGULATION 40)**

We welcome the agricultural land exceptions provided for in the Draft Regulations which address a number of the concerns raised at paragraph 3.1 of our Draft Legislation Submission.

However, there are still a number of points that we raised in our Draft Legislation Submission that have not been adequately addressed by the Draft Regulations, which we outline below.

#### **18.1 Carve-outs to agricultural land sensible**

We welcome the carve-outs to agricultural land set out in the Draft Regulations. In particular, the Draft Regulations now deem the following types of land as not “agricultural land” for the purposes of the Foreign Acquisitions and Takeovers Act:

- (a) land that is not used wholly or predominantly for a primary production business and which is the subject of an application for rezoning. We anticipate this would include land subject to a residential or commercial development application; and
- (b) land that is not used wholly or predominantly for a primary production business and which is used for a mining operation or which is the subject of an approval, or an application for approval, for a mining operation.

The Draft Regulations also contain a number of other carve-outs from the definition of “agricultural land” which appear to us to be sensible.

The carve outs should also be reflected in the Agricultural land register legislation.

### **18.2 Expand carve-out for incidental land used in relation to mining operations**

We recommend that the exception for land used wholly or predominantly for a mining operation be expanded to include “purposes incidental to a mining operation”. This would allow land used as buffer land for mining operations to be excluded from the definition of agricultural land.

Such land would continue to be “Australian land” and subject to the applicable thresholds under the Act.

### **18.3 No carve out for business purpose incompatible with primary production**

The Draft Regulations do not appear to carve out from the definition of “agricultural land” land that is held or used for a business purpose that is incompatible with the use for a primary production business. For example, a gas transfer station.

We raised this as a concern in our Draft Legislation Submission as, in our view, if land is technically able to be used for a primary production business, however its current use is patently incompatible with the use of the land for a primary production business, the land should not be subject to the same restrictions as true “agricultural land”.

Furthermore, this would result in significant landholdings being included in the Register of Foreign Ownership of Agricultural Land (as it relies on the same definition) which are not used for primary production and are unlikely to be so used in the foreseeable future. This would frustrate one of the objects of establishing the Register: an increase in transparency on the levels of foreign ownership of agricultural land in Australia.

We submit that a further condition should be added to Draft Regulation 40 to the following effect:

*Business purpose incompatible with primary production business*

The land is used wholly or predominantly for a business purpose that is incompatible with the use of the land for a primary production business.

### **18.4 No clarification in relation to exploration permits**

The Draft Act makes it clear that the Treasurer's powers do not extend to the acquisition by a foreign person of an interest in an exploration or prospecting tenement, because such tenements are excluded from the definition of "mining or production tenement". This reflects a policy that the acquisition of such interests should not be notifiable. It would be an anomalous result if an interest which has been expressly excluded from one category of what constitutes Australian land fell within the definition of another category of Australian land. In other words, it should not matter what category of land an exploration or prospecting tenement is granted over if the policy is that the acquisition of the tenement itself is not to be subject to the Treasurer's powers. It would also be anomalous if an interest which is not notifiable under the Draft Act is still registrable under the Agricultural Land Register Bill.

Although an exploration or prospecting tenement would generally not give rise to an interest in land, these anomalies would be avoided, in the context of both the Agricultural Land Register Bill and the Draft Act, if Draft Regulation 40(4)(b)(ii) and the equivalent rule to be issued under the Agricultural Land Register Bill was clarified in two ways:

- (a) the term "mining, production or exploration tenement" is defined in the regulations for the purposes of clarifying that foreign government investors must still notify in relation

to actions relating to exploration and prospecting rights (Draft Regulation 52). If that defined term was used in Draft Regulation 40(4)(b)(ii), rather than the term "mining or production tenement" which is defined in the Draft Act, then it would be clear that exploration and prospecting rights were not intended to fall within the definition of agricultural land, while still preserving the notification obligations that apply to foreign government investors; and

- (b) the test in relation to what constitutes a "mining operation" was clarified so as to include a "mining, production or exploration tenement", irrespective of whether there is a mining operation currently being undertaken or not.

