

Chapter 2

Views on the bill

Purpose of the bill

2.1 As a small open economy, maintaining strong (inbound) foreign investment is essential to Australia's economic growth and development. When introducing the bills, the Treasurer indicated that the bills would:

...ensure Australia maintains a welcoming environment for investment—but one that ensures that the investment is not contrary to our national interest.

...

The package delivers a robust and enforceable regulatory framework and provides a predictable and welcoming environment for investors.¹

2.2 A number of changes made by the bills have their origins in a report by the House of Representatives Standing Committee on Economics on foreign investment in residential real estate, tabled in November 2014. The Hon. Joe Hockey MP referred this matter to the Standing Committee in March 2014. Under the terms of reference, the committee was to examine: the benefits of foreign investment into residential real estate; the impact of foreign investment on the supply of new housing; international regulatory comparisons; and, whether the administration of Australia's foreign investment policy relating to residential real estate could be enhanced.²

2.3 As noted in the previous chapter, the Coalition in opposition had also conducted broad ranging consultation on options to change the rules governing the sale of agricultural land to foreign entities.

2.4 On the Fees Imposition Bill, the Hon. Joe Hockey MP noted that the introduction of application fees would 'ensure Australian taxpayers are no longer required to fund the costs of the administration and enforcement of the foreign investment regime'.³

2.5 On the Register Bill, the Hon. Joe Hockey MP stated:

The register bill complements the lower agricultural screening thresholds that the government has put in place to deliver better scrutiny and transparency around foreign investment into Australia's agricultural sector.

...

1 The Hon. Joe Hockey, MP, *House of Representatives Hansard*, 20 August 2015, p. 8984.

2 House of Representatives Standing Committee on Economics, *Report on Foreign Investment in Residential Real Estate*, November 2014, pp. 2–3.

3 The Hon. Joe Hockey, MP, *House of Representatives Hansard*, 20 August 2015, p. 8986.

For the first time, the land register will provide a clear picture on the actual levels of foreign ownership of agricultural land in Australia.⁴

Evidence before the committee

2.6 The introduction of the bills follows extensive consultation undertaken by Treasury with industry stakeholders and state and territory governments on two options paper and exposure draft bills. The committee received evidence from a range of organisations, including:

- industry bodies;
- professional associations;
- commercial law firms; and
- the Foreign Investment Review Board.

2.7 Some submitters informed the committee that they had received a number of opportunities to express their views on Australia's foreign investment framework.⁵ However, stakeholders advised that certain issues of concern to them have not been addressed in the bills or have arisen following the consultation process.

2.8 During the inquiry, submitters considered the following main topics:

- the high regard for Australia's foreign investment framework;
- the imposition of application fees on all foreign investment applications;
- the importance of an appropriate penalty regime;
- enhanced compliance and enforcement capabilities;
- the importance of the register of foreign investment in agricultural land; and
- issues raised in relation to the Foreign Acquisitions and Takeovers Regulations 2015.

2.9 In this chapter, the committee discusses each specific topic including its findings on the matter. The committee's overall conclusion is at the end of this chapter.

High regard for Australia's foreign investment framework

2.10 Almost all submissions highlighted stakeholders' high regard for Australia's foreign investment framework. In particular, stakeholders recognised the importance of ensuring the foreign investment framework delivers investment that is in the national interest.

2.11 The Cattle Council of Australia highlighted the long history of foreign investment in the Australian beef industry and noted its support for the 'case-by-case assessment of foreign investments against the national interest test with powers vested

4 The Hon. Joe Hockey, MP, *House of Representatives Hansard*, 20 August 2015, p. 8986.

5 Real Estate Institute of Australia, *Submission 3*, p. 2; Property Council of Australia, *Submission 7*, p. 1.

in the Treasurer'.⁶ Similarly, the Urban Development Institute of Australia (Institute) considered that Australia's current foreign investment framework supports beneficial investment in the supply of new housing by 'directing foreign investment into newly constructed dwelling'.⁷

2.12 In regards to the reasons for changing Australia's foreign investment framework, the Foreign Investment Review Board observed:

While the framework has generally worked well since it was introduced, heightened community sensitivity over certain types of foreign investment (in particular agriculture and residential real estate), and shifts in global investment patterns are increasing community focus on the framework. These concerns have the potential to undermine confidence that foreign investment is in the national interest.⁸

2.13 One stakeholder, however, did express caution about the need to convey clearly to the Australian public the intentions behind the foreign investment framework. The Electronic Conveyancing Group (ECG), a collaboration between the Australian Bankers' Association, Australian Institute of Conveyances and the Law Council of Australia, expressed reservations about the changes, particularly in relation to residential real estate transactions:

The ECG accepts that there may be parts of the community who perceive that there is a compliance problem although this perception is not generally shared, or supported, in its view, by the members of its constituent bodies. The ECG suspects that the perception is being driven by unsuccessful auction bidders despairing at the affordability of dwelling prices and assuming that the successful buyer may be purchasing illegally. The underlying problem is the current real high price of dwellings in large capital cities.⁹

2.14 There was a general acceptance among submitters of the need to modernise Australia's foreign investment framework and ensure community confidence in the government's processing of foreign investment applications. Reflecting these considerations, the Institute noted that it supported:

...aspects of the Legislation Amendment Bill designed to strengthen enforcement of the existing foreign investment framework to reduce incidences of non-compliance, and improve community confidence in the policy.¹⁰

6 Cattle council of Australia, *Submission 2*, p. 2.

7 Urban Development Institute of Australia, *Submission 9*, p. 1.

8 Foreign Investment Review Board, *Submission 5*, p. 1.

9 Electronic Conveyancing Group, *Submission 12*, pp. 3–4.

10 *Submission 9*, p.1.

Lowering compliance costs for investors

2.15 Some stakeholders highlighted the importance of streamlining existing provisions and processes to ensure the application processes under the foreign investment framework are as efficient as possible so the impact on the level of foreign investment is close to zero. Hickey Lawyers, for example, noted that Australia must compete on the international stage for foreign investment: '[f]oreign investors are continually looking to invest their money into offshore projects and opportunities, and Australia is just one of many places that is attracting these investment dollars'.¹¹ Noting that the lowering of the value of the threshold test for purchases of agricultural land would increase the number of applications, the Cattle Council of Australia emphasised that 'there must be focus on ensuring that the administrative procedures for processing applications are efficient, timely and not bureaucratic'.¹²

2.16 The Foreign Acquisitions Bill updates and streamlines a number of the existing provisions of the Foreign Acquisitions Act, which has not been significantly updated since it was introduced in the 1970s.¹³ The Foreign Investment Review Board asserted that the package of bills would reduce compliance costs and complexity through a number of changes:

Compliance costs and complexity will be reduced by removing routine cases from the system and more closely aligning key concepts and definitions with other corporate legislation such as the *Corporations Act 2001*. For example, the substantial interest threshold will be raised from 15 to 20 per cent to align with Australia's takeover rules. This means investors acquiring a stake of less than 20 per cent will no longer need foreign investment approval.¹⁴

2.17 The modernisation of Australia's foreign investment framework was supported by a number of stakeholders, including the Financial Services Institute of Australia (Finsia) who submitted that:

The proposed modernisation of Australia's foreign investment laws address a number of the problems in the existing regime. Finsia is of the belief that enacting these reforms will, for the most part, do much to improve Australia's reputation internationally as a place to do business.¹⁵

2.18 In addition, the Foreign Investment Review Board noted that one of the key improvements made by the package of bills is the incorporation of all types of foreign investment applications into the legislative framework:

Australia's foreign investment framework currently includes some non-legislative prior approval requirements that are set out in Australia's

11 Hickey Lawyers, *Submission 1*, attachment 1, p. 2.

12 *Submission 2*, p. 3.

13 *Submission 5*, p. 2.

14 *Submission 5*, p. 2.

15 Financial Services Institute of Australia, *Submission 10*, p. 1.

Foreign Investment Policy (Policy-only requirements). The reforms ensure that these Policy-only requirements (such as those relating to foreign government investors) are incorporated into the legislative framework to increase legal certainty for investors, legal advisers and Government.¹⁶

2.19 Thus, while there was general support for the current foreign investment regime, submitters identified scope for further improvement.

The imposition of application fees on all foreign investment applications

2.20 The Foreign Acquisitions Bill provides the framework for the types of applications foreign persons must submit for approval, while the Fees Imposition Bills sets out the rates of the fees that would apply for each application. The fees range from \$5,000 to \$100,000, depending on the type of application or action.¹⁷

2.21 The House of Representatives Standing Committee, in its report on foreign investment in residential real estate, recommended that the government apply a modest administrative fee to the screening for all foreign purchases of residential real estate.¹⁸ The Standing Committee suggested that a fee of between \$500 and \$1,500 per residential real estate application could be considered to enhance compliance activities and data collection.¹⁹

2.22 Some stakeholders supported the introduction of application fees but indicated that the fees should seek only to cover the cost of processing foreign investment applications. For example, the Cattle Council of Australia supported the introduction of application fees but was of the view that:

...these fees must be imposed on a purely cost-recovery basis, consistent with the *Australian Government Cost Recovery Guidelines*...any measures to increase consolidated revenue from application fees would act [as] a deterrent for investment and should not be considered.²⁰

2.23 The National Farmers' Federation expressed a similar sentiment:

The NFF does not support the proposed fee rates. The NFF maintains its support for a full cost-recovery model, whereby investors are charged only for the cost required to screen their investment proposals. In the NFF's view, such an approach will work to drive efficiency and transparency within the FIRB [Foreign Investment Review Board].²¹

2.24 More specifically, the Property Council of Australia commented in relation to residential real estate:

16 *Submission 5*, p. 2.

