

Chapter 5

Investment threshold and related issues

5.1 This chapter examines the issue of the investment threshold which triggers the Foreign Investment Review Board (FIRB) review process. In doing so, the chapter first considers the appropriateness of the current threshold for foreign acquisitions of agricultural land and businesses, the issue of cumulative purchasing, and potential impacts on local economies.

5.2 In addition, this chapter discusses two definitional issues that are fundamental to the operation of an investment threshold: the definition of rural land (and by implication agriculture) in the *Foreign Acquisitions and Takeovers Act 1975* (FATA), and the definition of direct investment in the Australian Foreign Investment Policy (AFIP).

FIRB foreign investment review threshold

5.3 The FIRB review threshold is the level of proposed foreign investment that a private foreign person or private foreign company (as opposed to foreign government owned company) must notify FIRB of prior to undertaking an acquisition in Australia. Although special arrangements have been established for certain sectors of the economy, such as residential real estate and media interests, rural land and agricultural businesses are covered by the general threshold level.¹ The threshold applies when a foreign private investor seeks to acquire 'a substantial interest in a corporation or control of an Australian business that is valued above \$248 million', or a 'substantial interest in an offshore company whose Australian subsidiaries or gross assets are valued above \$248 million.'² A 'substantial interest' is defined in the AFIP as occurring:

...when a single foreign person (and any associates) has 15 per cent or more, or several foreign persons (and any associates) have 40 per cent or more, of the issued shares, issued shares if all rights were converted, voting power, or potential voting power, of a corporation.³

5.4 In the case of foreign investment from United States persons or companies in Australia, the United States-Australia free trade agreement specifies the threshold for the review of investment is \$1078 million. On 1 March 2013, the government

1 As noted earlier in the report, for consistency, the 2013 figure of \$248 million is used throughout this report.

2 FIRB, Australia's Foreign Investment Policy, 2013, pp 2–3.

3 FIRB, Australia's Foreign Investment Policy, 2013, p. 17. Note: this quote in the AFIP includes a footnote (no. 22) stating: 'See section 6 of the *Foreign Acquisitions and Takeovers Act 1975* for the list of 'associates'.'

announced that New Zealand based private investors would also be subject to the \$1078 million threshold. These thresholds are indexed on 1 January annually.⁴

5.5 In the case of a foreign government entity, the review threshold is \$0 meaning that any proposed foreign direct investment in Australia from a foreign government entity (such as a state-owned corporation) requires FIRB approval before proceeding.⁵ The definition of 'direct investment' is discussed towards the end of the chapter.

5.6 The committee heard a wide variety of views on the relevance of the current threshold level to agricultural land and businesses, as well as suggestions for more appropriate new levels.

5.7 For example, the South Australian Farmers Federation (SAFF) recommended that the threshold that should apply to agricultural land be \$2 million.⁶ At the public hearing on 16 November 2011, Mr Peter White, President, SAFF, was adamant that the \$248 million was too high:

...Certainly the [\$248] million threshold is an absolute joke. It has never been triggered and is never likely to be triggered. Our suggestion is the limit should be \$2 million. It does not matter whether the investment is for mining or agricultural purposes; if it is done on agricultural land they should both come under the same scrutiny.⁷

5.8 The NSW Farmers Association (NSW Farmers) provided evidence that put the application of the threshold to agricultural assets into stark perspective. As Mr Bill McDonnell, Chairman, Business Economics and Trade Committee, NSW Farmers told the committee:

Concerns such as...the threshold for the national interest test are raised regularly...

I will give you an example. The average land value of grain producing farms in New South Wales in 2011 was valued at \$1.25 million. This information is courtesy of a report by PRDnationwide in 2011. Their source was the Valuer-General of land and property of the government of New

4 See FIRB website: www.firb.gov.au. The \$248 million threshold was \$244 million in 2012 and \$231 million in 2011 when the committee's inquiry began. Regarding the New Zealand threshold see: 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, Media Release No. 22, 'Milestone in Investment Ties with New Zealand', 1 March 2013. Also note, the indexation of the thresholds was announced in August 2009, which stated that the thresholds are 'indexed on 1 January each year to the GDP price deflator in the Australian National Accounts for the previous year.' The Hon Wayne Swan MP, Deputy Prime Minister and Treasurer, Media Release, 'Reforming Australia's Foreign Investment Framework', 9 August 2009.

