

Chapter 2

Main provisions of the bill

The national interest test

2.1 The current criterion used by the Treasurer to make decisions about applications is outlined in the Treasurer's *Foreign Investment Policy*.¹ The Foreign Investment Review Board² (FIRB) provides advice to the Treasurer on foreign investment proposals using these guidelines. Upon this advice, the Treasurer or his delegate, usually the Assistant Treasurer, can then block proposals or apply conditions to the way the proposals are implemented in order to protect the national interest.³ 'Foreign investment decisions' may then be published as a press release on the FIRB website.⁴

2.2 In a media release, the Treasurer outlined that while the FIRB plays an important advisory role in determining whether a proposal is consistent with the national interest, it is ultimately a matter for the Treasurer.⁵ There is currently no definition of "national interest" in the *Foreign Acquisitions and Takeovers Act 1975* (FATA). This has been the case under successive governments since foreign investment was initially regulated in 1975.⁶

2.3 The bill seeks to make the national interest test a legislative requirement, rather than a guide.⁷ The national interest test is proposed in item 5 of the bill in new section 21C. It takes the existing guidelines and adds additional criteria to be considered.⁸ It requires the Treasurer to have regard to the following in determining whether the acquisition of an interest in agricultural land is contrary to the national interest:

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- 1 *Foreign Investment Policy*, June 2010, revised for indexing January 2011, [http://www.firb.gov.au/content/downloads/Australias_Foreign_Investment_Policy_\(English\).pdf](http://www.firb.gov.au/content/downloads/Australias_Foreign_Investment_Policy_(English).pdf) (accessed 23 May 2011).
 - 2 The Board comprises four part-time Members and a full-time Executive Member, the Executive Member is the General Manager of Treasury's Foreign Investment and trade Policy Division and is the link between the Board and the Treasury. (*Foreign Investment Review Board Annual Report 2009-10*, pp. 4-5).
 - 3 Treasury, *Australia's Foreign Investment Policy*, January 2011, p. 2.
 - 4 FIRB website, <http://www.firb.gov.au/content/publications.asp?NavID=5> (accessed 23 May 2011).
 - 5 The Hon. Wayne Swan, Treasurer, 'Government Improves Transparency of Foreign Investment Screening Process', Media Release, 17 February 2008, [p. 1].
 - 6 Treasury, *Submission 10*, p. 6.
 - 7 *Explanatory memorandum*, [p. 1].
 - 8 *Explanatory memorandum*, [p. 3].

- national security issues, including Australia's ability to protect its strategic and security issues;
- the impact on competition and global market outcomes;
- any impact on tax revenues; and
- any impact on, or benefit to the Australian economy and community including:
 - job opportunities and retention of labour;
 - the introduction of new technology or business skills;
 - increased export receipts for Australian exporters;
 - greater efficiency or productivity, or enhanced domestic services;
 - additional investment for development purposes;
 - an increase in Australia's capacity to process Australian primary products
- whether Australia's economic interests are safeguarded and promoted (including the examination of issues of aggregation and vertical integration);
- mitigating factors to assess whether an investment will allow for Australian oversight and involvement, such as an Australian based head office or whether Australian directors will be appointed; and
- the character of the investor (including business experience and acumen relevant to the acquisition, financial commitment to the acquisition and good character).⁹

2.4 Item 5 also extends the Treasurer's authority to direct a foreign person to dispose of an interest if the Treasurer is satisfied that the agricultural land was acquired contrary to the national interest.¹⁰

Changing the investment threshold that triggers review

2.5 Currently, a potential foreign acquisition interest that exceeds 15 per cent, provided the firm is worth \$231 million or more, will trigger a review by the FIRB.¹¹ All foreign governments and their related entities are required to apply to the

9 *Foreign Acquisitions Amendment (Agricultural Land) Bill 2010*, pp. 8-9; *Explanatory memorandum*, [p. 3].

10 Subsection 21B(4), *Foreign Acquisitions Amendment (Agricultural Land) Bill 2010*, p. 7 and *Explanatory memorandum*, [p. 3].

11 Greater restrictions are placed on foreign acquisition in the banking sector, Australian international airlines, airports, shipping, media and communications (see Treasury, *Australia's Foreign Investment Policy*, January 2011, p. 3).

