INFRASTRUCTURE PARTNERSHIPS AUSTRALIA

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International Tax Unit
Corporate and International Tax Division
Treasury
Langton Cres
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SUBMISSION TO THE TREASURY IN RESPONSE TO ITS CONSULTATION PAPER ON PROPOSED CHANGES TO THE FOREIGN RESIDENT CAPITAL GAINS TAX REGIME

Infrastructure Partnerships Australia is an independent think tank and executive member network, providing research focused on excellence in social and economic infrastructure. We exist to shape public debate and drive reform for the national interest. As the national voice for infrastructure in Australia, our membership reflects a diverse range of public and private sector entities, including infrastructure owners, operators, financiers, advisers, technology providers and policy makers.

Infrastructure Partnerships Australia draws together the public and private sectors in a genuine partnership to debate the policies and priority projects that will build Australia for the opportunities and challenges ahead.

Please find below a submission to the Treasury, prepared by Infrastructure Partnerships Australia's Tax Policy Taskforce, in response to its consultation paper on proposed changes to the foreign resident capital gains tax regime.

In addition to responding to the questions specified in the consultation paper, the submission also responds to several policy matters contained in the consultation paper, which will have a significant impact on the infrastructure sector, including projects critical to Australia's energy transition.

Infrastructure Partnerships Australia and its Tax Policy Taskforce looks forward to further assisting the Treasury on this consultation. If you require additional detail or information please do not hesitate to contact Mollie Matich, Head of Policy and Research at mollie.matich@infrastructure.org.au.

Yours sincerely,

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Response to Consultation Paper: General Comments

While the Consultation Paper has sought stakeholder views on specific implementation details of the announcement made in the 2024-25 Federal Budget handed down on 14 May, the Taskforce submits that the following policy matters are important considerations in developing draft legislation and considering the impact of the measures on key infrastructure sectors, including those critical to Australia's energy transition. The Taskforce's responses to the specific questions raised in the Consultation Paper follow this section.

1. Economics impact on foreign investment

Foreign investment

Australia relies on foreign investment to provide capital to finance new and established industries, develop infrastructure, drive productivity, and create jobs.

While the proposed foreign resident CGT changes are intended to align tax treatment between domestic and foreign investors, this is a difficult comparison and, the Taskforce respectfully submit that it fails to recognise the value foreign capital plays, with its often-shorter investment horizons. Firstly, domestic investors have access to offsets, concession rates, and other benefits not available to foreign investors. Secondly, few domestic investors operate in the 'greenfield' or medium-term investment segments that are substantially more reliant on capital gains for investment cases that reflect the risk required for such investments.

Role of greenfield foreign investors in Australia's energy transition

The Taskforce respectfully submits that the proposed changes to the foreign resident CGT regime will push greenfield and medium-term clean energy investors into other markets.

Greenfield investors are a class of renewable energy investors – overwhelmingly foreign – that typically enter a project at the development stage and stay in the investment through construction and operations – asset ownership may then be handed to investors with a lower cost of capital, such as superannuation funds. This investment model makes the capital gain an important part of delivering a return suitable for investors and reflective of the much higher risk those investors take on through greenfield investment and construction.

These investors are a critical part of the renewable energy transition. There is a limited pipeline of sufficiently low-risk renewable energy investments for institutional investors, resulting in very low levels of investment decisions from traditional funders in Australia in recent years. This is because renewable energy investments are technically, commercially and politically complex, and Australia compares unfavourably with other markets – including the US and UK – who have more favourable investment environments. Greenfield and medium-term investors carry development, construction and early operations risk to ensure more low-risk and investable projects are available for local institutional capital and other domestic investors. Each of these investors play an important role in Australia's clean energy investment landscape.

These investors are particularly important in driving the development and commercialisation of new asset classes in the market, including offshore wind and renewable hydrogen. This is because these technologies require very high development expenditure over long periods, and with much higher risk than more traditional renewables, and few investors have the capital and expertise to manage these risks.

