

Chapter 1

Introduction

1.1 The Rural and Regional Affairs and Transport References Committee's inquiry into the Foreign Investment Review Board (FIRB) national interest test contended with a major contemporary challenge facing Australia's agricultural industry: that is, how to encourage foreign investment in Australian agriculture while managing it in the best interests of the industry and the nation. The committee welcomes the significant wealth and job creating benefits that foreign investments can bring to the Australian economy as well as to the continued development of the agriculture sector. The committee unequivocally supports foreign investment in Australia that is commercial in nature, improves local and national agricultural markets, and competes fairly with domestic businesses.

1.2 However, the committee also notes the concerns of many of Australia's rural and regional communities that certain recent trends in foreign investment in Australian agriculture that may not be consistent with Australia's national interest.

1.3 The evidence before the committee suggests that the current community concerns regarding foreign acquisitions of Australian agricultural assets stem from:

- the increasing pressure created by the growing global food task;
- a lack of transparency about the FIRB national interest test; and
- major information gaps about the levels and types of foreign investment in Australia.

1.4 The global food task appears to be leading to an increasing trend of foreign governments considering investment in Australia for food security purposes, while at the same time the lack information about foreign investment undermines public confidence in how this issue is governed. The inadequacies of the *Foreign Acquisitions and Takeovers Act 1975* (FATA) to deal with contemporary practices in foreign investment have exacerbated these problems.

1.5 Therefore, based on the evidence before the committee, this final report of the inquiry discusses the key issues of:

- the regulatory framework for foreign investment in Australia and the international trends in foreign investment regulation;
- the global context of food security and foreign investment;
- major information gaps regarding foreign investment in Australian agriculture;
- the scrutiny and transparency of FIRB's application of the national interest test;
- the foreign investment review threshold; and
- the role of foreign investment in future agricultural developments through the case study of the Ord irrigation area in northern Australia.

1.6 The issue of tax arrangements and foreign investment in agriculture was examined in detail in the committee's interim report which made five recommendations specifically about Australia's taxation framework.¹ Although the tax issue will not be discussed in depth in the body of this final report, because it is an ongoing interest for the committee, it is outlined further below.

1.7 In addition, the committee notes that the government introduced a new visa category called the 'significant investor visa' effective from 24 November 2012. The Department of Immigration and Citizenship notes that the:

...purpose of the visa is to provide a boost to the Australian economy and to compete effectively for high net worth individuals seeking investment migration. Migrant investors will be required to invest AUD 5 million into complying investments for a minimum of four years before being eligible to apply for a permanent visa.²

1.8 The committee has not had the opportunity to examine the implications of this visa, however the committee has concerns that it may have the potential to distort markets. Further information about the visa has been included in Appendix 4.

Conduct of inquiry

1.9 On 6 July 2011 the Senate referred the matter of the examination of the Foreign Investment Review Board national interest test to the Rural and Regional Affairs and Transport References Committee for inquiry and report. The terms of reference are available in Appendix 1.

1.10 The committee advertised the inquiry in the *Australian*, on the committee's website, and invited submissions from peak bodies, government departments and relevant agricultural companies.

1.11 The committee received 35 submissions which are published on the committee website (see Appendix 2). The committee held public hearings in Canberra, Perth, Kununurra, and Sydney (see Appendix 3) and conducted several site visits in northern Western Australia on 10 and 12 April 2013. Overall, the committee examined evidence from a wide variety of industry bodies, government departments, small and large agricultural businesses, and interested individuals.

1.12 The committee tabled a substantial interim report for the inquiry on 28 November 2012. The interim report focussed on the taxation arrangements of foreign investment in Australian agriculture and noted evidence received by that time regarding the global food task and the out-dated nature of the FATA. The interim report made six recommendations in total: relating to Australia's tax arrangements for foreign investment (including tax revenue leakage and transfer pricing, tax on capital

1 Senate Rural and Regional Affairs and Transport References Committee, *Examination of the Foreign Investment Review Board National Interest Test, Interim report: Tax arrangement for foreign investment in agriculture and the limitations of the Foreign Acquisitions and Takeovers Act 1975*, November 2012, pp 5–20.

