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Policy and Legislative Framework Unit  
Foreign Investment Division  
The Treasury



Submitted online

### Foreign investment framework reforms – discussion paper

The Australian Financial Markets Association (AFMA) is responding to Treasury's Foreign investment framework reforms – discussion paper.

AFMA is the leading industry association representing Australia's financial markets - including the capital, credit, derivatives, foreign exchange, and other specialist markets including; gas, carbon, electricity and environmental products. We have more than 130 members, from Australian and international banks, leading brokers, securities companies, and government treasury corporations to fund managers, energy firms, and industry service providers. AFMA members include many of the major participants in the carbon market.

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#### Key Points

- **The treatment of ACCU's under foreign investment regulation should be clarified**
- **The approach to setting application fees should be reviewed**

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AFMA is concerned that the current the treatment of Australian Carbon Credit Units (ACCU) generated from changes in land use as interests in agricultural land is imposing unnecessary costs on the carbon market and increasing the cost of Australia's net-zero transition.

ACCUS can be generated from a range of methods including changes in land use on agricultural land and from reductions in industrial emissions. Regardless of the method used, the resulting ACCUs are fungible financial products. Our members are concerned that treating some ACCUs as interests in agricultural land results in inequitable treatment between different methods and is inconsistent with the general approach of not applying the *Foreign Acquisitions and Takeovers Act 1975* (FATA) to financial products, other than equities.

We consider that the current treatment of ACCUs increases costs without contributing to the objectives of FATA and that reform would help Australia to achieve its carbon reduction goals.

#### 1. ACCU projects

The generation of ACCUs from agricultural land typically involves a Carbon Service Provider (CSP) entering into a Carbon Service Agreement (CSA) with a land holder to deliver technical services to generate ACCUs from the property. We consider that CSAs are service contracts that should not be considered to create interests in Australian land as defined in section 4 of FATA. In many cases, under CSAs the landholder will be the ACCU project proponent and will have full ownership of and responsibility for the project, while in other cases the CSP will be responsible for delivering the project, but the landholder will retain full ownership of the land. CSPs are typically paid in ACCUs generated by the project.

Under FATA an interest in Australian land generally involves proprietary rights such as freehold, leasehold, or rights akin to occupation or control. AFMA does not consider that CSAs meet these criteria as they do not typically confer rights of access, control, or management over land. We consider that CSAs are service contracts under which the CSP provides technical advisory services to the landholder and are not arrangements for land tenure or exploitation.

Importantly:

- Nature of CSAs: Contractual agreements for technical services under *the Carbon Credits (Carbon Farming Initiative) Act 2011*, without transfer of title, right to obtain or put any covenants on the title or any other registrable rights.
- No Exclusive Possession or Control: CSAs do not involve physical possession, occupation, or control of land. Landholders retain full ownership and operational control of the land on which the ACCU project is registered.
- Service Provision vs. Tenure: CSAs govern service delivery, not land use or exploitation.

CSA contracts did not exist when FATA was enacted and we do not consider that FATA was ever intended to capture ACCU contracts. We think it is inappropriate that contracts for the provision of technical services paid for through a share of the production of ACCUs are treated as acquisitions of an interest in Australian land under FATA and consider that these provisions should be reviewed.

## **2. Financial transactions for the purchase / selling of ACCUs**

AFMA also considers that this review should clarify that secondary market trading of ACCUs generated from agricultural land is not subject to approval under FATA. Australia's carbon reduction legislation anticipates that there will be a healthy secondary ACCU market where parties, including firms with emissions reductions obligations under the Safeguard Mechanism, can buy and sell ACCUs.

Trading in the secondary market is typically done under standardised financial market documentation. These trading agreements do not convey any rights or interests in land or rights of access, control, or management over land and therefore should not be subject to review under FATA.

## **3. Fee Calculation Methodology**

While AFMA would prefer that FATA approval not apply to ACCUs, if it is to continue to apply, we think the methodology for calculating application fees should be reviewed. Currently, there is no public guidance on how application fees for ACCUs are calculated and no transparency about how fees are calculated on an industry-wide basis.

Our members advise that currently the Foreign Investment Review Board (FIRB) calculates fees based on projected ACCU production over the entire project life. We consider that this approach is unreasonable as it does not account for the cost of producing ACCUs and the uncertainty about the number of ACCUs that the project will produce over its lifetime. We also note that this approach is particularly challenging to apply as FIRB approval is typically required at the early feasibility stage of a project when the costs and risks of the project are poorly understood.

CSP are also subject to additional fees if a new CSA is required as a result of a landholder selling the property. These fees are assessed on the same basis as the initial application, essentially resulting in the CSP being charged twice for the same project. We consider that the approach to calculating fees should be reviewed to ensure that it better reflects the value a CSP derives from an ACCU project.

#### **AFMA Recommendations**

- i. CSAs should not be treated as an interest in agricultural land
- ii. The treatment of ACCUs traded in the secondary market should be clarified
- iii. If FATA continues to apply to ACCUs, the application fee methodology should be reviewed

AFMA would welcome the opportunity to discuss this submission further and would be pleased to provide further information or clarity as required. Please contact me at [lgamble@afma.com.au](mailto:lgamble@afma.com.au) or 02 9776 7994.

Yours sincerely,

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