17 Fees Imposition Bill, clauses 6, 7 and 8.

18 House of Representatives Standing Committee on Economics, *Report on Foreign Investment in Residential Real Estate*, November 2014, p. 39.

19 House of Representatives Standing Committee on Economics, *Report on Foreign Investment in Residential Real Estate*, November 2014, p. 38.

20 *Submission 2*, p. 3.

21 National Farmers' Federation, *Submission 11*, p. 9.

The Property Council remains opposed to the FIRB [Foreign Investment Review Board] application fees proposed, particularly as they apply to residential property. The fees are unjustifiably high, and in our view do not accurately reflect the administrative cost of the new processes.²²

2.25 Also in relation to real estate, the Institute submitted that it 'was unclear why the cost of administering an application should be positively correlated to the value of the property, as suggested by the fee regime'.²³ The Institute observed that the proposed fee structure was 'unlikely to be reflective of the true costs borne by the Government in administering the foreign investment regime'.²⁴ The Institute proposed that there be no application fee for new residential dwellings, but that fees for other types of investment could be increased to reflect their higher compliance costs.²⁵

2.26 The government has repeatedly indicated its intention to introduce application fees on all foreign investment proposals throughout the consultation process on options to reform Australia's foreign investment framework. According to the Explanatory Memorandum, the imposition of fees for foreign investment applications will:

...ensure that those who undertake activities regulated by the *Foreign Acquisitions and Takeovers Act 1975* (Act) rather than the general community bear the costs relating to the administration of the Act, including the costs of monitoring compliance with the legislation, investigating alleged breaches and commencing enforcement proceedings in appropriate cases.²⁶

2.27 Some submissions contended that the nature of the application fee (that is, being an application fee for a potential investment rather than payment for an actual investment) would put Australia at a disadvantage for attracting foreign investment compared with other similar jurisdictions. For example, the ECG concluded (succinctly) that the 'proposed fees should be approval, not application, based'.²⁷

2.28 Echoing these concerns, Hickey Lawyers noted that:

...apart from New Zealand (which itself only applies to 'sensitive land'), Australia will be the *only* jurisdiction to require an upfront, non-refundable application fee on foreign investment.

...[the application fee] appears to be a non-refundable tax levied against foreign investments which only allows the investor the right to enter into

22 *Submission 7*, p. 1.

23 *Submission 9*, p. 2.

24 *Submission 9*, p. 2.

25 *Submission 9*, p. 2.

26 Explanatory Memorandum, paragraph 12.4.

27 *Submission 12*, p. 5.

the property market. It is not linked to, nor does it guarantee, investment approval or the ultimate settlement of the proposed acquisition.²⁸

2.29 Hickey Lawyers recommended the government consider the foreign investment approval processes in Hong Kong and Singapore, which Hickey Lawyers contended have a 'much simpler system of "payment per acquisition" and does not carry the same level of negative undertone as is inferred by an upfront application fee'.²⁹

2.30 Hickey Lawyers opposed the introduction of any fees for foreign investments applications or approvals on the grounds that they would have a negative effect on the level of foreign investment:

The Government should fund the enforcement area from other sources rather than through a new tax system targeted on one class of investor.

We urge the Government to abandon new fees for property purchases. Should the Government wish for Australia to continue to prosper from foreign investment, it should maintain its current status quo in this regard.³⁰

2.31 Further, stakeholders raised concerns about the impact of the application fees on particular groups, including foreign investors searching for residential real estate over a substantial period of time and property developers seeking approval for off-the-plan developments, which will be explored below.

Section 59 certificates for established dwellings—concerns over the time period for foreign investors buying property at auction

2.32 The Real Estate Institute of Australia (REIA) raised concerns in its submission about the timeframe—for each application fee—for foreign investors who are bidding at multiple property auctions over a period of time.³¹ REIA had initially suggested, in response to Treasury's February 2015 options paper, that an additional provision was required to ensure foreign investors did not have to pay an application fee for each real estate auction they attended. A provision was inserted into the Foreign Acquisitions Bill to allow foreign investors to bid at multiple auctions for established dwellings over a specified period of time (known as a 'section 59 certificate'):

The new section 59 certificate for established dwellings allows a foreign person to bid at multiple auctions over a specified period (such as six months) while only paying one application fee. In the absence of such a certificate, foreign persons bidding at auctions would need prior foreign investment approval because bids at auction normally have to be unconditional. Only one property will be allowed to be purchased under each certificate and it will be a condition of the certificate that the foreign

28 *Submission 1*, attachment 1, p. 2.

29 *Submission 1*, attachment 1, p. 3.

30 *Submission 1*, attachment 1, p. 7.

