Chapter 2

Background—the global food task, comparative regulatory contexts and Australia's regulatory framework

2.1 This chapter sets out the global pressures and influences that underpin the current concerns raised by foreign investment in Australian agriculture. The chapter begins by noting the benefits of foreign investment for Australian agriculture. The chapter then discusses the growing issue of global food security based on future population growth in the coming 50 years. This has been a driving force behind many of the questions that the committee has posed throughout the inquiry. This chapter also discusses evidence received about a possible way forward regarding this issue.

2.2 The growing food task also appears to have been a cause for changing policy responses in a number of Australia's agricultural competitor countries. Therefore, the chapter outlines regulatory and policy responses to foreign investment in agriculture in other relevant countries. In doing so the chapter outlines the regulation of foreign investment in agriculture in comparable countries including Argentina, Brazil, China, India, New Zealand, and the United States. It also notes that Australia's domestic regulation for foreign investment could be affected by international free trade agreements.

2.3 Finally, the chapter discusses the legislative, regulatory and policy framework for foreign investment in Australian agriculture. It provides an overview of the *Foreign Acquisition and Takeovers Act 1975* (FATA), the Foreign Acquisitions and Takeovers Regulations 1989 (FATR) and Australia's Foreign Investment Policy (AFIP) with particular reference to agriculture. This outline focuses on the key aspects of Australia's current regulatory regime that have undermined the confidence of many stakeholders in the effectiveness of the Australian authorities to manage the current and future challenges of foreign investment in Australian agriculture.

The benefits of foreign investment

2.4 The committee supports the evidence from a wide range of stakeholders that demonstrates the historical importance and ongoing benefits of foreign investment for the agriculture industry. For example, the committee heard evidence that foreign investment is of great significance to the wine industry. At a public hearing with the Winemakers' Federation of Australia the evidence showed that a number of major foreign investments in the wine industry had been welcomed in the past and resulted in significant benefits to Australia.[1] In this respect, Mr Paul Evans, Chief Executive of the Winemakers' Federation of Australia told the committee of the feedback he received from wineries about foreign investment:

> Looking at some of the feedback from some of the wineries I have spoken to who have partnered with or indeed been acquired by foreign investment,

1 Mr Paul Evans, Chief Executive, Winemakers' Federation of Australia, *Committee Hansard*, 9 April 2013, p. 4.

> including Chinese investment, and talking through with them some of the benefits that have come through, the response I have got is increased access to capital and liquidity, job opportunity and creation, investment in R&D and innovation, investment horizons over the long term to improve certainty and business planning, and contribution to regional development. One particular winery spent over two years on the market. There was no other buyer. It was able to attract a Chinese investor and as a consequence 20 families in that one region then had certainty over their financial future and employment. Other benefits have been increased ability to re-invest back in the brands, business flexibility, access to global distribution channels, potential consolidation and efficiency gains and potential to commit and consider [joint ventures], [mergers and acquisitions] and strategic alliances.[2]

2.5 The importance of foreign investment was also noted in relation to access to capital. Gaining access to 'patient' capital (that is, capital with long-term horizons for returns) was a key issue for the wine industry.[3] Foreign investment appeared to be the major path for securing such patient capital because the industry has had significant difficulty in sourcing investment domestically.[4]

2.6 In terms of other agricultural sectors, one of Australia's largest agricultural companies also highlighted the long-term importance of foreign investment. AACo stated in its submission that 'foreign investment is an essential constant in our past, our present and our future'. The AACo submission went on to explain that since the company's establishment in 1824 through an act of the British Parliament granting it about 400 000 hectares, AACo has grown to employ about 500 people, own 6.71 million hectares of land and manage 600 000 cattle, and that foreign investment was an important part of this growth.[5]

2.7 In a general sense, the committee also heard evidence of the ongoing benefits that foreign investment can provide to the Australian economy and the agriculture industry. As a representative from the Department of Foreign Affairs and Trade (DFAT) told the committee:

> Foreign investment has played and will continue to play a key role, clearly, in developing our economy. It generates benefits for Australians, including creating and supporting new jobs, increasing trade, boosting household incomes, encouraging innovation and introducing new technologies. As with other parts of the economy, foreign investment in agriculture and agribusiness historically has played a vital role in linking Australia's agricultural sector to world markets. Similarly, foreign investment from

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2 Mr Paul Evans, Chief Executive, Winemakers' Federation of Australia, *Committee Hansard*, 9 April 2013, p. 2.

3 See chapter six in reference to patient capital and the Ord irrigation area development.

4 Mr Paul Evans, Chief Executive, Winemakers' Federation of Australia, *Committee Hansard*, 9 April 2013, pp 1, 2 and 4.

5 AACo, *Submission 8*, p. 1.

emerging economies such as China and others will strengthen our trade links with those markets.[6]

Committee view

2.8 As noted elsewhere in this report, the committee supports foreign investment in Australian agriculture where it is in the national interest and considers that it is essential to the industry's future success. It is in this respect that the committee has reviewed Australia's regulatory framework so that future foreign investment in Australia:

- contributes to the economic growth of Australia's agricultural industry;
- remains commercially motivated; and
- improves opportunities for Australian agribusinesses.