Treasurer before making a direct investment in Australia, regardless of the value of the acquisition.¹²

2.6 The bill proposes to change the current monetary threshold to a spatial threshold, where any foreign acquisition interest of agricultural land greater than five hectares would be subject to application to the Treasurer, and if the Treasurer deemed the proposed acquisition was contrary to the national interest, he or she could prohibit the acquisition.¹³

2.7 This provision is modelled on the New Zealand *Overseas Investment Act 2005*, and is designed to 'enable more foreign investment to come to the attention of the Treasurer so that they can make informed policy decisions about whether or not to approve an application'.¹⁴

2.8 The term "interests" in Australian agricultural land extends the reach of the bill beyond the purchase of farm real estate. Item 3 of the bill inserts new section 12D and defines the meaning of an "interest" in Australian agricultural land greater than five hectares to include:

- a legal or equitable interest;
- an interest by way of shares in a company that owns agricultural land (where the share entitles the holder to access, manage, oversee, or make a profit from the land);
- interest as a lessee or licensee of agricultural land that is likely to exceed five years;
- interest by way of a profit sharing arrangement;
- an interest in a share of an agricultural land corporation;
- an interest in a land trust estate; and
- an interest in a share of a corporation with connections to a trustee.¹⁵

2.9 The bill also seeks to protect against potential piecemeal purchases by foreign investors, whereby multiple acquisitions that do not exceed the threshold allow an

12 Treasury, *Australia's Foreign Investment Policy*, January 2011, p. 2.

The foreign investment policy was amended in February 2008 to include increased guidelines to be considered for investment proposals by foreign governments that are over and above those that apply to private sector proposals. (See The Hon. Wayne Swan, Treasurer, 'Government Improves Transparency of Foreign Investment Screening Process', Media Release, 17 February 2008).

13 *Foreign Acquisitions Amendment (Agricultural Land) Bill 2010*, p. 7.

14 *Explanatory memorandum*, [p. 1].

15 *Foreign Acquisitions Amendment (Agricultural Land) Bill 2010*, pp. 3-4; *Explanatory memorandum*, [p. 2].

investor to acquire large areas of land over a period of time.¹⁶ The bill addresses these 'creeping acquisitions' by expanding the definition of an interest in agricultural land to include joint purchases; a person who has previously acquired an interest; or a person who is increasing the amount of an existing interest.¹⁷

Publication of proposed acquisitions

2.10 Currently, foreign investment proposals are handled on a commercial-in-confidence basis. Some detail of a particular case may be available under a Freedom of Information (FOI) request, provided this does not contravene privacy law or business commercial confidences.¹⁸

2.11 The bill proposes that the Treasurer is required to publish on the Treasury website all applications of interest in Australian agricultural land, and for the status of the applications to be updated each week as they proceed. The information must include:

- details identifying the person intending to enter into the agreement;
- the country of residence or place of business of the person;
- the amount of the proposed investment;
- the sector of the agricultural industry to which the interest in land relates; and
- any other information as prescribed by regulations.¹⁹

Definitions

2.12 The bill inserts several new definitions. The term 'Australian agricultural land' creates a new category distinguished from rural land and urban land. It is defined as 'land situated in Australia that is used predominantly for carrying on a business of primary production'.²⁰ The term 'business of primary production' is derived from the *Income Tax Assessment Act 1997* and includes animal husbandry and farming, horticulture, fishing, forestry, viticulture, and dairy farming.²¹

16 *Explanatory memorandum*, [p. 1].

17 Subsection 12D(3), *Foreign Acquisitions Amendment (Agricultural Land) Bill 2010*, p. 4.

18 Treasury, *Submission 10*, p. 6.

19 *Foreign Acquisitions Amendment (Agricultural Land) Bill 2010*, p. 9; *Explanatory memorandum*, [p. 2].

20 Item 1, *Foreign Acquisitions Amendment (Agricultural Land) Bill 2010*, p. 3; *Explanatory memorandum*, [p. 2].

21 Examples of businesses that fall into the primary production category can be found on the Australian Taxation Office's ruling on "Am I carrying on a business of primary production?"

2.13 Section 5 of the Act, 'Interpretation of the FATA', refers to 'Australian rural land' which carries the same definition 'Australian Agricultural Land' in the bill. The FATA does not include vacant land in the definition (even if zoned as rural), hobby farms, rural residential blocks or land used for stock agistment or mining.²²

2.14 The definitions of 'Australian agricultural land corporation' and 'Australian agricultural land trust estate' in the bill are included in sections 13E and 13F of the bill. These terms define a trust estate, corporation or holding company (including its subsidiaries) where the value of its eligible land assets exceeds 50 per cent of its total assets.²³

22 *Submission 10*, p. 4.

23 Items 1 and 4, *Foreign Acquisitions Amendment (Agricultural Land) Bill 2010*, pp. 5-6.