For similar reasons, Draft Regulation 40(6) should be clarified so as to extend to "land used, or granted for use, for the purposes of... a mining operation". This would then clearly establish that interests in "mining, production or exploration tenements" were not agricultural land both for the purposes of the register and also for the purposes of the notification provisions under the Draft Act itself (other than for foreign government investors to which the notification provisions would continue to apply by virtue of Draft Regulation 52). Currently, it is arguable that a mining, production or exploration tenement granted over, for example, a pastoral lease or freehold land could be caught within the meaning of agricultural land if it is not currently being "used wholly or predominantly" for an operating mine, which seems contrary to the intention of the legislation. The Draft Regulations do not distinguish between the bundle of rights available to a mining tenement holder and those which a pastoral lease or freehold title holder has. As a matter of fact, agricultural activities are not a permitted activity under the terms of any mining, production or exploration tenement (as defined) and, therefore, it seems odd that a mining tenement could ever be considered as agricultural land.

The Draft Act and Draft Regulations should also squarely clarify that infrastructure and other tenure granted in connection with "mining operations" (as expanded by the proposed changes above) is excluded. For example, by extending the definition of mining operations to include infrastructure leases, licences and other forms of tenure granted in connection with a mining operation. This would then capture miscellaneous licences, special leases and other forms of tenure on which infrastructure in support of mining operations is constructed. Similar comments apply as set out above in relation to permitted use.

### **18.5 Clarify when land must be notified under the agricultural land register**

The Agricultural Land Register Bill uses the same definition of agricultural land in the Draft Act. Land held by a foreign person must be notified under the agricultural land register when the land becomes, or ceases to be, agricultural land.

Under the current proposed definition, it is too uncertain when land could become, or cease to be, reasonably used for primary production business and hence when the notification obligation arises.

We recommend that the Minister uses his/her powers to make rules under section 35 of the Agricultural Land Register Bill to exempt the categories of land described in Draft Regulation 40 with the additional exemptions in this Submission.

### **18.6 Increase percentage threshold for agricultural land corporation**

The current policy is that interests of 15% or more in a rural land rich corporation are to be notified. The proposed legislation reduces this to any interest in an agricultural land corporation. We submit that a 20% threshold matching that of the general corporate threshold be adopted.

## **19 ASSOCIATE EXEMPTION (REGULATION 41)**

We welcome the proposal to modernise and improve the definition of "associate" in section 6. We also welcome the proposed exemption in Draft Regulation 41 so that limited partners of a

limited partnership are not automatically associates of the other limited partners or general partners of the limited partnership.

However, as noted in this Submission paragraph 3.1 above, we believe that the automatic associate definition at section 6(1)(l) (dealing with foreign government investors from a single country) operates too broadly and should be deleted or limited.

## 20 RELIEF FOR AUSTRALIAN ENTITIES DEEMED FOREIGN (REGULATION 43)

### 20.1 Disregarding small holdings

The concession that interests of persons with less than a substantial holding in an entity which has its primary listings on the ASX or another Australian stock exchange should be disregarded in determining whether or not two or more persons have an aggregate substantial holding in the entity, is welcomed and, in our view, sensible. Such entities should not be deemed to be "foreign persons" under the Act merely because they have many foreign securityholders with small holdings that, in aggregate, amount to 40% or more.

However, as drafted, Regulation 43 may be difficult to apply in practice. The concepts of "interest" in the Draft Act and "substantial holding" in the Corporations Act are not the same; nor are the definitions of "associate" in the Draft Act and the Corporations Act aligned. Further, ASIC has power to modify the substantial holder provisions of the Corporations Act as they apply to persons or classes of persons (and has in fact done so generally). It therefore would simpler if Draft Regulation 43(1) provided that:

*For the purpose of determining whether two or more persons hold an aggregate substantial interest in an entity that is listed for quotation on in the official list or a stock exchange in Australia and that listing is the entity's primary listing in an official list of a stock exchange, disregard the interest in securities in the entity of any person who does not have a substantial holding in the entity (within the meaning of the Corporations Act 2001 as it applies to the person from time to time).*

*or in the alternative*

*the interest, together with any interests held by any associates of the person, is not a substantial holding (within the meaning of the Corporations Act 2001 **as relevantly modified from time to time**).*

We submit either formulation better reflects the policy behind the Regulation. Substantial holders are required to give substantial holding notices to listed entities under Part 6C.1 of the Corporations Act and, consequently, the entities should know who their substantial holders are. The notices are required to name the associates of the person, and their relevant interests will necessarily be taken into account in working out whether the person is a substantial holder (see definition of "substantial holding" in section 9 of the Corporations Act).