The global food task

2.9 The future global food task is a fundamental issue for this inquiry and represents a major challenge for global agriculture over the coming decades. As the Department of Agriculture, Fisheries and Forestry (DAFF) informed the committee there are currently:

> ...one billion people [who] suffer chronic hunger and the United Nations estimates that food production will need to increase by about 70 per cent from 2005–07 average levels to feed the projected world population of 9.3 billion by 2050.[7]

2.10 A large number of submitters and witnesses considered that the implications of foreign investment in Australian agriculture need to be examined in this broader context. For example, Mr Julian Cribb told the committee:

> I would like to comment on what I perceive as the major factors driving what is known as the global land grab, the increased trend towards foreign and speculative investment in agriculture both in Australia and worldwide. Globally, the area of farmland per person has shrunk from eight hectares in 1900 to under two hectares today and will decline to about one and a half hectares by the mid-century. The FAO's [Food and Agriculture Organization of the United Nations] land statistics show that the total area of farm and grazing land worldwide has in fact contracted in eight out of the last 10 years. The world is effectively losing an area equivalent to one Australian wheat belt per year, to multiple causes. These include land degradation, urban expansion, mining and energy expansion, recreation and sea level rise.
>
> Marler and Wallin, and Sundquist, estimate the world is losing between 70 and 100 billion tonnes of topsoil every year. If this continues, they say the world will exhaust its soil resources in 50 to 70 years. Sundquist estimates the world has already abandoned 4.3 million square kilometres of degraded land in the last 40 years. That is an area a bit larger than half of Australia.

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6 Mr Christopher Langman, First Assistant Secretary, Trade and Economic Policy Division, Department of Foreign Affairs and Trade, *Committee Hansard*, 9 May 2012, p. 17.

7 DAFF, *Submission 1 (attachment)*, p. vi.

> The FAO's latest state of land and water report estimates that 18 per cent of the planet's land surface is bare and unusable, 25 per cent is highly degraded, eight per cent is moderately degraded, 36 per cent is stable or degrading slightly and 10 per cent is improving. The report concluded:
>
> … land and water systems now face the risk of progressive breakdown of their productive capacity under a combination of excessive demographic pressure and unsustainable agricultural practices.
>
> The area occupied by the world's cities will equal the size of China—that is nine million square kilometres—by the 2050s. That is all good land that will probably never be farmed again. The urban recreational catchment will take a similar area out of agriculture.
>
> Global fresh water, which is closely linked to land and its tenure in most countries, is facing immense stress, with a likely doubling in demand from cities, the energy sector and industry by the 2050s, while food production too faces steep increases in demand for irrigation water. I think the FAO says that the world currently produces about 45 per cent of its food from irrigation, but by 2050 it has to produce two-thirds of its food from irrigation, because there is just not enough rain-fed land left. As major groundwater and surface resources deplete in China, the Indo-Gangetic region, North Africa, the Middle East, South-East Asia and North America, acute global water scarcities are likely to emerge by the 2030s. Generally speaking, agriculture is poorly placed to compete for its share of the water against the demands of giant industries and cities.
>
> These factors have combined to raise global awareness of farmland and water as major opportunities for both investment and speculation.[8]

2.11 Furthermore, some countries are taking active steps to invest in Australian agriculture to meet their domestic food security needs. Hassad Australia, for example, which is an Australian-based, Qatari government-owned entity, told the committee that its investments in Australian agriculture were initially based on developing Qatari food security.[9]

Committee view

2.12 The committee is concerned about the increasing challenges arising from global food security in the coming decades and agrees with evidence received by a variety of witnesses and submitters that raised these concerns. At the same time, the committee considers that the growing global food task represents a significant opportunity for Australia's agricultural industry. Australia is currently a net exporter of food with Australia food exports worth $27.1 billion in 2010/11.[10] Furthermore, the Australian government's *National Food Plan green paper* notes that 'Australia

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8 Mr Julian Cribb, *Committee Hansard*, 9 May 2012, p. 1.

9 Mr Tom McKeon, Chief Executive Officer, Hassad Australia Pty Ltd, *Committee Hansard*, 16 November 2011, p. 38. Hassad Australia also stated here that its operations have since moved to a commercial basis.

10 DAFF, *National Food Plan green paper 2012*, July 2012, p. iii.

produces enough food today to feed approximately 60 million people'.[11] The committee believes that Australian farmers are among the most efficient in the world and that combined with appropriate government policies designed to encourage future productivity growth, Australia can make a significant contribution to feeding the world's future population.

2.13 However, the committee considers that central to meeting these challenges is ensuring that foreign investment in Australia continues to be based on commercial motives and not strategic concerns of foreign governments about food security. Australia will not have the capability to effectively contribute to the future global food task if its agricultural capital and trading markets are distorted by foreign government-owned companies who invest in Australian agriculture but do not participate in the market on a genuinely commercial basis.

2.14 The committee also notes that a number of other countries are facing the same challenges as Australia in terms of future food security and foreign investment and are taking action to address this issue. Considering the policy frameworks adopted by other countries provides Australia with possible options to consider for its own regulatory response to the foreign investment in the context of the future global food task.