The Taskforce respectfully submits that just because a foreign investor does not pay capital gains tax on a project does not mean that the Australian government loses out on taxation revenue from the project, the project vehicle will still generate taxable income which is subject to economic taxation once in the form of taxable income arising in the project vehicle (and taxed at 30 per cent if the project vehicle is a company and at investors marginal tax rates (15-47 per cent) if the project vehicle is a trust or partnership.

2. Transitional Rules

The Tax Policy Taskforce understands Treasury's desire to clarify and broaden the TARP rules and the CGT base for non-residents. We welcome additional clarity of the law as having clear and transparent tax rules that can be applied by non-residents with respect to Australian investments is welcome. We do note, however, the absence of grandfathering or any appropriate transitional rules.

The non-resident CGT rules were introduced in 2006 (*Tax Laws Amendment (2006 Measures No. 4) Bill 2006)* with the following aims: (a) to enhance Australia's status as an attractive place for business and investment by foreign investors by removing the deterrent effect of broad-based foreign resident CGT rules; and (b) to encourage investment into Australia by aligning Australia's domestic law more consistently with international practice (including Australia's tax treaties and US FIRPTA rules) and providing greater certainty and lower compliance costs. The Revised explanatory memorandum to *Tax Laws Amendment (2006 Measures No. 4) Bill 2006* states: *"This measure* ***narrows the range of assets*** *on which a foreign resident will be liable to Australian CGT to Australian real property… This will further enhance Australia's status as an attractive place for business and investment by addressing the deterrent effect for foreign investors of Australia's current broad foreign resident CGT tax base…."*

Foreign investors have made substantial investments in Australia in accordance with what we believe are settled yet complex CGT rules with respect to determining direct (TARP) and indirect (IARPI) interests, that have been in place since 2006. The drafting decision in 2006 not to define the term "real property" when Division 855 was enacted and to rely instead upon general law concepts in identifying TARP and IARPI was a conscious decision. By 2006 it was already well understood that there were complexities and difficulties in applying that term "real property". For example, the fixtures/chattels distinction has always been a complex and uncertain area of law, the issue of how particular statutes work to severe the ownership of assets from land "statutory severance" under State or Federal laws meant that different rules apply to different asset classes, and as between States. This was well known. Further, the distinction between real property rights and contractual/personal rights was well understood. There had already been contention over this concept as an example when the TARP rules were changed in 2009 to make it clear that a lease of land was to be treated as real property.

Infrastructure Partnerships Australia acknowledges that actual and pending litigation processes in relation to TARP have been difficult to manage for both taxpayers and the Australian Taxation Office (ATO), which reflects the uncertainties in the way in which the law as drafted applies based on the facts of each case and the disputes in the classification and valuation of assets particularly in applying the principal assets test (PAT). Addressing the uncertainty is a reasonable approach, but it doesn't, in our view, justify the retrospectivity of its application in a manner adverse to taxpayers.

The concern is that although these proposed changes only apply from 1 July 2025, they seem to be intended to apply to all transactions that occur after that date, notwithstanding that (1) the asset sold (TARP) or (2) both the membership interest being sold and the underlying assets (IARPI) being valued in applying the PAT, were acquired/ or where construction commenced prior to that time.

When making investment decisions, institutional investors require a high level of confidence regarding the overall return on an investment, and taxation plays an important part of determining the ultimate return. In formulating investment decisions, foreign institutional investors will assess the characterisation of the asset as TAP based on a combination of professional taxation advice and publicly available ATO administrative guidance. Relevant decisions by the ATO include for example:

- generation assets (such as a windfarm), are not taxable Australian real property (TARP);(Private Binding Rulings Authorisation Number 1051354882115, Authorisation Number 1012939775381 and Authorisation Numbers 1012811534095)
- water entitlements are not TARP (PBR Authorisation Number 1051769632194 and Authorisation Number 1051821375616), and
- licences in relation to natural resources (fishing)(PBR Authorisation Number 1051415973035).

Changes to tax laws without a commensurate form of transitional relief can be extremely detrimental to investment returns and are highly likely to trigger impairments or write-downs of the net asset value of existing investments. Given the broad scope of assets that are proposed to become subject to CGT in Australia for foreign investors, this could have a material impact on existing investment portfolios and increase sovereign risk.