### 19.2 Working out percentages

With respect to Draft Regulation 43(2), we presume it is intended to confirm that Draft Regulation 43(1) does not operate to cause the interest of a person which is disregarded under Draft Regulation 43(1) to be disregarded for any purpose other than to determine whether two or more persons hold an aggregate substantial interest in an entity. We submit this intention may be more clearly expressed as:

*However, the interest of a person in securities which is disregarded under subsection (1) is disregarded only for the purpose of determining whether 2 or more persons hold an aggregate substantial interest.*

**21 TRACING OF SUBSTANTIAL INTERESTS IN CORPORATIONS AND TRUSTS (REGULATION 44)**

This regulation is obscure and is unclear. What is intended?

As noted above, this regulation appears to be part of a complex path to ascertaining whether an interest that sits above an Australian interest may be notifiable. However, the provision is so unclear that we suggest it be redrafted and then comment sought.

**22 EXEMPTIONS FOR CORPORATIONS ACT ACQUISITIONS (REGULATION 45)**

It is not clear why the rights issue under Draft Regulation 45(2)(a) must be “*under the Corporations Act 2001 or a law of a foreign country or a part of a foreign country*”. If this formulation of Regulation 45(2) is retained (which is not our preference for the reasons set out below), the words “*or otherwise*” should be added to the end of that phrase. This should clarify that the rights issue is to be read in its ordinary meaning. A rights issue can be a private issue by any entity unregulated by legislation, including in relation to securities or interests issued by entities which are neither a “body” nor a “management investment scheme” as referred to in section 9A of the Corporations Act.

As discussed with you, one of the long pressed for reforms is the introduction of a pro rata exemption for trusts. The suggestion is that Regulation 45 is that reform, however, trusts (other than management investment schemes) are not covered by Draft Regulation 45(2)(a) and the reform is not achieved. The pro rata provision that exists in the current legislation should be inserted instead:

*Pro rata exemption*

The Act does not apply in relation to a security holder of an entity subscribing for securities in the entity if:

(a) the securities were subscribed for in pursuance of a resolution by the entity to make available a number of securities specified in, or ascertained in accordance with, the resolution for allotment to persons who were registered as the holders of securities in the entity on a date specified in the resolution; and

(b) the number of securities for which the securityholder so subscribed bears to the total number of securities made available for allotment in pursuance of the resolution as nearly as practicable the same proportion as the number of issued securities in the corporation held by the securityholder immediately before the date specified in the resolution bears to the total number of issued securities in the entity immediately before that date.

**PART 4 – THRESHOLDS (REGULATIONS 46-49)**

23 We will provide further submissions in respect of these provisions shortly.

**PART 5 – SIGNIFICANT ACTIONS AND NOTIFIABLE ACTIONS (REGULATIONS 50-54)**

24 We have no substantive comments in relation to Part 5 save to repeat the observations made in relation to Part 2 concerning :

- the desirability of distinguishing between different categories of foreign government investors ( see Part 2, para 3 above ); and

- a foreign government acquiring a direct interest in an Australian business or entity ( see Part 2 , paras 3.2 (e) and (g) )

## **PARTS 6 AND 7 – OTHER AND TRANSITIONAL (REGULATIONS 55-60)**

### **25 DISCLOSURES OF PERIODIC AGGREGATE INFORMATION (REGULATION 57)**

The matters specified in Draft Regulation 57 (for disclosure of periodic aggregate information under section 124(a) of the Draft Act) include several references to withdrawal of notices/applications, but not the making/granting of requests to extend the period for making a decision. It is possible that, if the amendments are passed, applicants will be more likely to request extensions rather than withdraw applications. Accordingly, we think it would be appropriate to have disclosure of aggregated information regarding the number of requests for extensions that are made/granted.

## **FOREIGN ACQUISITIONS AND TAKEOVERS FEES IMPOSITION REGULATIONS**

- 25.1 We have proposed in our prior submissions that the Government consider a number of exemptions. Most of these exemptions have not been addressed in the current draft legislation.
- 25.2 Further discussion is required at a practical level as to how the fee regime is to work. In particular in respect of complex proposals involving multiple transactions.
- 25.3 There is also deep concern regarding reliance on Guidance Notes that have not been issued and that do not have the effect of legislation.
- 25.4 The fees legislation needs to address:
- (a) all acquisitions by an existing majority holder (greater than 50 per cent), not just notifiable actions;
  - (b) foreign government investors setting up special purpose vehicles that have no assets and have not commenced business;
  - (c) competitive bids where the bidder is unsuccessful;
  - (d) acquisitions of a property comprising a number of parcels of land.
- 25.5 We suggest that a cap be put on fees paid by any one investor in a 12 month period. In the alternative, a discount should be applied. The fees are a disincentive to investment and there should be some measure of encouragement applied.
- 25.6 We will provide further submissions in respect of the Fees Regulations shortly.