Addressing Australia's future agricultural challenges

2.15 The committee received evidence proposing a possible way forward in addressing the future challenges to Australian agriculture posed by issues including the future global food task. A supplementary submission from Mr David Farley, CEO, AACo proposed the establishment of an Independent Commission of Audit into Agribusiness (the commission). The submission states that the commission should:

> ...have a wide-ranging remit to look at a number of issues facing agriculture, including taxation incentives for investment and the ability of Government to either underwrite supporting infrastructure projects or participate in public-private partnerships.[12]

2.16 In providing reasoning for establishing the commission, Mr Farley noted the rising demand for food in the region:

> If Australia continues to produce food at its current level it will not only miss out on an opportunity, but the lack of food provision could have catastrophic consequences for the region and Australia’s diplomacy within. With the long-term, cyclical nature of agriculture, it is critical that Australia prepare in the next five years to increase production to the necessary levels.
>
> This will take a range of initiatives and forward-thinking policies. It will require infrastructure for northern Australia – the gateway to Asia. It will require an increased focus on research and development, not just into agriculture, but into associated sectors such as logistics and international commerce. Above all, it will require policies and financial structures which

11 DAFF, *National Food Plan green paper 2012*, July 2012, p. 62.

12 AACo, *Submission 8 (supplementary)*, p. 1.

> encourage and incentivise investment in agriculture. The Committee is well aware of the reluctance of many Australian investment funds, with their short-term time horizons, to invest in a long-term business such as agriculture. Many foreign funds have no such short-sighted policies and see the benefit of investing in Australian agriculture.
>
> The policy here must be twofold – encourage Australian investment and refrain from blocking the international capital Australia will need to meet the food boom.[13]

2.17 Mr Farley argued that that the terms of reference for the commission would need to 'pull together all the strands of national policy and the national economy, rather than addressing the issues of agribusiness in a piecemeal fashion, or on a state-by-state basis.'[14]

2.18 In this respect Mr Farley's submission states:

> [it] is not enough to simply look at the tax treatment of agricultural investment without considering other, equally important aspects of encouraging investment, such as access to markets, logistics and research and development support. Australia must demonstrate that agriculture is not just an attractive financial investment, it is a viable industry with long-term potential.[15]

2.19 The submission provides suggested terms of reference for the commission and an outline of the commission's structure and mandate to collect information. The proposed terms of reference are included as Appendix 5.

Committee view

2.20 The committee welcomes the input from Mr Farley, proposing an Independent Commission of Audit into Agribusiness. The committee supports the establishment of such a commission. The committee considers that three key findings of this inquiry show the need for the establishment of a comprehensive review of agricultural policy such as that proposed by Mr Farley.

2.21 First, the committee's interim report and recommendations one and two in this report show that Australia's tax arrangements for foreign investment in Australian agriculture require substantial reform in order to protect Australia's revenue base and to encourage greater domestic investment.

2.22 Second, as per recommendation four of this report, the committee considers that a wide-ranging review of Australia's foreign investment framework is required. As foreign investment will always be an essential part of continued economic and productivity growth in Australian agriculture, an extensive review of Australia's regulatory framework for foreign investment would need to be a central feature of any future comprehensive agricultural policy for Australia.

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13 AACo, *Submission 8 (supplementary)*, pp 1–2.

14 AACo, *Submission 8 (supplementary)*, p. 2.

15 AACo, *Submission 8 (supplementary)*, p. 2

2.23 Finally, as noted in recommendation six, greater knowledge is needed about Australia's current circumstances in relation to foreign investment in Australian agriculture and what the future consequences will be for the industry if no changes are made.

2.24 These three broad issues, and the other recommendations of this report, should be explicitly considered in any terms of reference for the commission. The committee also notes the terms of reference for the commission already proposed by Mr Farley. The committee considers that these terms of reference provide a good starting point for wider consultations leading to the final terms of reference for the commission.

Recommendation 3

2.25 The committee recommends that the government establish an Independent Commission of Audit into Agribusiness, or similar body, to develop a comprehensive policy approach to Australian agriculture. Furthermore, the government should use this inquiry's interim report and final report, and the submission from Mr Farley (referred to above) as the basis for consultations with industry stakeholders aimed at establishing the terms of reference and general structure of the commission (including relevant commissioners and powers for information gathering).

Comparative regulatory contexts

2.26 Across the globe there are a wide variety of regulatory frameworks for foreign investment in agricultural land and business. Some countries prohibit foreign investment in agricultural land; others require the provision of information of foreign investors to the respective government; and others still have virtually no restrictions. However, in recent years certain countries, particular those with agricultural land that has experienced increasing levels of foreign investment have made regulatory changes to meet this challenge. The trends in the key states of Argentina, Brazil, China, India, New Zealand and the United States are discussed in turn to shed light on the debate in Australia about foreign investment in agriculture.

Argentina

2.27 In December 2011, Argentina enacted new legislation to restrict foreign ownership and acquisition of agricultural land. The new limitations include restricting the overall foreign ownership of Argentinean farmland to 15 per cent of the total agricultural land surface. The legislation also restricts the individual holdings of foreigners to 1000 hectares or less of agricultural land. In addition, the law 'defines future acquisitions of land as acquisition of a non-renewable resource rather than an investment.'[16]

16 OECD, *Inventory of investment measures taken between 1 November 2011 and 29 February 2012*, April 2012, p. 7, www.oecd.org/daf/inv/investment-policy/FOIinventorymeasures_april_2012.pdf.