We respectfully submit that non-resident investors that have invested prior to the transitional time should, in our view, have TARP/IARPI determined in accordance with the relevant existing laws. Making retrospective changes that are designed based on a changed policy perspective could undermine confidence in the taxation system.

Retrospective changes to the law in the area of TARP come on the back of a series of changes to tax laws over the last 15 years that have consistently, materially and adversely focused on foreign investors in Australian infrastructure assets. These changes include increases to the MIT withholding rates in 2010, the effective abolition of stapled structures for new investments in 2018, changes to the tax treatment of foreign pension funds and sovereign wealth funds in 2018 and substantial changes to the way in which thin capitalisation operates in 2023, as well as certain state-based stamp duty and land tax changes. On the back of these series of changes of law, to

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change the TARP and to have retrospective application to existing investments may tarnish Australia's reputation and ability to attract foreign capital.

We consider that a form of grandfathering or transitional rule is necessary and appropriate to maintain foreign investor confidence in Australia as an investment destination of choice. The decision to apply the new TARP definition post-1 July 2025, while helpful to impacted investors with unrealised non-TARP (under current law) gains, creates a rush to the door for selling investors who need to complete sale processes prior to that time. This, however, does not help long-term infrastructure investors that would not otherwise divest. Investors who have committed capital on the basis of current laws should continue to be able to apply the TARP definitions as currently drafted.

Whether the grandfathering commences on 1 July 2025 or whether it commences on Budget Night, being 14 May 2024, is open to Treasury.

In this context, grandfathering means that on disposal of assets (for example membership interests which constitute IARPI) the existing Division 855 rules should continue to apply to that disposal with respect to rules that apply to the definition of and valuation of what is a TARP asset. Where an existing membership interest holder sells to a new investor, the new investor would need to apply the new rules. This was the approach taken by government when the CGT rules were introduced in 1985, with capital gains on "pre-CGT assets" grandfathered to the current time.

Adoption of a transitional rule of this nature is consistent with the approach that has been taken in the past by Treasury where a change of law impacts the overnight value of an investment. That is, the value of the asset to the current holder may otherwise be substantially reduced where a non-TARP asset/membership interest becomes designated as real property under an expanded definition. This is mitigated by the transitional rule.

In many circumstances in the past this has been acknowledged and a range of transitional regimes have applied to mitigate this value reduction.

We acknowledge that having an open-ended rule like this may not be attractive to Treasury. However, perhaps a transitional time period (say 15 years) which is consistent with the stapled structure approach, could be adopted. We think a grandfathering approach rather than a market value cost base uplift provides the most equitable path forward for non-resident investors and limits claims that the rules operate retrospectively. That is because the investment case pursuant to which the investment commitment was made factors in the tax treatment of future expected gains. Therefore, having no transitional rule or even protecting current unrealised gains is insufficient.

Transitional rules that have previously been incorporated where amendments have been made to broaden the tax base include:

- **Division 855 non-resident CGT rules –** one of the purposes of the original Division 855 rules was to strengthen the application of CGT to foreign residents in Australia by taxing foreign residents on the sale of non-portfolio interests in entities where more than 50 per cent of the value of the underlying assets is

attributable to Australian real property. For interests that became subject to CGT as a result of the changes, a market value reset of the cost base applied as at the date the changes were announced. This ensured that foreign residents were not subject to tax on capital gains that accrued before the date the changes were announced. (Paragraph 4.99 of the Supplementary explanatory memorandum to *Tax Laws Amendment (2006 Measures No. 4) Bill 2006* stated *"The cost base of indirect Australian real property interests that are interests that were not previously taxable for foreign residents will be reset to the market value of such interests on 10 May 2005, the date the Treasurer announced this measure in Press Release No. 44. This will ensure that unrealised accumulated capital gains or capital losses from interests in land-rich foreign interposed entities that were not previously within Australia's tax regime will not be subject to capital gains tax."*)