31 Real Estate Institute of Australia, *Submission 3*, p. 3.

person notifies the Australian Taxation Office (ATO) once they have purchased a property.³²

2.33 The RIS for the package of bills provided the following explanation of the purpose of the section 59 certificate:

This [section 59 certificate] would alleviate the need for individual foreign investors to pay multiple application fees.

This is appropriate where a foreign person is in the unique competitive environment of an auction. Sales of residential real estate by a negotiation or 'for sale' arrangement are typically subject to the purchaser receiving approval under the [Foreign Acquisitions] Act should it be required. It would be expected that such arrangements would continue.³³

2.34 REIA, in its submission, expressed satisfaction that the provision had been inserted into the Foreign Acquisitions Bill following consultation but indicated that the six month timeframe mentioned in the explanatory materials would not be reasonable for a potential foreign investor:

REIA does not think that this [six month timeframe] is reasonable for a potential buyer who has been active in seeking a property. The lack of success is most likely attributable to failing to find the right property at the budgeted price.... After consultation with our members we have ascertained that it is not uncommon for this to take much longer than six months. A further complication may arise if a long settlement period is agreed to.³⁴

2.35 REIA recommended that where a foreign investor, having already paid the requisite application fee, requires additional time to purchase a property they should be permitted to do so—without incurring an additional application fee—after seeking approval for an extension.

2.36 Importantly, the Foreign Acquisitions Bill itself does not provide that the time period for section 59 certificates is a six month time period. Instead, the Foreign Acquisitions Bill provides that the section 59 certificate (in addition to other exemption certificates) may specify a period during which the certificate is in force.³⁵ In effect, the timeframe is not set out in the bills or in the regulations and is up to the discretion of the ATO when they issue the section 59 certificate.

Committee view

2.37 The committee draws to the attention of the ATO the concerns about the timeframe for section 59 certificates for established dwellings, so that the concerns can be considered when section 59 certificates are issued to foreign persons.

32 Explanatory Memorandum, paragraph 3.32.

33 Department of the Treasury, *Regulation Impact Statement: Foreign investment proposals*, 14 September 2015, paragraphs 1.228 and 1.229, <http://ris.dpmc.gov.au/2015/09/14/strengthening-australias-foreign-investment-framework/> (accessed 15 September 2015).

34 *Submission 3*, p. 3.

35 Foreign Acquisitions Bill, item 4, proposed paragraph 60(1)(b) of Schedule 1.

2.38 Section 59 certificates should specify a realistic time period which takes into consideration the difficulty foreign persons may have in purchasing a suitable established dwelling, particularly when the housing market is booming, in order to alleviate the need for foreign persons to pay multiple application fees.

Application fees for section 57 exemption certificates for new dwellings (off-the-plan developments)

2.39 Section 57 of the Foreign Acquisitions Bill allows property developers (Australian or foreign) to apply for an exemption certificate allowing them to sell all new dwellings in a development of 100 or more dwellings to foreign persons. Foreign persons purchasing dwellings in a section 57 development do not require separate approval.³⁶ To obtain a section 57 exemption certificate, property developers will need to pay an application fee of \$25,000 as well as a six monthly reconciliation of properties sold to foreign persons based on the usual fees for residential real estate.³⁷

2.40 In effect, property developers will pay \$25,000 in advance for the exemption certificate and then pay the relevant residential real estate application fees for any properties sold to foreign investors.

2.41 Hickey Lawyers raised concerns about the ability of property developers to fund an exemption certificate under section 57 of the Foreign Acquisitions Bill, which is required to market off-the-plan developments.³⁸ Similarly, the ECG noted that the introduction of application fees would increase costs for businesses, 'especially for off-the-plan bulk approvals'.³⁹

2.42 The Institute also had reservations about the cost of section 57 exemption certificates and submitted that:

...the overall administrative cost to the Government of issuing an advanced off the plan certificate for a particular development should be less than granting approval for every unit in that development on an individual basis...

This is not reflected in the Fees Imposition Bill, which proposed the introduction of a \$25,000 upfront application fee on developers, in addition to the per dwelling fee structure, which would imply a much larger administrative cost from using advancing off the plan certificates, when this is not the case.⁴⁰

2.43 Further, the Institute warned the committee that the cost of section 57 exemption certificates may encourage developers to forego applying for a section 57

36 Foreign Acquisitions Bill, item 4, proposed section 45 of Schedule 1.

37 Fees Imposition Bill, clause 6. The fee for residential properties valued at \$1 million or less is \$5,000, while the fee for residential properties valued at greater than \$1 million is \$10,000 then \$10,000 incremental fee per additional \$1 million in property value.

38 *Submission 1*, p. 3.

39 *Submission 12*, p. 4.

40 *Submission 9*, p. 3.

exemption certificate.⁴¹ Instead, the government would likely incur higher administrative costs if foreign persons seek approval on an individual basis for new dwellings they purchase.⁴² Property developers will need to weigh up the compliance and administrative costs of each option.