Brazil

2.28 In general, the issue of foreign ownership of rural land in Brazil is covered by a regulatory framework established in 1971. This requires that a:

> ...foreign legal person or individual must be a resident in the territory and the purchase or renting of the rural property must be no greater than a quarter of the total area of the municipality...to which the property belongs. This restriction is more flexible when the foreigner is married to a Brazilian citizen or has Brazilian descendants. Specific authorisations are needed according to the size of the property to be purchased or rented by foreigners.[17]

2.29 More recently there has been consideration in Brazil of further restricting rural land ownership by foreign persons or bodies. This resulted in an August 2010 Brazil Government order further regulating farmland. This order means that the above restriction 'shall apply not only to foreign individuals of foreign legal entities, but also to Brazilian companies which [a] majority of the corporate capital is held, either directly or indirectly, by foreign individual[s] or foreign legal entities.'[18]

China

2.30 Foreign investment in China is codified by the *Catalogue for the Guidance of Foreign Investment* which places restrictions on foreign investment in certain industry sectors. These guidelines provide three categories of investment: encouraged, restricted, and prohibited. Sectors that are not listed in the guidelines are considered to permit foreign investment.[19] In terms of agriculture (defined as the farming, forestry, animal husbandry and fishery industries), the following are 'encouraged' sectors of foreign investment:

- Planting, development and production of woody edible oil, ingredient and industrial raw material;
- Development of planting technology of green and organic vegetables (including edible fungus and melon-watermelon), dried fruits, teas and production of these products;
- Development and production of new technology of sugar-yielding crops, fruit trees, forage grass, etc;

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17 OECD, *National Treatment for Foreign-Controlled Enterprises including adhering country exceptions to national treatment 2012*, updated July 2012, www.oecd.org/daf/internationalinvestment/investmentpolicy/nationaltreatmentinstrument%20english.pdf, p. 21.

18 Camila da Motta Pacheco Alves de Araujo *et al*. "New Rules – Restrictions on the acquisition of rural real properties by foreigners in Brazil" www.martindale.com/real-estate-law/article_Araujo-e-Policastro-Advogados_1147364.htm.

19 United States Government Accountability Office, "Foreign Investment: Laws and Policies Regulating Foreign Investment in 10 Countries", February 2008, www.gao.gov/new.items/d08320.pdf, p. 44.

- Production of flowers and plants, and construction and operation of nursery base;
- Planting of rubber, oil palm, sisals and coffee;
- Planting and cultivation of traditional Chinese medicines (limited to equity joint ventures or contractual joint ventures);
- Reusing in fields and comprehensive utilization of straws and stalks of crop, development and production of resources of organic fertilizers;
- Planting of forest trees (including bamboo) and cultivation of fine strains of forest trees, and cultivation of new breed varieties of polyploid trees;
- Breeding of aquatic offspring (except precious quality varieties peculiar to China);
- Construction and operation of ecological environment protection projects preventing and treating desertification and soil erosion such as planting trees and grasses, etc; and
- Breeding of aquatic products, cage culture in deep water, large-scale breeding of aquatic products, breeding and proliferation of eco-ocean products.[20]

2.31 On the other hand foreign investment is 'restricted' in areas including 'breeding and seeds developing production of new train crop breed' and raw cotton processing. It is 'prohibited' in sectors including 'China's rare and precious breeds' genetically modified (GM) organisms, GM plant seeds and GM aquaculture, and fishing in waters under Chinese jurisdiction.[21]

2.32 In addition to these general regulations, China has region specific guidance for foreign investment which may differ between western, central and eastern China. There is also a review process for foreign investment acquisitions and mergers. This process has been considered by some as unpredictable, although a large majority of investment applications are cleared.[22] In 2011, this process was updated and the review, which can apply to foreign mergers and acquisitions in major agricultural products sectors, takes into account issues such as 'national defence, national economic stability, basic order in social life, and research and development in key technologies related to national security.'[23]

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20 The above is text is taken directly from *Catalogue for the Guidance of Foreign Investment Industries (Amended in 2011)* as it appears on the Invest in China website www.fdi.com.cn/app?page=LawDetailEn&service=page&id=5c42bce337da5f930137db33576e004e.

21 *Catalogue for the Guidance of Foreign Investment Industries (Amended in 2011).*

22 United States Government Accountability Office, "Foreign Investment: Laws and Policies Regulating Foreign Investment in 10 Countries", February 2008, www.gao.gov/new.items/d08320.pdf, pp 46–47.

23 OECD, *Inventory of investment measures taken between 16 February 2011 and 31 October 2011*, January 2012, www.oecd.org/investment/investmentpolicy/49449570.pdf, p. 10.