- **Division 880 sovereign entities and activities** – the tax laws were amended from 1 July 2019 to make sovereign investors liable for tax on Australian sourced income and capital gains. This change effectively broadened the application of Australia's CGT rules to the assets held by sovereign entities. As part of the amendments, transitional rules were enacted to preserve the sovereign immunity exemption for assets acquired before the announcement date for a period of seven years, together with a market value cost base to be adopted at the end of the transitional period (Division 880 of the *Income Tax (Transitional Provisions) Act 1997).*

- **Division 149 asset stops being a pre-CGT asset –** these rules provide for the transition of "pre-CGT assets" into the CGT regime where a majority change in the beneficial interests had occurred. The rules deem the asset to become a post CGT asset and provide a market value reset of the cost base at the time of transition. Division 149 has been successful in its operation and provided an equitable outcome for taxpayers in respect of the taxation of unrealised gains that had accrued before a change in taxation policy (Section 149-5 of the *Income Tax (Transitional Provisions) Act 1997)*.

- **Managed Investment Trust (MIT) withholding tax (staples structures)** – the measure introduced to amend the operation of the MIT withholding tax rules provided transitional rules to preserve the concessional withholding tax rates for established projects and arrangements. Relevantly, the transitional arrangements maintained the concessional withholding tax rate for new and established nationally significant infrastructure projects for up to 15 years. (Subdivision 12-H of Schedule 1 of the *Tax Administration Act 1953).*

3. Clarifying and broadening Australia's foreign resident CGT base and Australia's tax treaty practice

The reforms are intended not only to broaden Australia's foreign resident CGT base but also clarify the assets that should be subject to tax within that regime.

This requires a clear legal test rather than a vague economic concept such as assets 'with a close economic connection to Australian land and/or natural resources'. The Taskforce respectfully submits that the legislation

should contain a test that draws on well-established legal concepts under Australian law and, where relevant, OECD guidance.

The only reference in the OECD Commentary on Article 6 of the Model Tax Convention on Income and on Capital (as it read on 21 November 2017) is in commenting that it is appropriate to tax income from immovable property because there is a "very close economic connection between the source of this income and the State of source". The Commentary notes this justifies the basis of allocation of taxing rights for immovable property, but does not provide detailed discussion of this term nor otherwise treat it as an operative concept – that is, economic connection is the *reason* for the taxation of immovable property, it is not itself a separate basis of taxation.

A further concern is that unless clarified there is the potential that the concept could be interpreted so broadly as to apply to a wide range of intangible assets merely on the basis that they refer to or relate to the use of Australian land.

Relevant examples of intangible assets that could arguably be inadvertently and inappropriately covered by the concept include:

- Customer contracts for goods or services that are delivered using assets located on Australian land – even though the value of such contracts may be based on customer relationships, goodwill and knowhow rather than any connection to particular Australian land.
- In the context of social infrastructure projects, a project deed under which a proponent receives an availability payment for the delivery of operational and maintenance services to a particular school, hospital or prison located on Australian land.
- In the context of a renewables project, a grid connection agreement, EPC or offtake agreement – merely because they refer to or will require services to be delivered from a particular piece of Australian land or assets fixed to that land.

These are just a few examples of intangible assets that may be inappropriately caught by the proposed reforms. Rather than relying on a clear legal test, the determination of whether such assets fall outside the proposed regime would seem to require detailed economic analysis and, at the very least, further guidance on the level of economic connection between the contract and Australian land that is required in order for the asset to be considered TARP. Such an approach will undoubtedly lead to expensive disputes with the Commissioner of Taxation and increased uncertainty for foreign investors looking to invest in Australia.

The only intangible assets mentioned in the consultation paper are:

- leases or licences to use land situated in Australia, including (but not limited to) pastoral leases and licences including an agreement to lease land that is used in a manner that gives rise to the creation of emissions permits; and
- Australian water entitlements in relation to land situated in Australia.

To the extent that there are specific intangible assets that are intended to be covered by the regime, these should be specifically included. This specific inclusion approach is adopted under the current regime in respect of mining rights and options and could be easily extended to cover relevant intangible assets that are intended to be considered TARP under the proposed reforms.