Committee view

2.44 The government has consistently indicated its intention to introduce an application fee on all foreign investment proposals to ensure that Australian residents are not required to cover the cost of administering the foreign investment framework. By transferring some compliance functions to a specialised investigative and enforcement area in the ATO, the community will benefit from significantly stronger compliance, information gathering powers and data collection. The cost of these auditing, compliance and enforcement activities should not be a financial burden to the Australian community.

2.45 The changes to the foreign investment framework will lower the compliance burden for investors and business in a number of ways, and cutting red tape on foreign investment applications will help to ensure the changes to Australia's foreign investment framework will not significantly deter future foreign investment. For example, the committee considers that creating a comprehensive legislative framework is an important step to lowering compliance costs for investors.

The importance of an appropriate penalty regime

2.46 The Foreign Acquisitions Bill increases the maximum criminal penalty that would apply to breaches of the foreign investment framework and introduces civil penalty orders and infringement notices. The Treasurer also retains other powers such as divestment orders to respond to breaches of the foreign investment approvals process.

2.47 The House of Representatives Standing Committee, in its report on foreign investment in residential real estate, recommended that the government introduce these enhanced and additional penalties to motivate better compliance and provide more options for enforcement activities.⁴³

2.48 Support among stakeholders for the increased maximum penalties and the introduction of civil penalty provisions and infringement orders was mixed. In regard to the agricultural sector, the Cattle Council of Australia indicated they supported the new penalty regime:

While we acknowledge there is little evidence to suggest non-compliance with conditions imposed on approved agricultural investments, the

41 *Submission 9*, p. 3.

42 *Submission 9*, p. 3.

43 House of Representatives Standing Committee on Economics, *Report on Foreign Investment in Residential Real Estate*, November 2014, pp. 39–41.

imposition of civil pecuniary penalties would provide additional remedies to the government to pursue non-compliance.⁴⁴

2.49 In contrast, the ECG considered that there was 'no evidence to support additional civil penalties at this time'.⁴⁵

2.50 Hickey Lawyers opposed key aspects of the new penalty regime because of the message it sends to potential foreign investors:

Whilst we accept that breaches of the foreign investment review rules need to be properly enforced, and appropriate deterrents need to be in place, a penalty regime of this nature runs the risk of becoming a *blanket* deterrent to investment on the whole, rather than a *targeted* deterrent to those actively looking to breach the rules.

For example, imposing criminal sanctions on property developers marketing [new dwellings] exclusively overseas send the message that Australia is not 'open for business'...⁴⁶

2.51 The Foreign Acquisitions Bill introduces civil penalties for officers of corporations who authorise, permit or fail to prevent contraventions of requirements under the Foreign Acquisitions Bill.⁴⁷ In addition, Part 2.4 of the *Criminal Code* extends criminal liability to a person who may not directly or individually have committed an offence, for example through being an accomplice.⁴⁸ The ECG raised concerns with this approach:

The ECG is opposed to any suggestion of making third parties liable for the acts or omissions of the principal parties other than for the current penalties for aiding and abetting the commission of an offence. There will be a substantial transaction cost to all Australians to the extent that lawyers, conveyancers, and financiers are burdened by additional risk and compliance obligations.⁴⁹

2.52 The House of Representatives Standing Committee recommended that third parties who knowingly assist a foreign investor to breach the foreign investment framework should also be subject to civil and criminal penalties.⁵⁰

Committee view

2.53 The committee considers that the enhanced and expanded penalty regime will provide the government with useful tools to ensure compliance, even though there is

44 *Submission 2*, p. 2.

45 *Submission 12*, p. 5.

46 *Submission 1*, attachment 1, p. 5.

47 Foreign Acquisitions Bill, item 4, proposed sections 101 and 102 of Schedule 1.

48 Foreign Acquisitions Bill, item 4, proposed sections 102 and 103 of Schedule 1.

49 *Submission 12*, p. 4.

50 House of Representatives Standing Committee on Economics, *Report on Foreign Investment in Residential Real Estate*, November 2014, pp. 39–40.

currently limited evidence of non-compliance. These changes also bring the penalties for the foreign investment framework into line with penalty regimes for other regulatory regimes such as the *Corporations Act 2001*.