India

2.33 India permits foreign investment in Indian companies subject to its Foreign Direct Investment Policy (FDI Policy). However it also prohibits foreign investment in certain sectors or activities (such as: lottery and gambling sectors; real estate business and construction of farm houses; and sectors not open to private sector investment – for example, atomic energy and some railway transport).[24] In areas where foreign investment is permitted, the FDI Policy sets the circumstances under which foreign investment can occur through the 'Automatic Route' or through the 'Government Route'. The FDI Policy states:

> Under the Automatic Route, the non-resident investor or the Indian company does not require any approval from the Government of India for the investment. Under the Government Route, prior approval of the Government of India is required.[25]

2.34 In terms of the agriculture industry in India, foreign investment of up to 100 per cent of a company is permitted under the Automatic Route for the following:

a) Floriculture, Horticulture, Apiculture, and Cultivation of Vegetables and Mushrooms under controlled conditions;

b) Development and production of Seeds and planting material;

c) Animal Husbandry (including breeding of dogs), Pisciculture, Aquaculture, under controlled conditions; and

d) Services related to agro and allied sectors.[26]

2.35 With the exception of the four areas noted above, India prohibits foreign direct investment in 'any other agricultural sector/activity.'[27]

New Zealand

2.36 Foreign investment in agricultural land in New Zealand is highly regulated and the purchase of land above certain thresholds is subject to a national interest test. According to a New Zealand treasury official, the attitude to foreign investment in

24 Government of India, Department of Industrial Policy and Promotion and Ministry of Commerce and Industry, *Consolidated FDI Policy,* http://dipp.nic.in/English/Policies/FDI_Circular_01_2013.pdf (accessed 13 June 2013), p. 13.

25 Government of India, Department of Industrial Policy and Promotion and Ministry of Commerce and Industry, *Consolidated FDI Policy,* http://dipp.nic.in/English/Policies/FDI_Circular_01_2013.pdf (accessed 13 June 2013), p. 29

26 Government of India, Department of Industrial Policy and Promotion and Ministry of Commerce and Industry, *Consolidated FDI Policy,* http://dipp.nic.in/English/Policies/FDI_Circular_01_2013.pdf (accessed 13 June 2013), p. 40. Note, "controlled conditions" relates to the artificial control of the climate or environment under which the relevant agriculture takes place. For further information see p. 41 of the FDI Policy.

27 Government of India, Department of Industrial Policy and Promotion and Ministry of Commerce and Industry, *Consolidated FDI Policy,* http://dipp.nic.in/English/Policies/FDI_Circular_01_2013.pdf (accessed 13 June 2013), p. 40.

agricultural land developed in the context of the view that large aggregations of land ownership being concentrated among a few individuals should be avoided.[28]

2.37 The key legislation framework for investment in agricultural land is the *Overseas Investment Act 2005* (New Zealand) and the Overseas Investment Regulation 2005 (New Zealand). Under this framework foreign investment in agriculture is overseen by the Overseas Investment Office.

2.38 The land subject to foreign investment regulation in New Zealand is determined by size, type of land and the type of adjoining land. Such land is referred to as "sensitive land" and is subject to review. Among a number of different criteria, all non-urban land above 5 hectares is sensitive land.[29] The regulatory framework also requires that overseas investors need to be of good character, have relevant business acumen, experience and financial commitment, and be able to show that the investment will have an overall benefit to New Zealand.[30] There are about 20 factors that need to be considered, where relevant, for applications of foreign investment – which cover social, economic and environmental issues. In January 2011 this included the addition of an "economic benefit" test.[31]

2.39 According to New Zealand officials the Overseas Investment Office receives approximately 75 to 100 foreign investment applications a year and a recent review showed that about 98 per cent of applications passed. There is also the option for judicial review in the case of an application being rejected and summaries of the decisions are posted on the office's website.[32]

2.40 There is no significant difference in the treatment of sovereign investors and private foreign investors in New Zealand. As a New Zealand Treasury official told the Senate Economics Committee inquiry 'we do not have any differences in our [New Zealand] regime for sovereign investors. Sovereign investors and private investors are treated the same through our [New Zealand] screening regime. It is not a specific consideration in our regime.'[33]

2.41 In February 2012, the New Zealand High Court decided a case involving the foreign purchase of a collection of dairy farms in New Zealand. The court ordered that the New Zealand Government review its decision to permit Milk NZ (a company owned by Chinese based Shanghai Pengxin) to purchase the farms from the previous

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28 Senate Economics Committee, *Committee Hansard*, 12 April 2011, p. 33.

29 www.linz.govt.nz/overseas-investment/applications/technical-resources/sensitive-land.

30 Senate Economics Committee, *Committee Hansard*, 12 April 2011, p. 33.

31 Senate Economics Committee, *Committee Hansard*, 12 April 2011, p. 33. These are set out in Section 17 of the *Overseas Investment Act 2005* and Regulation 28 of the Overseas Investment Regulations 2005.

32 Senate Economics Committee, *Committee Hansard*, 12 April 2011, p. 35. For the summaries of decisions see: www.linz.govt.nz/overseas-investment/decisions.