5 As set out in FIRB, Australia's Foreign Investment Policy, 2013, pp 2 and 14–15.

6 South Australian Farmers Federation, *Submission 9*, p. 6.

7 Mr Peter White, President, South Australian Farmers Federation, *Committee Hansard*, 16 November 2011, p. 21.

South Wales. Extrapolating these figures to market value—and let's be generous and double that figure to \$2.5 million...⁸

5.9 Based on the \$2.5 million figure (quoted above) and the 2012 FIRB review threshold of \$244 million, a private foreign investor could acquire a property valued 97 times an average farm or a property of about 194 000 hectares without being subject to FIRB review.⁹

5.10 Evidence of this sort regarding the threshold was also reflected in the Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES) report *Foreign investment and Australian agriculture* which states that:

The threshold of [\$248] million is above the value of most agricultural land transactions, with only large enterprises such as aggregations of properties in managed investment schemes being subject to FIRB examination.¹⁰

5.11 Similarly, evidence provided by the Australian Taxation Office (ATO) suggests that there are only a very small number of companies that may be captured under current FIRB threshold levels. In response to a question on notice about the number of agricultural entities with a turnover¹¹ of more than \$250 million, the ATO stated:

Australian Taxation Office data shows that there were 10 entities (all of which were companies) in 2009-10 (the latest year for which Taxation Statistics have been released) with a turnover of more than \$250 million and with "agriculture" as their main industry. Of these 10 companies, none were described as 'non resident' for tax purposes.¹²

5.12 Like a number of other witnesses, the National Farmers Federation (NFF) argued for a significant reduction in the threshold. However, the NFF noted the potential burden of a threshold that was too low and that this needed to be balanced against appropriate scrutiny:

We have not been prescriptive about any kind of reduction. We are just saying that the [\$248] million at the moment is clearly not a relevant threshold for the vast majority, if not all, of the agricultural purchases...

8 Mr Bill McDonnell, Chairman, Business Economics and Trade Committee, NSW Farmers Association, *Committee Hansard*, 17 February 2012, p. 9.

9 This calculation is based on details from 2012 provided by the Mr Bill McDonnell of the NSW Farmers Association – who made a similar point to the committee. Mr Bill McDonnell, Chairman, Business Economics and Trade Committee, NSW Farmers Association, *Committee Hansard*, 17 February 2012, p. 9.

10 ABARES report, *Foreign investment and Australian agriculture*, p. 16.

11 The committee is aware that 'turnover' and the 'value' of the business are different concepts, however, it considers that this evidence supports the general agricultural industry view, that only a very small number of agribusinesses and agricultural land is large enough to be captured by the FIRB review threshold.

12 ATO, answer to question on notice, 9 May 2012, (answered 5 June 2012).

Some of the discussions that we have had internally at the NFF have been talking about: what is the top 10 per cent of agricultural land values or land purchases? Ultimately, this kind of activity is happening in the bigger end of town and the larger purchases. If you set the threshold too low obviously there is the risk of putting in a new level of bureaucracy and administration that is pretty unnecessary...

We want to make sure it is well targeted. We have not been prescriptive about those but obviously there has been some discussion at a higher level maybe around the \$30 million dollar mark for some, but we need to get some greater clarity around the actual FIRB compliance processes—these other issues that were raised—before we will be in a position to really appropriately make a call.¹³

5.13 The committee heard evidence of two key problems arising from the current size of the threshold at \$248 million. These were the potential of cumulative purchases by foreign companies avoiding FIRB review and the lack of review for major purchases that could significantly impact local economies. These issues will be discussed in turn.