In respect of tangible assets, it is respectfully submitted that the objective of clarifying the foreign resident CGT base could be better achieved by codifying an existing legal concept that relates to an asset's physical connection with or installation/location on Australian land. In this regard, many of the states have a concept of an asset 'fixed to land' rather than relying on the fixture/chattel distinction for determining the incidence of stamp duty and landholder duty.

In summary, it is respectfully submitted that by defining specific intangible assets that are intended to be covered by the regime, an appropriate test for tangible assets based on their physical connection or installation/location on Australian land can be adopted leveraging established legal tests. This should provide a clear legal test that applies across all Australian states and territories and avoids uncertainty or overreach.

Response to Consultation Paper: Questions

1. We are interested in views on the appropriateness of the policy principle for continuing to exclude economic interests, and whether there would be any unintended consequences from changing the treatment of economic interests in TARP, to ensure they are taxed equivalently in Division 855 of the ITAA 1997 with membership interests in TARP.

By way of overarching observation, it is noted that an economic interest in an asset is not the same as legal ownership of the underlying asset, with clear differences in the associated ownership rights and risks (e.g. control of the underlying asset v financial right to income). In the event that a foreign resident sold an economic interest in TARP, it is to be expected that a different financial and commercial outcome would arise as compared to selling a legal interest in TARP. A difference in tax outcomes in these circumstances is an appropriate reflection of this difference, with the foreign resident liable to taxation on any resulting capital gain on disposition of the TARP in the future. Where economic interests are concerned, for example contractual rights associated with TARP, greater clarity and justification is required to remove current uncertainty and other concerns.

Whether Division 855 should take into account non-share equity interests was an issue which was previously considered by the Board of Taxation in 2014, as part of its review of the debt and equity tax rules (see Question 8.7 specifically). In this regard, it was observed by the Board of Taxation at that time that Division 855 does not take into account non-share equity interests; and further, debt interests held by foreign residents are also outside the scope of the Australian rules, notwithstanding those foreign residents can participate in the upside attributable to the underlying Australian real property.[1] No changes were made to Division 855 following consideration of the matter, and the Taskforce is not aware of any recommendations to make changes being suggested.

Such an outcome is also consistent with the overarching policy basis for the taxation of capital gains realised on assets. As summarised by the Board of Taxation in its consultation paper on the review of CGT roll-overs in 2020, CGT "reflects the economic notion of income, which includes the **change in value of assets** in addition to the regular cash flow they generate" (emphasis added). This was encapsulated in Principle 1 of the Board of Taxation's guiding principles for policy coherence on roll-overs – specifically, "Generally, CGT **should apply to tax the gain in asset value** when disposed of, whether the asset is held directly, or through the various business structures in which investment in assets is made or managed".

For each of the reasons outlined above, the Taskforce respectfully puts forward that expanding the foreign resident CGT base to economic interests may only further add complexity, uncertainty, and make Australia a less attractive investment destination in circumstances where the underlying real property interest is already subject to CGT.

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[1] Board of Taxation, Review of the Debt and Equity Tax Rules Discussion Paper (March 2014), para 8.92.

2. Are there other consequences of the proposed reforms that raise similar behavioural concerns? Do you consider that additional integrity rules are required to address them, or that the existing general anti-avoidance rules, and other specific integrity rules, provide sufficient protection?

The Policy Taskforce is not aware of other consequences of the proposed reforms that raise similar behavioural concerns (to increased structuring arrangements in relation to assets with a close economic connection to Australian land and/or natural resources). See also our response to Question 1 regarding the general policy principle regarding the taxation of dispositions of assets generally.

Further, the Taskforce does not consider that additional integrity rules are required to address any behavioural concerns.