33 Senate Economics Committee, *Committee Hansard*, 12 April 2011, p. 37.

owner (following bankruptcy).[34] The New Zealand Government publicly indicated that it would not appeal the court's decision.[35]

United States of America[36]

2.42 There are two major levels for the regulation of foreign investment in agricultural business and land in the United States: the national level and the state level. At a national level, foreign investment is regulated by the *Agricultural Foreign Investment Disclosure Act 1978* (AFIDA). According to one study, the AFIDA developed in a similar context of media attention to that which is occurring presently in Australia.[37] The AFIDA does not restrict foreign investment in United States farmland but requires all foreign persons who obtain or hold an interest in United States agricultural land to notify the Secretary of Agriculture. Furthermore, changes in ownership holdings of agricultural by foreign persons must also be reported.[38]

2.43 This established a nation-wide system for the collection of information regarding foreign ownership in United States agricultural land.[39] This information is used for periodic reports to the President and Congress and, as at December 2010, foreign investors held an interest in 24.2 million acres of U.S. agricultural land, including forest land. This represented 1.9 per cent of all privately held agricultural land.[40]

2.44 At a state level there can be additional regulations of the ownership of agricultural land by foreign individuals or corporations. There are variations across states on the level of regulations. For example, a recent OECD report noted that Iowa, Minnesota, Missouri, Nebraska, North Dakota, Pennsylvania, and South Dakota have regulations that prevent or significantly restrict foreign ownership of agricultural land. In addition, the states of California, Illinois, Kansas, Nevada, New Hampshire, New

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34 OECD, *Inventory of investment measures taken between 1 November 2011 and 29 February 2012*, April 2012 p 18, www.oecd.org/dataoecd/36/61/50053970.pdf, see also High Court of New Zealand, Decision CIV-2012-485-101 [2012] NZHC 147.

35 *Otago Daily Times*, 13 March 2012.

36 This section draws heavily on www.apfo.usda.gov/FSA/webapp?area=home&subject=ecpa&topic=afa.

37 Derek Byerlee and Klaus Deininger "Foreign Investment in Farm land: Worries About a Land Grab in Australia are Unfounded", *Farm Policy Institute*, vol. 8, no. 2, 2011, pp 7–8.

38 A 1995 OECD review of Foreign Direct Investment in the US does not suggest any restrictions per se on investment in agricultural land. See: www.oecd.org/dataoecd/4/54/34383483.pdf

39 The Farm Service Agency, *Foreign Investment Disclosure Handbook* includes definitions of who is a foreign person, what is agricultural land and what is a reportable interest. Available at www.fsa.usda.gov/Internet/FSA_File/1-afida_r02_a02.pdf.

40 See USDA, Foreign Holdings of U.S. Agricultural Land: Through December 31, 2010 www.apfo.usda.gov/Internet/FSA_File/afida_thru_12312010.pdf.

Jersey, New York, and North Carolina, also have some level of restriction on the foreign ownership of agricultural land.[41]

Committee view

2.45 In the context of restrictions and oversight of foreign investment in agricultural businesses and land in the countries listed above, the committee considers that a significant review of Australia’s regulatory process is warranted. Although the committee acknowledges that some other countries may have less regulatory restrictions than Australia, those countries noted above provide useful comparison for Australia. For example, the U.S. requirement for foreign companies to register ownership has been long-standing, and as noted later in this report, it is concerning that a register is only now being formally developed in Australia.

2.46 On the other hand, the committee does not consider the approach from some countries that significantly restricts or may deter commercially orientated foreign investment to be an appropriate approach for Australia’s agricultural and economic environment. Nevertheless, considering the approaches of the countries listed above is a valuable part of the investigation into the effectiveness of Australia’s regulatory regime for managing foreign investment in light of the challenges of the growing global food task.

Recommendation 4

2.47 The committee recommends that, given the future challenges arising from the global food task and the changing approaches to the regulation of foreign investment that have occurred in countries comparable to Australia, the government should commission an independent and wide-ranging review of Australia's foreign investment regulatory framework. In particular, the review should examine the ways that the government can ensure that foreign investments in Australian agriculture:

- **are made on a genuinely commercial basis;**
- ***do not* distort the capital market;**
- ***do not* distort the trade in agricultural products; and**
- **compete fairly with domestic Australian farmers and agribusinesses.**

2.48 The review should take into account the issues raised, and the recommendations made, in this report and the committee's interim report of November 2012.

2.49 The review should be used as a reference point for the government's strengthening of the national interest test, improvement of relevant compliance

41 OECD, *National Treatment for Foreign-Controlled Enterprises including adhering country exceptions to national treatment 2012*, updated July 2012, p. 95, www.oecd.org/daf/internationalinvestment/investmentpolicy/nationaltreatmentinstrument%20english.pdf.

regimes, and the other policy and legislative changes recommended in this report.

Implications of free trade agreements for Australia's foreign investment regulations

2.50 Free trade agreements between Australia and its trading partners may have implications for foreign investment regulation in Australia. As noted in this chapter below, there are much higher thresholds for the Foreign Investment Review Board (FIRB) review of foreign investment for private investors based in the United States and New Zealand. The higher review threshold for investors based in the United States was a result of the Australian-United States Free Trade Agreement. The threshold for New Zealand investors arose from the Protocol on Investment for the Australia-New Zealand Closer Economic Relations.[42]

2.51 There are also two key multilateral agreements that may impact on foreign investment arrangements in Australia in the future. First, Australia is currently involved in negotiations with other countries with the aim of developing the Trans Pacific Partnership Agreement (TPP). The TPP negotiations currently include: Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam. According to DFAT the:

> Australian Government will pursue a TPP outcome that eliminates or at least substantially reduces barriers to trade and investment. The TPP is more than a traditional trade agreement; it will also deal with behind-the-border impediments to trade and investment.[43]

2.52 Second, Australia is part of the negotiations for the Regional Comprehensive Economic Partnership (RCEP) which began in November 2012. The negotiations include the 10 member countries of ASEAN and Australia, China, India, Japan, the Republic of Korea and New Zealand.[44] DFAT has stated that the:

> …objective of launching RCEP negotiations is to achieve a modern, comprehensive, high-quality and mutually beneficial economic partnership agreement that will cover trade in goods, trade in services, investment,

42 FIRB, *Australia's Foreign Investment Policy*, 2013, pp 3, 16 and 18. The Hon David Bradbury MP, Assistant Treasurer and Minister Assisting for Deregulation and the Hon Craig Emerson MP, Minister for Trade and Competitiveness and Minister Assisting the Prime Minister on Asian Century Policy, Joint Media Release "Milestone in Investment Ties with New Zealand", No. 22, 1 March 2013, http://assistant.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2013/022.htm&pageID=003&min=djba&Year=&DocType; Department of Foreign Affairs and Trade, " Australia-United States Free Trade Agreement: Fact Sheet – Investment: www.dfat.gov.au/fta/ausfta/outcomes/09_investment.html (accessed 13 June 2013).

43 Department of Foreign Affairs and Trade, "Trans-Pacific Partnership Agreement negotiations", www.dfat.gov.au/fta/tpp/ (accessed 13 June 2013).

44 ASEAN members states are Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam.

economic and technical cooperation, intellectual property, competition, dispute settlement and other issues.[45]

2.53 In terms investment between potential signatory countries, the Guiding Principles and Objectives for Negotiating the RCEP state that the RCEP aims to create 'a liberal facilitative, and competitive investment environment in the region.'[46]

Committee view

2.54 The committee notes that both the TPP and the RCEP specifically include negotiations about foreign investment between the countries that sign on to the respective agreements. The committee also notes that the FIRB review thresholds for the United States and New Zealand were raised as a result of bilateral agreements between Australia and the two countries, respectively.

2.55 In light of this, the committee considers that the Government should ensure that the role of FIRB in reviewing foreign investment is fully considered as part of Australia's negotiations for the TPP and the RCEP. Furthermore, the Government should avoid making international commitments through the TPP and the RCEP that unduly restrict the ability of FIRB to review foreign investment in terms of the national interest and apply conditions on such investment where appropriate. In particular, any such international commitments should allow the Australian Government to apply appropriate FIRB review thresholds for private foreign investments and should not compromise FIRB's ability to review investments by foreign government owned entities regardless of value.

Australia’s foreign investment framework

2.56 This section provides a brief overview of the current framework of foreign investment in Australian agriculture. A detailed discussion of the relevant parts of Australia’s regulation is provided in chapter four regarding the transparency and scrutiny of foreign investment and chapter five regarding the investment threshold and related issues.

2.57 The key legislation for the approval of foreign investment in agriculture in Australia is the *Foreign Acquisitions and Takeovers Act 1975* (FATA) and the corresponding regulations are the Foreign Acquisitions and Takeovers Regulations 1989 (FATR). In June 2010, the government published Australia’s Foreign Investment Policy (AFIP) for the first time. The FATA, FATR and AFIP set out the conditions under which foreign companies and foreign government owned entities can invest in Australian businesses and purchase Australian property.

2.58 The Foreign Investment Review Board (FIRB) is a non-statutory government body which examines cases and provides advice to the Treasurer regarding cases of

45 Department of Foreign Affairs and Trade, "Regional Comprehensive Economic Partnership negotiations", www.dfat.gov.au/fta/rcep/ (accessed 13 June 2013).

46 *Guiding Principles and Objectives for Negotiating the RCEP*, available at: Department of Foreign Affairs and Trade, "Regional Comprehensive Economic Partnership negotiations", www.dfat.gov.au/fta/rcep/ (accessed 13 June 2013).

foreign investment. It is the Treasurer rather than FIRB that ultimately makes decisions regarding the approval, the setting of conditions, or rejection of applications for foreign investment in Australia. The Treasurer has 30 days from notification of a foreign investment proposal to reject such a proposal or place conditions on a proposal, although this can be extended through an interim order.[47]

2.59 There are a number of different restrictions for foreign investment in urban land and developments and 'sensitive' industries such as the media. However, agricultural businesses and agricultural (or 'rural') land, which is defined as 'land used wholly and exclusively for carrying on a business of primary production',[48] are treated in the same way as foreign investment in other businesses.[49]

2.60 In general, the legislation and regulations set out various threshold levels which trigger the review of a foreign investment proposal by FIRB. For the agriculture industry, the FIRB review trigger for completely private individuals or companies—that is those companies that are not owned by foreign governments—is the proposed acquisition of a 'substantial interest in a corporation or control of an Australian business that is valued above $248 million' (this also applies to 'rural land').[50] The exception to this is that the threshold for New Zealand and US investors is $1078 million. These thresholds are subject to annual indexation and were last set at 1 January 2013.[51] Different threshold levels apply to investment into urban land and real estate developments.

2.61 Under the current AFIP any 'direct investment' in land or businesses by 'foreign government investors' (such as, foreign state-owned companies and foreign sovereign wealth funds) is also subject to review by FIRB. Direct investment is defined as 'investment of an interest of 10 per cent or more'.[52] In addition, direct investment maybe considered to be an interest that is less than 10 per cent where the 'acquiring foreign government investor is building a strategic stake in the target, or can use that investment to influence or control the target'.[53] For the purpose of the report, foreign direct investment is referred to as foreign investment, unless otherwise stated. The FIRB definition of 'foreign governments investors' is stated as including:

- a body politic of a foreign country;

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47 *Foreign Acquisitions and Takeovers Act 1975*, Part II, sections 22 and 25.

