

Chapter 3

Inadequacies of the Foreign Acquisitions and Takeovers Act

3.1 The committee heard evidence of the inadequacy of the *Foreign Acquisitions and Takeovers Act 1975* (FATA) to appropriately regulate some of the key issues regarding foreign investment in agriculture. In particular, the committee heard evidence from the then Chair of the Foreign Investment Review Board (FIRB), Mr John Phillips, which gave the committee the impression that the FATA was out-dated and dealt with agricultural issues in a peculiar way. A number of the issues covered below will be dealt with in more detail in the final report.

3.2 The committee heard evidence that in the late 1980s the FATA was amended to deal with foreign investment in urban land and that foreign investment in agricultural (rural) land was not a major consideration at the time. As a result, the legislation treats rural properties as ordinary businesses for the purpose of the FIRB review threshold, whereas there are special arrangements for the foreign purchase of urban land. As Mr Phillips explained in response to a question about the FIRB review threshold:

Senator XENOPHON: ... Do you think some of the criticisms in respect of transparency relate to thresholds—in other words, thresholds that are matters of government policy by which you determine applications? There is no role for the Foreign Investment Review Board in agricultural land transactions below [\$244] million, which is a matter you do not determine.

Mr Phillips: Unless they are from a sovereign—

Senator XENOPHON: That is right.

Mr Phillips: That is a problem. I was almost going to make a mistake then and say regrettably. We have to stay within the legislation that the legislators, yourselves, have passed. The legislation that we deal with deals with urban land. It only deals with rural land as a business. My involvement does not go back to the time when that legislation was written, but my understanding is that at the time the legislation was put into the parliament one of the major concerns of the legislators was what was happening in the housing market, particularly what was happening with foreign investment in the housing market. This was still the case when I first became the chairman. So there was a concentration on making sure that the law covered what was described as urban land, but it seems that people did not regard the rural land as being a problem in those days. So it was just regarded as part of the normal turnover of business.¹

1 Mr John Phillips, Chair, FIRB, *Committee Hansard*, 9 February 2012, p. 2. Note: the FIRB review threshold is indexed annually. In 2011 (when the inquiry began) the figure was \$231 million and in 2012 the figure is \$244 million. For consistency in this report, whenever the figure of \$231 million was used in evidence it has been replaced with the \$244 million figure.

3.3 The requirement for FIRB to examine only cases above the \$244 million threshold also led to the problem of examining cumulative purchases, which in total could exceed the review threshold amount. Mr Phillips conceded in the following exchange that this was an 'anomaly':

CHAIR: ...If a foreign investor acquired 10 farms in a single year for \$30 million each, which is beginning to happen, would it have to obtain foreign investment approval given the overall value of the purchase exceeded \$244 million?

Mr Phillips: At the moment, no.

CHAIR: Isn't that perhaps not bizarre but inadequate?

Mr Phillips: I think it is an anomaly.²

3.4 The limits on FIRB's ability to examine certain cases of foreign investment is also related to one of the key issues noted in the inquiry – that there has been a significant lack of information on foreign investment in Australian agriculture despite increasing anecdotal evidence of significant foreign purchasing. The dearth of information also appears to stem from how the FATA operates. As Mr Phillips noted:

The movements in rural land I think came to the notice of the board a bit before they came to the notice of the press in large amounts. We were trying to get some idea of how this was working out and how much there was, looking at what other countries had done and whether there were things that we ought to be doing. It became very clear to us and, I think, also to the Treasurer very early in the piece that we did not know as much as we ought to know, and that was partly because of the nature of the legislation and partly for other reasons.³

3.5 The other aspect of the FATA treatment of rural land is that while it is defined as land 'that is used wholly and exclusively for carrying on a business of primary production', urban land is simply defined as land 'that is not Australian rural land.'⁴ As the committee heard, this has led to unusual classifications of rural and urban land. An exchange between the committee and the FIRB Chair and an official demonstrates this point:

Mr Phillips: We get some very funny situations—and I blame you legislators for this—because we get some things that look as though they are rural land but which, by definition under the act, are clearly—

CHAIR: I will try to clarify it for you, Mr Chairman. Given what you have just said, does that mean you class land in the middle of the Simpson Desert as urban land and you class a mine in the middle of the Kimberleys as urban land but not the pastoral property next door?

Mr Phillips: We do not; the act does.

2 Mr John Phillips, Chair, FIRB, *Committee Hansard*, 9 February 2012, p. 18.

3 Mr John Phillips, Chair, FIRB, *Committee Hansard*, 9 February 2012, p. 5.

4 *Foreign Acquisitions and Takeovers Act 1975*, ss. 5(1)

CHAIR: So that is actually the description?

Mr Phillips: I think that is fair enough. The act defines one [Australian rural land] and everything else falls into the second basket [Australian urban land].

CHAIR: So the Kimberleys is urban land?

Ms Reinhardt: It depends.

Mr Phillips: If there is no agricultural production on it.

CHAIR: How about that.

Mr Phillips: As I say, I blame you legislators for this.⁵

3.6 This artificial definition of urban land results in foreign purchases of agricultural properties worth up to \$244 million not being scrutinised under the FIRB national interest test (unless purchased by a sovereign entity), which is in stark contrast to foreign purchases of vacant land⁶ in rural and remote areas of any value which must undergo such a review:

CHAIR: But, for the purposes of the act, it seems strange to me that the purchase of what some people would see as wasteland—though there is no such thing; all land is valuable—or arid land is subject to tighter scrutiny than farmland. Isn't that bizarre?

Mr Phillips: I think it has possibly become out of date. To call it bizarre is making a very strong statement.⁷

3.7 The FATA is the legislative foundation for the review of foreign investment in Australia. Many of the concerns noted above were confirmed and elaborated on by other submitters and witnesses throughout the inquiry. This will be discussed in more detail in the final report where appropriate recommendations will be made. However, given the evidence that the committee received from the then Chair of FIRB about the shortcomings of the FATA and the issues that arise from it, the committee considered it necessary to highlight these in this interim report. As a result, the committee is of the view that the FATA needs to be extensively reviewed and updated so that it can properly manage the contemporary issues of foreign investment in Australian agriculture.

5 Mr John Phillips, Chair, FIRB, *Committee Hansard*, 9 February 2012, p. 16.

6 See also, FIRB, *Australia's Foreign Investment Policy*, January 2012, p. 10. The vacant land referred to here is vacant land for the purposes of future commercial development. Some exemptions to FIRB review apply and are listed on p. 11.

7 Mr John Phillips, Chair, FIRB, *Committee Hansard*, 9 February 2012, p. 18.

Recommendation 6

3.8 The committee recommends that the government undertake a review of the *Foreign Acquisitions and Takeovers Act 1975* with the aim of developing proposed amendments that address contemporary issues of foreign investment, particularly in agriculture.

3.9 The review should specifically consider:

- the definition of 'rural land' and 'urban land';
- drawing a distinction between the treatment of rural land and agricultural business; and
- any limitations that the *Foreign Acquisitions and Takeovers Act 1975* may place, either explicitly or implicitly, on the Foreign Investment Review Board's ability to effectively review the level and nature of foreign investment activities in Australia.

Senator the Hon. Bill Heffernan

Chair