Cumulative purchases

5.14 The issue of cumulative purchases was of significant interest to the committee during the course of the inquiry. The issue arises because under the current FIRB review framework, foreign companies can make series of smaller purchases of agricultural interests to avoid the application of the FIRB national interest test.

5.15 The committee was concerned that the FIRB did not have appropriate oversight of such cumulative purchases. As acknowledged by the former FIRB Chair, Mr John Phillips:

Senator WILLIAMS: Do you have any system to monitor the accumulation of land by a company?...

Mr Phillips: With some companies, where we become available, yes, but I would not like to pretend that we can monitor all of them, because we do not have the information at this stage.¹⁴

5.16 The explanation continued, highlighting that in early 2012 FIRB needed to further develop its approach to the issue:

Senator NASH: ...if the situation proceeds as it is—and, as you say, you are trying to monitor that accumulation—surely it is too late by the time you potentially identify the accumulation of parcels of land? They have already been acquired, so what would you do at that point anyway, once they have been identified?

13 Mr Charles McElhone, General Manager, Policy, National Farmers' Federation, *Committee Hansard*, 17 February 2012, p. 8.

14 Mr John Phillips, Chair (former), FIRB, *Committee Hansard*, 9 February 2012, p. 5.

Mr Phillips: No, I was not really talking that way. I was really talking about ways in which one becomes aware of accumulation as it happens or before it happens rather than after the event. After the event is not much good.

Senator NASH: That is my point. I am just wondering if any consideration has been given to how you actually do that.

Mr Phillips: Yes is the short answer, but I could not go any further than that at this stage.

CHAIR: Because at the present time you have no idea, have you?

Mr Phillips: Some, but not a lot. The answer is yes, we do have some, but it is not as good as any of us would like.¹⁵

5.17 The relationship between the review threshold and the issue of progressive agricultural asset purchases was also highlighted by some submitters. Indeed, the SAFF considered it as a major reason of its recommendation of a \$2 million threshold. As stated in its submission:

A \$2 million limit would be low enough to be able to monitor any progressive buying that may be taking place. There are often allegations that there is progressive buying of properties just below any trigger level of price and/or size.¹⁶

5.18 Similarly, the NFF was concerned about how to govern cumulative purchase in the future:

The concern primarily from our members is around what the [\$248] million would take in and what it would exclude. For the vast majority of agricultural land there are not too many single purchases that are even going to hit that threshold. That has been the primary concern of our members to say: 'Well, if that's the case, and we are concerned about that, we are concerned about creeping acquisitions, then what should the threshold be.' The overwhelming view has been that it should be lower.¹⁷

Local economy impacts

5.19 The concern expressed by a number of submitters that large-scale foreign investment could have on local communities was articulated well by NSW Farmers:

...if there is a local community and a larger company or foreign investment company comes in, they generally are not buying in the local community. They will go out to the bigger companies, put tenders out and source it all out. Then the small business owner in that small community does not receive the benefit of that business...¹⁸

15 Mr John Phillips, Chair (former), FIRB, *Committee Hansard*, 9 February 2012, pp 5–6.

16 South Australian Farmers Federation, *Submission 9*, p. 6.

17 Mr Matthew Linnegar, Chief Executive Officer, National Farmers' Federation, *Committee Hansard*, 17 February 2012, p. 4.

18 Mr Bill McDonnell, Chairman, Business Economics and Trade Committee, NSW Farmers Association, *Committee Hansard*, 17 February 2012, p. 10.

5.20 Although this witness was expressing a concern about the impacts of foreign investment generally, the committee is of the view that it would apply directly to the foreign purchases of agricultural assets because the vast majority of agricultural purchases do not reach the value required for FIRB review (unless undertaken by foreign government entities).