Enhanced compliance and enforcement capabilities

2.54 The changes to the foreign investment framework are complemented by an increased focus on compliance functions and an increase in funding to improve compliance and monitoring. In its report on foreign investment in residential real estate, the House of Representatives Standing Committee recommended that appropriate processes for the purposes of audit, compliance and enforcement of the foreign investment framework be put in place by the Foreign Investment Review Board.⁵¹

2.55 The government announced the transfer of approval of real estate applications to the ATO (from Treasury) on 2 May 2015, effective from that date.⁵² This includes the upfront screening, compliance and enforcement for foreign investment in residential real estate, as well as the collection of fees for all foreign investment applications (including residential real estate, business, agriculture and commercial real estate applications).⁵³

2.56 The government considered that the transfer of functions to the ATO would provide stronger enforcement of the foreign investment framework because of the ATO's 'sophisticated data-matching systems and specialised staff with compliance expertise'.⁵⁴ The Foreign Acquisitions Bill would allow the Treasurer to delegate all of the Treasurer's powers or functions to the Secretary of the Treasury, the Commissioner of Taxation or a public servant employed by Treasury or the ATO, providing flexibility to delegate to the most appropriate agency in the Treasury portfolio. The Foreign Investment Review Board emphasised the benefits for foreign investors flowing from this focus:

Foreign investors will also benefit from better service delivery. In addition to the funding that has been provided to the Australian Taxation Office to increase compliance and enforcement activities, additional funding has also been provide to Treasury so that the Foreign Investment Review Board can

51 House of Representatives Standing Committee on Economics, *Report on Foreign Investment in Residential Real Estate*, November 2014, p. 39.

52 The Hon. Tony Abbott, MP, Prime Minister of Australia, and the Hon. Joe Hockey, MP, Treasurer, 'Government strengthens the foreign investment framework', Media release, 2 May 2015.

53 Department of the Treasury, *Australian Government response to the House of Representatives Standing Committee on Economics report: Foreign Investment in Residential Real Estate*, August 2015, pp. 2–3.

54 The Hon. Tony Abbott, MP, Prime Minister of Australia, and the Hon. Joe Hockey, MP, Treasurer, 'Government strengthens the foreign investment framework', Media release, 2 May 2015.

increase engagement with clients and intermediaries and improve service levels.⁵⁵

2.57 Hickey Lawyers supported the transfer of powers and functions to the ATO:

Generally, we support greater compliance and enforcement measures within the foreign investment review framework...we support the creation of a new compliance and enforcement area in the Australian Taxation Office to address compliance matters.⁵⁶

2.58 On the other hand, the ECG submitted that it 'has not seen any evidence or statement from government in the last 12 months or so that justifies such an expensive compliance regime'.⁵⁷

Committee view

2.59 The committee considers that the delegation of functions to the ATO and increased funding to both the ATO and Treasury will deter non-compliance and, as a result, improve the community's perception of compliance with the foreign investment framework.

The importance of the register of foreign investment in agriculture land

2.60 In its report on foreign investment in residential real estate, the House of Representatives Standing Committee received evidence that current data limitations lead to poor decision-making by governments and speculative debate over the level of foreign investment in Australia:

The quality of the currently available data on foreign investment in residential property was a regular topic of discussion in the written submissions to this inquiry and in the evidence given to the committee at public hearings. A consistent theme emerges from this evidence, which is that data needs to be improved to enable better informed decision-making.⁵⁸

2.61 The Standing Committee recommended that the government, in conjunction with the states and territories, establish a national register of land title transfers that records the citizenship and residency status of all purchasers of Australian real estate.⁵⁹

2.62 In the explanatory material accompanying the package of bills, the government acknowledged that the current data collection for foreign investment for real estate was insufficient:

55 *Submission 5*, p. 2.

56 *Submission 1*, attachment 1, p. 5.

57 *Submission 12*, p. 3.

58 House of Representatives Standing Committee on Economics, *Report on Foreign Investment in Residential Real Estate*, November 2014, p. 55.

59 House of Representatives Standing Committee on Economics, *Report on Foreign Investment in Residential Real Estate*, Recommendation 8, November 2014, p. 75.

There is no definitive data source showing how much Australian land is owned by foreigners. Treasury only collects data on approvals of applications submitted to it, which are published in the FIRB [Foreign Investment Review Board] Annual Report. It does not track whether an approval translated into an acquisition or a subsequent disposal of a property.⁶⁰

2.63 In light of the current data limitations, stakeholders welcomed the establishment of the register of foreign persons with interests in Australian agricultural land. The Cattle Council of Australia submitted that the 'maintenance of a foreign investment register is a useful tool to the inform Australian Government decisions on investment'.⁶¹ Finsia also considered that the register could provide valuable information to all Australians in policy discussions about foreign investment:

Finsia believes that a national register of foreign ownership of agriculture land is an initiative that could serve to dispel common misconceptions about foreign direct investment.

...