2 Department of Immigration and Citizenship, 'Significant Investor Visa, frequently asked questions', www.immi.gov.au/skilled/business/pdf/significant-investor-faq.pdf, p. 2.

gains and passive income, and tax barriers to domestic capital investment in agriculture); and the need to update the FATA. These recommendations are reproduced at the beginning of the report.

1.13 While the issue of tax arrangements for foreign investment in agriculture is primarily considered in the interim report rather than this final report, such tax arrangements remain an ongoing concern for the committee. Therefore, the committee reiterates its recommendations regarding the taxation arrangements for foreign investment contained in the committee's interim report.

1.14 The committee notes and welcomes the recent progress that the Government has made in this area, including the review of transfer pricing legislation. The committee notes that tax revenue leakage due to the practices of multinational companies has been identified as major concern in other countries. Furthermore, the committee notes that international organisations including the Organisation for Economic Co-operation and Development (OECD) and the G20 are seeking to address this issue and that Australia has been actively engaged in these international processes.³

1.15 However, the committee considers that tax arrangements for foreign investment should remain an ongoing priority for the Government and that significant reforms are still required.

Recommendation 1

1.16 The committee recommends that the government further strengthen Australia's tax regulations in order to protect against the erosion of Australia's tax revenue. In particular, the government should develop more rigorous approaches to prevent tax revenue leakage that may occur due to the business structures and practices used by foreign investors in relation to:

- **transfer pricing;**
- **capital gains;**
- **passive income;**
- **thin capitalisation; and**
- **any other relevant tax mechanisms.**

3 For information about the transfer pricing review see: Bernard Pulle, *Tax Laws Amendment (Cross-Border Transfer Pricing) Bill (No. 1) 2012*, Bills Digest No. 160, 2011–12, Parliamentary Library, 19 June 2012. For the international response to tax arrangements see OECD, *Addressing Base Erosion and Profit Shifting*, OECD Publishing, 2013, <http://dx.doi.org/10.1787/9789264192744-en> and The Hon Wayne Swan MP, Deputy Prime Minister and Treasurer, media release no. 050, "G20, IMF and World Bank Meetings", 18 April 2013, <http://ministers.treasury.gov.au/wmsDisplayDocs.aspx?doc=pressreleases/2013/050.htm&pageID=003&min=wms&Year=&DocType=0> (accessed 13 June 2013).

Recommendation 2

1.17 The committee also recommends that the government continue to work towards international reforms to address tax revenue leakage, including issues relating to transfer pricing. The committee notes the current progress by the government, the OECD and the G20 in this area and urges the government to continue pursuing international taxation reforms through these organisations.

Acknowledgements

1.18 The committee acknowledges the many individuals and organisations that made contributions to the inquiry through submissions, providing briefings, hosting site visits or appearing as witnesses to the inquiry.

Note on references

1.19 References to Committee Hansard are to the proof versions. Page numbers may vary between the proof and official version of the Hansard.

Previous Senate inquiries

1.20 In the years preceding this inquiry there have been two key reviews of foreign investment in Australia by senate committees that are relevant to the current inquiry. The first, in 2009, was by the Senate Economics References Committee which conducted an inquiry into foreign investment in Australia by sovereign wealth funds and foreign state owned corporations.

1.21 The majority report of that inquiry included three recommendations about foreign investment in Australia. The first recommendation stated that FIRB should improve its communication of the national interest test.⁴ The result of this was that the government publicly released the Australian Foreign Investment Policy (AFIP) for the first time in June 2010.⁵

1.22 The final recommendation of that report was that the government tighten the FATA to deal with cases where complex transactions were used to target strategic assets (below the 15 per cent review threshold) and that FIRB should 'give adequate consideration to the interaction between the various components of an acquisition'.⁶ Although the government response stated that existing legislation covered the acquisition of small (less than 15 per cent) strategic assets, the government introduced amendments which led to the *Foreign Acquisitions and Takeovers Amendment Act*

4 Senate Economics References Committee, *Foreign Investment by State-owned Entities*, September 2009, p. ix.

5 Australian Government, *Australian Government Response to the Senate Economics References Committee Report: "Foreign Investment by State-Owned Entities"*, June 2011, p. 3.