5.21 The Western Australian Farmers Federation (WAFF) also noted that there were situations where foreign investment arrangements were making it difficult for local producers to gain access to farm assets in their region. As explained in the following exchange:

CHAIR: ...One of the things that I have noticed, Mr Norton, concerns a property over there [WA], and this is about distorting the market in terms of return on your investment with regard to what the commodity prices are. It concerns, without naming anyone, a serious wheatgrower who has got himself into a fair bit of a tangle financially. An American super fund which has some representatives here in New South Wales has bought a property with him—the right to lease it back. I think this particular gentleman is having great trouble meeting the lease payments which are related to return on the superannuation fund's invested capital. The super fund were looking to buy another lump of this particular property, as I understand it, and made a bid for it but they were gazumped by a Chinese company who offered nearly double what the super fund offered. Given that the return on the investment for the super fund made the lease unviable, do you understand...that you can actually price farmers, based on returns on produce, out of the market?

Mr Norton: That is what is causing the angst, Senator. The wheat grower you are talking about had \$700,000 quarterly lease payments on that block, and the Americans padlocked the front gate in about September or October of last year. I do not know what has happened down there since then. But with the other property back towards Lake King, there were a lot of local farmers around that 70,000-acre property who wanted to buy pieces of it. They certainly contacted the land agent, but the land agent virtually shut them out and was only doing business with the Chinese to try to sell it in one lump. Once again, even as late as yesterday I was out in that neck of the woods, and nobody really knows yet whether that property has been sold. This has been going on for about nine months, and the owner is busily stripping a lot of the fixed assets off that block. It is a very confused, twisted debate that is going on out there at the moment, and the locals just are not getting an opportunity to have a crack at those assets.¹⁹

5.22 In response to a question about the impacts of cumulative purchases, the WAFF President, Mr Mike Norton, argued for a local interest test. As Mr Norton stated:

Mr Norton: ...In the rural towns, as farms amalgamate, you just strip all the assets and the people out of those communities. There is nobody left in

19 Mr Mike Norton, President, Western Australian Farmers Federation Inc, *Committee Hansard*, 17 February 2012, p. 16.

the fire brigade, the ambulance, the golf club falls apart, the bowling club—all those communities fall apart. We need to do a lot more in-depth analysis on what we are doing to our rural communities. As this type of investment takes hold, it has enormous knock-on effects.²⁰

5.23 On the other hand, there was one case of foreign investment examined by the committee that provided an alternative view on the local impacts. For background in this case, the company's (BFB Pty Ltd) Chief Executive Officer and Managing Director, Mr Terry Brabin, described its relationship to its major foreign investor:

BFB Pty Ltd is located in Temora, New South Wales, and was founded on 20 May 1985... The bulk of our staff live in Temora on a property owned by the company. We also hire contractors and seasonal help as may be required... BFB has two major shareholders. My family and I own 12 per cent of the company and two investment funds managed by Black River Asset Management own, collectively, 83 per cent...

The Black River funds first invested in BFB in June 2009 As private equity funds, they raised capital from qualified third-party investors, such as pension funds and university endowments—an investing company such as ours, taking a long-term view. Black River Asset Management is a global alternative asset management firm based in Minnetonka, Minnesota. It is an independently managed subsidiary of Cargill—an international producer and marketer of food, agricultural, financial and industrial products and services. Cargill is a passive minority investor through one of the Black River funds and its ownership translates to less than five per cent ownership in our company.²¹

5.24 The committee was also told that for the purposes of the FATA, BFB Pty Ltd was not considered to be a foreign company. As the following exchange shows:

CHAIR: ...For the purposes of the act of foreign investment [FATA], given that 83 per cent of [BFB Pty Ltd] is owned financially by a foreign entity [Black River Asset Management], for the purposes of the act, do you think you are a foreign company? Mr McBride, you might like to comment.