Finsia submits that regular reporting of this data could be used to encourage genuine debate about how foreign investment can benefit Australia in the coming decades.⁶²

2.64 The Law Society of New South Wales expressed reservations about the timing provided for foreign persons to notify the ATO of interests in agricultural land and the compliance burden of the obligations. The Law Society of New South Wales contended that:

- foreign persons must give notice to the ATO in the approved form within 30 days of the event occurring (or within 30 days of the Register Bill commencing, for events which occur before the commencement of the Register Bill), which may be an insufficient period of time for foreign persons with large land holdings;
- other parties, such as the executor or administrator of a person's estate and the liquidator of a corporation, may be required to give notice the ATO in the approved form within 30 days of a foreign persons' event occurring, which may be an insufficient period of time depending on the circumstances; and
- the ATO's approved form must be completed on a 'per lot' basis, which is a time-consuming process for foreign persons who have an interest in multiple lots or whose rural property consists of a number of lots.⁶³

60 Department of the Treasury, *Regulation Impact Statement: Foreign investment proposals*, 14 September 2015, paragraph 1.101, <http://ris.dpmc.gov.au/2015/09/14/strengthening-australias-foreign-investment-framework/> (accessed 15 September 2015).

61 *Submission 2*, p. 3.

62 *Submission 10*, p. 3.

63 *Submission 6*, pp. 2–5.

2.65 As the Register Bill is a taxation law, the Commissioner of Taxation has powers under the Taxation Administration Act to:

- provide further time for foreign investors to notify the ATO; and
- determine the content of an approved form and the manner in which it is given to the Commissioner of Taxation, including by electronic means.⁶⁴

Expansion of the register to include all types of land

2.66 The government has indicated that the register will be expanded at a later date to include data on foreign investment in all types of land, not just agricultural land.

When fully operational, the register will capture all land transfers to and from foreign persons, regardless of whether the land is agricultural, commercial or residential.

...

The Government is currently negotiating with States and Territories to leverage from their existing State and Territory land title collects to establish the all land register.

...

From 1 July 2016 it is expected that the register would include information on all land types with data to be supplied from the States and Territories. There is no proposal to conduct a stocktake of existing foreign ownership of other types of land.⁶⁵

Committee view

2.67 The committee considers that the establishment of a national register of foreign investment in land title transfers will aid both compliance and public discussion about foreign investment trends. Further, leveraging off state and territory data collections will avoid duplication and unnecessary red tape for foreign investors.

2.68 Even so, the committee notes the concerns raised about the compliance burden posed by the ATO's approved form, particularly for foreign persons who own multiple lots of agricultural land. The committee recognises that the content and format of the approved form should be as simple and straightforward as possible to minimise the compliance burden on foreign persons with an interest in Australian agricultural land. The ATO website currently advises foreign persons who need to register their interest in more than one property to either complete multiple forms or contact the ATO via email.⁶⁶ In the committee's view, the Commissioner of Taxation

64 Taxation Administration Act, sections 388-50 and 388-55 of Schedule 1.

65 Department of the Treasury, *Regulation Impact Statement: Foreign investment proposals*, 14 September 2015, paragraphs 1.102, 1.104 and 1.107, <http://ris.dpmc.gov.au/2015/09/14/strengthening-australias-foreign-investment-framework/> (accessed 15 September 2015).

66 ATO, 'Agricultural land registration form and instructions – individuals and partnerships', <https://www.ato.gov.au/Forms/Agricultural-land-registration-form-and-instructions---individuals-and-partnerships/> (accessed 26 September 2015).

should consider ways to simplify the notification process for foreign persons who hold or acquire interests in multiple lots of agricultural land.

Issues raised in relation to the Foreign Acquisitions and Takeovers Regulations 2015

2.69 As part of this inquiry, the committee only considered matters raised in regards to the package of bills. However, submitters often referred to matters in the Foreign Acquisitions and Takeovers Regulations 2015 (the associated regulations) as an exposure draft of the associated regulations was released as part of the Treasury consultation process. The associated regulations are intended to replace the Foreign Acquisitions Regulations.

2.70 The government has indicated that it intends to undertake further consultation in relation to the associated regulations before they are made.⁶⁷ As such, the committee notes the following matters for consideration as part of that consultation process.

Definition of agribusiness

2.71 The associated regulations define agribusinesses based on classes of the Australian and New Zealand Standard Industry Classification (ANZSIC) codes; an agribusiness is defined to include classes in Division A as well as any classes in Subdivision C (food product manufacturing), with some exemptions.

2.72 The National Farmers' Federation and the Australian Food and Grocery Council both submitted that certain supply chain business types should not be captured by the definition of agribusiness as this could deter foreign investment in the food supply chain.⁶⁸ The Australian Food and Grocery Council proposed that the definition of agribusiness should apply to activities covered by Division A of the ANZSIC codes only.⁶⁹ In contrast, the Cattle Council of Australia did not have a preference as to whether the definition of agribusiness should be extended to meat processing or other aspects of the supply chain.⁷⁰

2.73 The National Farmers' Federation and the Australian Food and Grocery Council also raised concerns about the percentage of the value of the assets of a business that needs to be classified as an agribusiness for the purposes of the Foreign Acquisitions Bill. The associated regulations state that an Australian business is an agribusiness if the value of assets of the business in the relevant ANZSIC codes is at least 25 per cent of the total asset value of the business.⁷¹ The National Farmers' Federation and the Australian Food and Grocery Council both submitted that 25 per

67 Department of the Treasury, *Regulation Impact Statement: Foreign Investment Proposals*, 14 September 2015, p. 39, <https://ris.govspace.gov.au/files/2015/09/Foreign-investment-reforms-RIS-web-accessible.pdf> (accessed 15 September 2015).