In this regard, it is noted that Australia already has a general anti-avoidance rule (GAAR) in Part IVA of the *Income Tax Assessment Act 1936.* Part IVA was amended in 2013 to further strengthen its operation, and the Multinational Anti-Avoidance Law (MAAL) and Diverted Profits Tax (DPT) were also recently introduced. In addition:

- amendments were recently made to Australia's transfer pricing reconstruction and related provisions and thin capitalisation provisions
- a range of tax transparency measures have been introduced, including country-by-country reporting
- a new equity funded dividend rule was recently enacted to prevent certain distributions that are funded by capital raising from being frankable
- a new debt deduction creation rule (DDCR) was recently enacted to disallow debt deductions relating to certain debt raising activities (the DDCR also has its own specific anti-avoidance rule), and
- Australia signed the Multilateral Instrument (MLI) including, amongst other things, reference to the 'principal purpose test' and other anti-treaty shopping provisions.

This suite of additional integrity and reporting measures – some of which are new integrity rules which self-execute without the need for the establishment of a tax avoidance purpose (e.g. the new equity funded dividend rule and DDCR) – make the current tax environment in Australia significantly complex and challenging for foreign investors to navigate. Part IVA on the other hand is well-known and subject to established administrative protocols and significant body of case law.

These pre-existing measures are an appropriate measure to combat any contrived or artificial arrangement that results in CGT not applying to the disposition of assets with a close economic connection to Australia land and/or natural resources and also ensure that Australia's taxation system is not made even more complex through the introduction of additional rules.

4. Similarly, we are interested in views on the appropriate timeframe with which foreign resident vendors will be required to notify the ATO in advance of a transaction (i.e., the set review period), noting the policy intent, as outlined above.

Under Australia's current law and foreign investment regulatory regime (i.e. "FIRB approval"), a CGT event typically occurs at the time a contract is entered into (not at settlement). Where the purchaser is a foreign resident and the transaction is subject to Foreign Investment Review Board (FIRB) notification and approval requirements, the purchase contract must be made conditional upon the receipt of FIRB approval – accordingly, a FIRB approval will already have been received or an application for approval will be made prior to completion. In these circumstances, we understand that the ATO will already be aware of the transaction.

Where the vendor is a foreign resident, they will be subject to the pre-existing foreign resident capital gains withholding regime (FRCGW), as outlined in the consultation paper. In addition, if the initial investment was subject to a recent FIRB approval, it is likely that the foreign resident will be subject to a FIRB reporting tax condition to notify the FIRB and the ATO of the disposal in writing at least 60 days prior to transaction completion. Such notification requires specifics of the transaction to be provided to the ATO, including contract details and the estimated Australian income tax payable (which necessitates consideration and disclosure of the Division 855 outcome).

Significant transactions to which the proposed measure will apply, by their very nature, progress at different timeframes and are subject to a number of regulatory regimes, including those highlighted above. Some transactions have very short timeframes between negotiation, agreement and settlement. Whilst the policy intent of introducing an additional ATO notification and review period requirement is understood, this should be balanced with the potential compliance burden and uncertainty that may arise between transacting parties. Uncertainty in transactions creates deal risk, and therefore, it must be a design outcome that any ATO notification and review period does not delay or otherwise compromise the ability for a transaction to be agreed and completed.

In addition, the Taskforce respectfully submits that it is unclear from the consultation paper what the ATO will provide in response to the ATO notification – the consultation paper currently suggests that approval will only be known through absence of ATO intervention.

For these reasons, the following design features of any ATO notification and review period are recommended, should such a measure be introduced:

- the review period should be no more than 28 days
- the ATO auto-issues a receipt to the vendor (as outlined in the consultation paper)
- the ATO should be required to positively provide confirmation of its acceptance, or refusal, of the vendor declaration as soon as practicable

- if the ATO does not reply within the 28 day review period, the vendor declaration is deemed to be accepted by the ATO

- if the ATO proposes to intervene, it should provide reasons for its decision and its proposed course of action – the vendor or its representatives should have an opportunity to engage with the ATO on the decision, and

- the vendor should have the opportunity to lodge an application on an urgent and/or non-contentious basis and an ability to engage with the ATO on the matter, thus facilitating an expedited review where necessary (i.e. shorter than the ATO deadline response date).

