

DRAFT
SUBJECT TO LEGAL REVIEW FOR ACCURACY, CLARITY, AND CONSISTENCY
MARCH 1, 2004

Exchange of Letters on the FIRB

The Honourable Robert B. Zoellick
United States Trade Representative
600 17th Street, NW
Washington, DC. 20508

Dear Ambassador Zoellick:

I have the honour to refer to the Australia –United States Free Trade Agreement (the “Agreement”) signed on this date. During the course of discussions concerning the non-conforming measure relating to Australia’s Foreign Investment Policy, under the *Foreign Acquisitions and Takeovers Act 1975 (FATA)* and implementing policies and regulations, the Australian Government provided extensive background on its current and past practice and policy relating to the screening of foreign investments.

The Government of Australia values the contribution that foreign investment has made and continues to make in Australia’s development. Australian government policy over recent decades has been to welcome foreign investment. In particular, that policy supports an open, contestable economy, and recognizes that foreign ownership of firms in Australia can result in a range of benefits, such as injections of capital, access to new skills and technologies, and enhanced competitive pressure on the domestic market.

Consistent with its welcoming policy toward foreign investment, the Government of Australia has historically rejected very few proposals for acquisitions or arrangements by foreign investors on grounds inconsistent with national treatment, reflecting the government’s commitment to competitive markets. Excluding residential real estate, over the past five years, the government has only rejected four out of 2,285 proposals for investments. Additionally, 64 percent of all proposed investments were decided within ten days, and 93 percent of all proposed investments were decided within 30 days.

Where the government has rejected a foreign investment proposal, other than those concerning routine cases involving urban land, the Treasurer has made the final decision in each case. If the government has potential concerns with respect to a proposed foreign investment, the practice has been to enter into discussions with the investors to reach an outcome that addresses these concerns (including the use of conditions of approval) rather than reject an investment. Except in this context, the government has not imposed additional conditions on investors or their investments.

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In accordance with the principles of natural justice, the investor has been informed if its proposal was inconsistent with the foreign investment policy and the reasons why it was inconsistent, so that the investor has an opportunity to modify or withdraw its proposal prior to the Treasurer making a final decision. Australia's government regulators may contact relevant government agencies in the investor's home country to help address concerns about proposals and investors, where this may assist in resolving inconsistencies between the proposal and Australia's foreign investment policy.

The Government of Australia confirms that its approach to foreign investment in the future will be consistent with the approach described above, which has served Australia well in gaining the benefits of foreign investment consistent with community interests. The Government of Australia also recognizes the importance the Government of the United States attaches to U.S. investors' liberal access to the Australian market in relation to the U.S. Government's acceptance of this non-conforming measure.

With reference to Australia's non-conforming measure relating to the FATA, in the event of a U.S. investor's proposed investment (other than relating to acquisitions of urban land) which in the judgment of Australia's government raises serious concerns likely to require it to impose conditions on, reject, or require the unwinding of the investment, the Government of Australia shall, with the consent of the investor, inform the Government of the United States of the reasons why the proposed investment may be problematic and provide the U.S. Government an opportunity to consult with the Government of Australia on the matter. The Australian Government notes that this will need to be done in a manner which balances the need for an expeditious consideration of the investment proposal with the objective of allowing sufficient time for the U.S. Government to make representations to the Australian Government, if it so chooses.

Furthermore, our governments will consult periodically on the operation of their respective investment policies, in particular as they relate to their non-conforming measures with respect to investment under the Agreement.

I would be grateful if you would confirm that your government shares these understandings and have the honour to propose that the above understandings be treated as an integral part of the Agreement.

Sincerely,

Mark Vaile

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The Honourable Mark Vaile MP
Minister for Trade
Parliament House
Canberra ACT 2600

Dear Minister Vaile:

I have the honour to confirm receipt of your letter of this date, which reads as follows:

“Dear Ambassador Zoellick:

I have the honour to refer to the Australia –United States Free Trade Agreement (the “Agreement”) signed on this date. During the course of discussions concerning the non-conforming measure relating to Australia’s Foreign Investment Policy, under the *Foreign Acquisitions and Takeovers Act 1975 (FATA)* and implementing policies and regulations, the Australian Government provided extensive background on its current and past practice and policy relating to the screening of foreign investments.

The Government of Australia values the contribution that foreign investment has made and continues to make in Australia’s development. Australian government policy over recent decades has been to welcome foreign investment. In particular, government policy supports an open, contestable economy, and recognizes that foreign ownership of firms in Australia can result in a range of benefits, such as injections of capital, access to new skills and technologies, and enhanced competitive pressure on the domestic market.

Consistent with its welcoming policy toward foreign investment, the Government of Australia has historically rejected very few proposals for acquisitions or arrangements by foreign investors on grounds inconsistent with national treatment, reflecting the government’s commitment to competitive markets. Excluding residential real estate, over the past five years, the government has only rejected four out of 2,2851 proposals for investments. Additionally, 64 percent of all proposed investments were decided within ten days, and 93 percent of all proposed investments were decided within 30 days.

Where the government has rejected a foreign investment proposal, other than those concerning routine cases involving urban land, the Treasurer has made the final decision in each case. If the government has potential concerns with respect to a proposed foreign investment, the government’s practice has been to enter into discussions with the investors to reach an outcome that addresses these concerns (including the use of conditions of approval) rather than reject an investment. Except in this context, the government has not imposed additional conditions on investors or their investments.

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In accordance with the principles of natural justice, an investor has been informed if its proposal was inconsistent with the foreign investment policy and the reasons why it was inconsistent, so that the investor has an opportunity to modify or withdraw its proposal prior to the Treasurer making a final decision. Australia's government regulators may contact relevant government agencies in the investor's home country to help address concerns about proposals and investors, where this may assist in resolving inconsistencies between the proposal and Australia's foreign investment policy.

The Government of Australia confirms that its approach to foreign investment in the future will be consistent with the approach described above, which has served Australia well in gaining the benefits of foreign investment consistent with community interests. The Government of Australia also recognizes the importance the U.S. Government attaches to U.S. investors' liberal access to the Australian market in relation to the U.S. Government's acceptance of this non-conforming measure.

With reference to Australia's non-conforming measure relating to the FATA, in the event of a U.S. investor's proposed investment (other than relating to acquisitions of urban land) which in the judgment of Australia's government raises serious concerns likely to require it to impose conditions on, reject, or require the unwinding of the investment, the Government of Australia shall, with the consent of the investor, inform the U.S. Government of the reasons why the proposed investment may be problematic and provide the U.S. Government an opportunity to consult with the Government of Australia on the matter. The Australian Government notes that this will need to be done in a manner which balances the need for an expeditious consideration of the investment proposal with the objective of allowing sufficient time for the U.S. Government to make representations to the Australian Government, if it so chooses.

Furthermore, our governments will consult periodically on the operation of their respective investment policies, in particular as they relate to the non-conforming measures of both Parties with respect to investment under the Agreement.

I have the honour to propose that the above understandings be treated as an integral part of the Agreement and would be grateful if you would confirm that your government shares these understandings.

Sincerely,
Mark Vaile"

I have the honor to confirm that my government shares these understandings and that these understandings are an integral part of the Agreement.

Sincerely,
Robert B. Zoellick