68 Australian Food and Grocery Council, *Submission 8*, p. 6; *Submission 11*, p. 11.

69 *Submission 8*, p. 3.

70 *Submission 2*, p. 3.

71 *Submission 11*, p. 12.

cent is too low and may capture businesses that are largely not an agribusiness; instead, they submitted the percentage of the value of the assets should be raised to at least 50 per cent.⁷²

Definition of direct interest in a business

2.74 Generally, the associated regulations define an investor taking a 'direct interest' in a company if a 10 per cent or greater share of the company is acquired.⁷³ However, there is also a provision in the associated regulations which states that if a foreign investor has a 5 per cent stake in a company and adds a new interest of at least 1 per cent, this new interest will require foreign investment approval. The National Farmers' Federation and the Australian Food and Grocery Council both considered that this provision is too onerous for the size of the investment and recommended that a foreign investor should have a stake of at least 10 per cent (instead of 5 per cent) before the obligations for a new interest applies.⁷⁴

Threshold tests for purchases of agricultural land and agribusinesses

2.75 From 1 March 2015, the government reduced the threshold test for purchases of agricultural land (previously known as 'Australian rural land') from \$252 million to \$15 million for investors from most countries. This \$15 million threshold is cumulative, capturing combined purchase values. This change was implemented through Australia's Foreign Investment Policy, which is a Ministerial statement, and will also be made through the associated regulations. Schedule 3 of the Foreign Acquisitions Bill contains transitional provisions relevant to actions relating to agricultural land during this period.

2.76 The Cattle Council of Australia considered that this \$15 million threshold test may be too low and may potentially deter investment.⁷⁵ However, given the threshold was already in place, the Cattle Council of Australia proposed that the focus should now be on streamlining administrative process for processing applications so that the process did not prove to be a deterrent to foreign investment in agricultural land.⁷⁶ The National Farmers' Federation supported the \$15 million threshold, stating:

Though some NFF [National Farmers' Federation] members oppose the threshold being cumulative, the NFF believes it is in the best interests of the broader sector to support a cumulative threshold.⁷⁷

2.77 In addition, the changes to the foreign investment framework introduced a \$55 million threshold (based on the value of investment) for direct investments in agribusinesses to capture downstream or supply chain activities with links to primary

72 *Submission 11*, p. 12; *Submission 8*, p. 7.

73 *Submission 11*, p. 12.

74 *Submission 11*, p. 12; *Submission 8*, p. 8.

75 *Submission 2*, p. 3.

76 *Submission 2*, p. 3.

77 *Submission 11*, p. 9.

production. Similar to the threshold value for agricultural land, the \$55 million threshold value for direct investments in agribusinesses will be implemented through the associated regulations. The National Farmers' Federation supported the \$55 million threshold for agribusinesses.⁷⁸

Other issues

2.78 Herbert Smith Freehills made a number of proposals, including widening the underwriter exemption to include foreign government investors.⁷⁹ Herbert Smith Freehills also suggested amending the definition of 'agreement country investor' to include entities who invest through any jurisdiction with which Australia maintains diplomatic relations and incorporating an exemption for acquisitions of land that are 'wholly incidental' to the investor's business activities.⁸⁰

Conclusion

2.79 The committee recognises that foreign investment plays an important role in the Australian economy. Australia's foreign investment framework, with its case-by-case assessment of applications to ensure they are not contrary to the national interest, has played a major role in ensuring foreign investment supports economic activity and should be retained.

2.80 That said, the committee notes that Australia's foreign investment legislation has not been updated in almost 40 years despite the significant changes in foreign investment trends and approaches to regulation that have occurred during that time. It is also apparent that reforms are needed to improve community confidence in Australia's foreign investment framework, particularly with regards to the penalty regime and the level of compliance and enforcement of the rules. These issues were among those raised during the government's extensive consultation on the package of bills with industry stakeholders and state and territory governments.

2.81 The committee has considered the evidence and formed the view that the package of bills, through tougher penalties and increased compliance and enforcement capabilities, will help deter non-compliance. In addition, the improved data collection and transparency of collected information will provide valuable information to both the government and the community about foreign investment trends and levels of non-compliance.

Recommendation 1

2.82 The committee recommends the bills be passed.

Senator Sean Edwards
Chair

78 *Submission 11*, p. 6.

79 Herbert Smith Freehills, *Submission 4*, p. 2.

80 *Submission 4*, pp. 4–5.