In addition, further consideration should be given to the interaction between the FIRB tax reporting condition for disposals of previously approved investments, and any additional ATO notification and review period requirement for foreign vendors. Specifically, consideration should be given to whether there is an opportunity to streamline the process of any ATO notification and review period requirement in light of the pre-existing FIRB tax reporting condition (or vice versa).

We suggest that a foreign vendor be permitted to apply to the ATO for ATO pre-clearance ahead of a sale occurring of an asset being TAP or non-TAP. Recognising that the classification of shares in company or units in a trust being TAP or on-TAP may likely depend on the final selling price, such pre-clearance would likely be expressed in a selling price range that would be narrowed as the sales proceed process progress and the values of various assets of the entity become more settled. The ATO should be obligated to facilitate such pre-clearance in the reasonable timeframe (suggest pre-clearance should be available where first requested 12 months ahead of a sale occurring), and a fixed work fee say [$50,000] could be chargeable to partially cover ATO costs and prevent this process being used for transactions of minor value.

5. What information should the purchaser be required to consider, and when, in determining whether a declaration is false (and if so, to withhold)? We also welcome views on whether not knowing the declaration to be false at the time the declaration is given to the purchaser remains the appropriate threshold, in light of the new ATO notification process?

It is respectfully submitted that there should be no additional burden placed upon a purchaser to determine whether a vendor declaration is false. That is withholding when having received a declaration should be limited to circumstances where, based on the purchaser's knowledge of the entity it is acquiring an interest in, it is not possible to identify non-TARP assets that could feasibly account for more than 50 per cent of market value.

This submission is made on the following basis:

- The current purchaser knowledge requirement achieves the appropriate tax policy of ensuring that the purchaser is not a party to collusion or fraud together with the vendor. Further, the effectiveness of the existing test will be further enhanced merely by ensuring that the proposed reforms achieve their objective of providing more clarity regarding the TARP/ non-TARP borderline. To place any more onus or

obligation on the purchaser could be overreach increasing uncertainty and exposing the purchaser to unjustifiable risk and cost.

- The extent of relevant information available to a purchaser for these purposes will vary widely from transaction to transaction. However, in all cases, there will be significant information asymmetry between the vendor and purchaser, which could be considered unreasonable to place a higher threshold on a purchaser's decision to withhold than exists under the current law.

The new vendor ATO notification requirements will ensure the Commissioner becomes aware of a transaction and better allow the ATO to intervene earlier and avoid unnecessary cost and disruption to the transaction. This may also provide sufficient additional comfort regarding the integrity of the vendor declaration process without placing additional burden and risk on the purchaser.

6. Are the current administrative penalties for the failure to lodge an approved form and for providing a false and misleading vendor declaration sufficient for ensuring compliance with the new requirements? If not, what is an appropriate level? This question should be considered in the context of the threshold identified at question 3 above.

The Australian tax law includes a strong and comprehensive penalty regime, and hence we consider the existing administrative penalties are sufficient for ensuring vendor compliance with any new measures. This is particularly the case given many foreign investors purchasing Australian assets over the $20 million threshold are likely to be significant global entities and so already subject to higher penalties.

Further, matters such as compliance with Australia tax laws and the choices and behaviours that an investor evidences in their tax affairs form part of the tax issues that are considered by the ATO in preparing its advice to the Treasurer for FIRB purposes. As part of its assessment, the ATO considers earlier transactions and patterns of behaviour by the investor and its related parties. As such, there is a further level of strong deterrence for foreign investors, given non-compliance with this proposed measure could impact existing or future Australian investments.

7. How can the approach to this new process assist the purchaser in complying with their obligations, including clarity on when to withhold?

The Consultation Paper provides that the purchaser can rely on the vendor declaration in the absence of ATO intervention within the review period. However, the Taskforce respectfully submits that the legal specifics of this are not clear. We recommend that the rules be drafted such that the ATO is deemed to accept the vendor's notification if there is no ATO intervention by the end of the review period. This deemed acceptance would provide the purchaser with a greater level of clarity as to the requirement to withhold when making the payment.