Mr McBride: My understanding is that we [BFB Pty Ltd] are not, according to the act.²²

5.25 Mr Brabin, then went on to indicate that the company purchased significantly from businesses in the area:

Through our relationship with Black River, BFB has the capital resources to grow our company, which allows us to continue creating good jobs in the Temora community. Our company believes strongly in giving back to the

20 Mr Mike Norton, President, Western Australian Farmers Federation Inc, *Committee Hansard*, 17 February 2012, p. 16.

21 Mr Terry Brabin, Chief Executive Officer and Managing Director, BFB Pty Ltd, *Committee Hansard*, 17 February 2012, p. 23.

22 Mr Peter McBride, Director, Corporate Affairs, Cargill, *Committee Hansard*, 17 February 2012, p. 25.

community. We have given in excess of \$750,000 to the community since inception. We support most of the Temora area sports and have given to numerous projects, such as our community heated pool.²³

5.26 Mr Brabin also highlighted that the decisions for developing the business were not direct by the foreign investors:

...basically in our business we have a strategy of developing our core property and getting some efficiencies by having some properties close to each other. When we got to a certain level, we undertook to buy strategically rather than commercially. Hence our Billabong, Jugiong and Kara purchases. They were bought purely for strategic reasons—for drought risk management. I should make it clear that for every single property that we have bought we have had no influence from our investors. I have made the decision on every single property that we have bought.²⁴

Committee view

5.27 The committee notes the evidence it received stating that BFB Pty Ltd was not considered a foreign company for the purposes of the FATA. This is despite clear ties that BFB Pty Ltd has to the foreign entity, Black River Asset Management. As a result, the committee is concerned that there are structures that companies can use to avoid coverage of the FATA despite clear financial relationships to foreign entities. Therefore, as per recommendation six (chapter three), the committee considers that it is essential that the agricultural land register capture comprehensive information about company structures and foreign investment, including foreign debt structuring and ultimate liability.

5.28 The committee considers that the current investment threshold for private foreign entities is not appropriate for agricultural land and business. Very few Australian farm purchases trigger a FIRB review yet the impact of foreign investments below the \$248 million threshold on local economies could be significant. The committee is concerned that many and perhaps virtually all private foreign acquisitions of agricultural land and business are proceeding without any consideration of whether it is in Australia's national interest. In the committee's view this is largely out of step with contemporary community expectations. Accordingly the committee believes that a new threshold for foreign acquisitions of agricultural land and business is needed.

5.29 In addition, the committee is concerned about the prospect of progressive purchases below the FIRB threshold having significant cumulative effects. The committee is pleased that FIRB has acknowledged this as an issue and it encourages FIRB to continue to develop mechanisms to identify cases of cumulative purchases. However, the committee is also of the view that FIRB does not currently have the

23 Mr Terry Brabin, Chief Executive Officer and Managing Director, BFB Pty Ltd, *Committee Hansard*, 17 February 2012, p. 23.

24 Mr Terry Brabin, Chief Executive Officer and Managing Director, BFB Pty Ltd, *Committee Hansard*, 17 February 2012, p. 30.

capability to make significant in-roads in this area unless it is required to review foreign investment cases well below the current threshold of \$248 million.

5.30 Although the committee acknowledges the positive work of certain privately-owned foreign companies to contribute to local economies and communities, the committee is far from reassured that this is always the case. At the very least the lack of scrutiny of significant agricultural purchases makes local communities very concerned that their interests are being overlooked. It is the committee's view that under the current foreign investment rules, the future of rural communities impacted by significant purchases by foreign entities relies more on the goodwill of individual companies than effective government regulation.

Recommendation 20

5.31 The committee recommends that the threshold for private foreign investment in agricultural land be lowered to \$15 million.

Recommendation 21

5.32 The committee also recommends that once cumulative purchases of \$15 million of private investment in agricultural land has been reached by a private business or associated entities, any further investment by that business or entity be required to receive FIRB approval regardless of value.

Recommendation 22

5.33 The committee recommends that FIRB reviews any proposed foreign acquisition of an agribusiness where investment exceeds 15 per cent or more in an agribusiness valued at \$248 million (indexed annually) or exceeds \$54 million.

