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INQUIRY INTO FOREIGN INVESTMENT PROPOSALS

Background

We appreciate the important role that the *Foreign Acquisitions and Takeovers Act* (**FATA**), and associated policy settings and administrative arrangements, play in enabling Australia to maintain a globally competitive open economy, while also protecting Australia's national interest more generally. However, we believe a number of improvements could be made to the FATA and its administration.

Ensuring Australian targets receive procedural fairness and decision makers have access to complete and accurate information

Currently there is no obligation for the target of a foreign investment proposal to be informed of a FATA application in relation to the proposal, meaning that (unless the target learns of the application by other means) important decisions about the proposal may be made without the benefit of information and submissions from the target.

Providing targets with notification of foreign investment applications (including information on key dates and deadlines) would allow the Treasurer and the Foreign Investment Review Board (**FIRB**) to make better informed decisions and would provide procedural fairness to Australian target companies.

We appreciate that confidentiality of their proposals is important to applicants, and do *not* suggest that target companies be informed of confidential proposals (for example in relation to a forthcoming hostile bid) without the applicant's consent, but only that FIRB approval not be *granted* until the target is able to be informed of the application and make submissions – in practice this would mean that hostile proposals would need to be launched on a 'subject to FIRB' basis, and the decision in relation to the application could then be made after the proposal was public and with the benefit of both public and target input.

We do not believe there would be anything remarkable or unworkable in this change to procedure (indeed, it is perhaps more remarkable that in the current environment decisions may be made without any testing of the applicant's submissions and assertions). In this regard, we note that other decision makers, like the ACCC, which makes similarly important decisions on whether or not to grant merger clearances, will only make such decisions in contentious cases after a public consultation process, meaning that it is able to take into account information provided by all relevant stakeholders – acquirers, targets and other affected parties including Australian customers and suppliers. This ensures it is able to assess the veracity of information it receives from the acquirer and test it against views and information provided by other affected parties. The ACCC's informal merger clearance process does not prevent M&A activity, but simply ensures it occurs in an appropriately informed and considered environment.

We also note that instituting this system would not necessarily require legislative change. A policy of not granting approval[1] until the target of a foreign investment application had been informed and had the opportunity to make submissions could simply be adopted as an administrative matter.

[1] Or, technically, of ensuring a proposal is not able to proceed whether through approval or effluxion of time.

Key points:

- FIRB procedures should be changed to ensure targets are notified of foreign investment applications relating to them (including key dates and deadlines), and have the opportunity to make submissions and provide relevant information before an approval decision is made.
- This should not happen without the applicant's consent, but approval should not be granted until the target is able to be informed and has had a reasonable opportunity to respond.

Creeping acquisitions

Although having broader implications beyond the foreign investment sphere, we believe that the '3% creep' rule in Australia's takeover provisions[2] is unduly permissive and can allow control of a target to pass to an acquirer through 'attrition' and in a manner which denies shareholders as a whole the ability to receive a premium for their shares.

Under this rule, a person seeking control can currently acquire up to a 20% stake and then simply buy a further 3% each 6 months until its holding is substantial enough to confer practical control. This means that a bidder can gain control without ever having to make an offer to all shareholders, effectively being able to get to 50% within 5 years. This is fundamentally at odds with the principles underpinning our takeover law.

Australia is significantly out of step with other leading jurisdictions in this regard. For example, the United Kingdom abolished the ability to creep between 30% and 50% in 1998. New Zealand also provides no creep exception below 50%. Hong Kong only allows acquisitions of up to 2% every 12 months between 30% and 50%, and Singapore similarly only permits acquisitions of up to 1% every 6 months between 30% and 50%.

Key points:

- Australia's '3% creep' rule can permit control of a target to pass without shareholders having the opportunity to receive a premium, and is fundamentally at odds with the principles underpinning our takeover law.
- It should be reformed to bring it into closer alignment with the comparable provisions in other jurisdictions, where creeping to control is either not permitted (UK and NZ, in our view the preferable model) or severely curtailed (Hong Kong and Singapore).

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[2] Corporations Act, section 611, item 9.