48 FIRB, *Australia's Foreign Investment Policy*, 2013, p. 13.

49 FIRB, *Australia's Foreign Investment Policy*, "Annex 2, Policy Statement: Foreign Investment in Agriculture", 2013, p. 19.

50 FIRB, *Australia's Foreign Investment Policy*, 2013, pp 2 and 13.

51 FIRB, 'Recent Changes to Policy', www.firb.gov.au/content/policy.asp?NavID=1n (accessed 23 April 2013). Note: when this inquiry began in 2011, the relevant review threshold was $231 million. In 2012, this was increased to $244 million and in 2013 to $248 million which is the current figure. The $248 million figure will be used for all corresponding threshold figures throughout this report.

52 FIRB, *Australia's Foreign Investment Policy*, 2013, p. 14.

53 FIRB, *Australia's Foreign Investment Policy*, 2013, p. 14.

- entities in which governments, their agencies or related entities from a single foreign country have an aggregate interest (direct or indirect) of 15 per cent or more;
- entities in which governments, their agencies or related entities from more than one foreign country have an aggregate interest (direct or indirect) of 40 per cent or more; or
- entities that are otherwise controlled by foreign governments, their agencies or related entities, and any associates, or could be controlled by them including as part of a controlling group.[54]

2.62 In addition, it is a requirement that these entities notify the FIRB before an investment takes place.

2.63 In general, when FIRB conducts a review (and provides recommendations to the Treasurer), it considers whether the proposal will be contrary to the national interest. The national interest is not formally defined in the legislation but the AFIP states that the following issues will be taken into account:

- national security;
- competition;
- impact on the economy and community;
- Australian government policies such as tax; and
- the character of the investor.[55]

2.64 The reviews are flexible rather than prescriptive and conducted on a case by case basis.[56] The government has also released a policy statement on foreign investment in agriculture which states that foreign investment proposals in the agriculture sector will be reviewed in light of the following:

- the quality and availability of Australia's agricultural resources, including water;
- land access and use;
- agricultural production and productivity;
- Australia's capacity to remain a reliable supplier of agricultural production, both to the Australian community and our trading partners;
- biodiversity; and

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54 FIRB, *Australia's Foreign Investment Policy*, 2013, p. 15. Note: footnote 20 on this page states: 'Entities include companies, trusts and limited partnerships.'

55 FIRB, *Australia's Foreign Investment Policy*, 2013, pp 7–8.

56 FIRB, *Australia's Foreign Investment Policy*, 2013, p. 7.

- employment and prosperity in Australia's local and regional communities.[57]

2.65 In addition to the FATA, the regulations, and the AFIP, foreign investors in Australia must abide by a number of other key legislative frameworks that apply to businesses such as those governing competition and taxation. As noted elsewhere, taxation arrangements are discussed in detail in the committee's interim report of 28 November 2012.[58] A brief overview of the role of other key agencies, such as the Australian Competition and Consumer Commission and the Australian Taxation Office in the conduct of the FIRB review process is provided in chapter four.

2.66 Finally, the committee heard evidence from the Chair of FIRB noting the limited changes to the FATA that had occurred since the late 1980s. When asked about whether the FATA was currently covering relevant foreign investment scenarios, Mr Wilson responded:

> …I will simply say that the Foreign Acquisitions and Takeovers Act was put in place in 1975 and, as I recall, was last modified in 1989 and it is now 2013 so you could draw your own conclusions about how up to date it might be.[59]

Committee view

2.67 Although the above issues are detailed at greater length in chapters four and five, the committee considers that the current regulatory framework poses many questions. For example, it is clear to the committee that the following issues require further examination:

- the FATA definition of 'rural land' and 'urban land' (see chapter five);
- the investment review threshold, as the current of $248 million for private companies means only a very small percentage of foreign investments in agricultural assets are reviewed (see chapter five);
- the 'flexibility' of the national interest test, as this limits the transparency of the test's application (see chapter four); and
- the compliance mechanisms regarding the requirements for notification of foreign investment (see chapter four).

2.68 It is on this basis and in response to the changing regulatory context in comparable countries towards foreign investment and the challenges of the global food task that the committee has examined the FIRB national interest test.

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57 FIRB, *Australia's Foreign Investment Policy*, "Annex 2, Policy Statement: Foreign Investment in Agriculture", 2013, p. 19.

58 Senate Rural and Regional Affairs and Transport References Committee, *Inquiry into the Foreign Investment Review Board National Interest Test, Interim report: Tax arrangements for foreign investment in agriculture and the limitations of the Foreign Acquisitions and Takeovers Act 1975*, 28 November 2012.

59 Mr Brian Wilson, Chair, Foreign Investment Review Board, *Committee Hansard*, 9 May 2013, p. 8.

2.69 Given this contextual framework, the committee is unsurprised by the concerns of many stakeholders in the agricultural industry about the adequacy of the FATA, its regulations and the AFIP, implemented by FIRB, to effectively manage the issues.