6 Senate Economics References Committee, *Foreign Investment by State-owned Entities*, September 2009, p. x. The second recommendation was that FIRB present a more timely annual report to parliament, p. ix.

2010 to clarify that 'convertible notes and similar instruments will be treated in a similar fashion to shareholdings for the purposes of the foreign investment regime'.⁷

1.23 The second Senate report was tabled in June 2011 as the Senate Economics Legislation Committee reported on its inquiry into the Foreign Acquisitions Amendment (Agricultural Land) Bill 2010. The bill sought a number of changes to the FATA including:

- that the national interest test be formalised in legislation and listing the factors that must be considered by the Treasurer in conducting a review of applications;
- shifting the threshold of the FIRB review of purchases in agricultural land from a monetary threshold to a review of any purchases greater than five hectares; and
- publishing the applications for interest in agricultural land.⁸

Structure of the report

1.24 The remaining five chapters of this report discuss the current framework for foreign investment in Australian agriculture and the evidence presented to the committee about possible changes to this regime.

1.25 Chapter two examines the growing global food task and the international practices towards the foreign investment in agriculture in order to provide the context for Australia's management of foreign investment in the future. First, the chapter notes the benefits of foreign investment for Australian agriculture and then moves on to outlining the growing issue of global food security based on future population growth in the coming 50 years. It also discusses the challenges and opportunities that this provides for Australia's agricultural industry and national interest and evidence the committee received for a possible way forward. Second, the chapter outlines regulatory and policy responses to foreign investment in agriculture for countries that face, or have been involved with similar issues regarding foreign investment that were examined in this inquiry. In doing so it outlines the regulation of foreign investment in agriculture in countries including the United States, New Zealand, Brazil, Argentina, China and India. This chapter also notes the possible impacts that international free trade agreements could have on Australia's regulation of foreign investment.

1.26 Finally, chapter two outlines the legislative, regulatory and policy framework for foreign investment in Australian agriculture. It provides an overview of the FATA, the Foreign Acquisitions and Takeovers Regulations 1989 (FATR) and AFIP with particular reference to agriculture.

1.27 Chapter three firstly notes the concerns of many stakeholders about the lack of information regarding foreign investment in the Australian agricultural sector. The

7 Australian Government, *Australian Government Response to the Senate Economics References Committee Report: "Foreign Investment by State-Owned Entities"*, June 2011, p. 3.

8 Senate Economics Legislation Committee, *Foreign Acquisitions Amendment (Agricultural Land) Bill 2010*, June 2011, pp 13–16.

chapter goes onto examine the major attempts to date to improve the information gaps in this area: the Australian Bureau of Statistics (ABS) agriculture survey; the subsequent Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES) report about foreign investment in Australian agriculture; and the progress to date towards a register for foreign investment in agricultural land.

1.28 Chapter four examines the implementation of the legislative, regulatory and policy framework for foreign investment in Australian agriculture through the FIRB review process and that of relevant government agencies. It discusses the main criticisms of the process, the support from some stakeholders for current practice, and the mechanisms of compliance with FIRB review and conditions. Finally, it examines these issues through two short case studies of acquisitions by Hassad Australia and the sale of Cubbie Station.

1.29 Chapter five discusses the consequences of key aspects of the current framework governing foreign investment in Australian agriculture. It considers the relevance of the current threshold for FIRB review of foreign investment in agriculture, including the related issues of cumulative purchasing and the potential impacts on local economies that the high threshold level provides. It also notes that the FATA does not fully cover the foreign investment relationships for certain company structures. The chapter then focuses on the definitional issues in the framework relating to direct investment and rural land.

1.30 Finally, chapter six examines the role of foreign investment in major agricultural developments in Australia's northern regions through the case study of the Ord irrigation area. The chapter discusses the significant contribution that future agricultural developments, such as the Ord, can make for Australia's economy and future food security. In doing so, it analyses the development challenges due to land tenure, water entitlements and capital and how these issues can be addressed by encouraging and regulating both domestic and foreign investment in the national interest.