Recommendation 23

5.34 The committee recommends that the zero trigger required for approval by FIRB for any purchase of agricultural land or an agribusiness by a state owned enterprise will continue to apply.

Recommendation 24

5.35 The committee recommends that Australia's Foreign Investment Policy (AFIP) be amended to clearly define the "interests of local economies" and the "interests of local communities". Furthermore, there should be a greater requirement for FIRB to take into account these local interests in the assessment of foreign purchases of agricultural assets.

Definition of "rural land"

5.36 The committee received evidence raising concerns about the appropriateness of the definitions of 'Australian rural land' and 'Australian urban land' in the FATA. This was of particular concern because "agricultural land" and "agricultural businesses" are not specifically defined in the FATA. Agricultural businesses are treated the same as any other businesses and the distinction between 'rural land' and 'urban land' provides the clearest guidance in the FATA regarding the arrangements for the agriculture industry.

5.37 The definition of rural land is set out in the FATA as follows:

Australian rural land means land situated in Australia that is used wholly and exclusively for carrying on a business of primary production.²⁵

5.38 Furthermore, the FATA defines urban land simply as land that is not rural land:

Australian urban land means land situated in Australia that is not Australian rural land.²⁶

5.39 The implication of such a definition was illustrated by the former Chair of the FIRB, Mr John Phillips. The explanation shows how the definition came about and why the focus on urban land existed:

...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.²⁷

5.40 The current Chair of the FIRB, Mr Brian Wilson expanded the reasoning for the urban and rural land distinction:

When the act was first put in place in 1975, land in total was entirely excluded. In 1989 urban land, which was defined as everything other than wholly rural land, was included largely, as I said earlier, around concerns about Japanese investment in Queensland tourism and the like. As I understand it, the main reason that all land was not brought into the net

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

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

27 Mr John Phillips, Chair (former), FIRB, *Committee Hansard*, 9 February 2012, p. 2.

back in 1989 was as a result of relatively effective lobbying by the farming lobby back at that time.²⁸

5.41 The committee received evidence that showed the inconsistency in the definitions of rural land and urban land in the FATA to the common understandings of what such land is in reality. The consequence of the current definitions is that land used exclusively for agricultural production (i.e. 'rural land') is subject to the higher national interest test threshold of \$248 million, while very similar land that was not used for agricultural purposes could be categorised as urban land and subject to the much stricter review process for urban land.²⁹

5.42 This inconsistency was clearly demonstrated by following exchange with the committee and the former Chair of the FIRB and other FIRB officials:

CHAIR: ...Can you explain the difference between urban land and rural land under the act.

Mr Phillips: ...Everything that is not urban land is rural land.

...

Ms Reinhardt: So rural land is land that is used for 12 months of the year for producing agricultural outputs. Urban land is all non-rural land.

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: ...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.

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?

...

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

...

28 Mr Brian Wilson, Chair, FIRB, *Committee Hansard*, 16 August 2012, p. 22.

29 For example, The AFIP states that for types of urban land such as real estate: 'Regardless of value, foreign persons generally need to notify the Government and get prior approval to take an interest in residential real estate, vacant land or to buy shares or units in Australian urban land corporations or trusts. Foreign persons also need to notify for prior approval if they want to take an interest in developed commercial real estate that is valued at \$54 million or more...'. See FIRB, Australia's Foreign Investment Policy, 2013, p. 4.

Senator STERLE: I just want to clarify this, as a regular visitor to the Kimberley for the last 30 years. What is the Kimberley? It is cattle country, but what do you classify it as?

Ms Reinhardt: It would depend on the particular piece of land and how it was used through the year.

Mr Phillips: If it was used for grazing cattle it would be rural land.

...

Senator STERLE: ...The west Kimberley, particularly the Dampier Peninsula, where there is no cattle grazing, would be urban?

Ms Reinhardt: Nonrural.

Mr Phillips: It would be nonrural, therefore it would be treated as though it was urban land. But bear in mind the propositions that would come forward in foreign investment there would almost certainly qualify for examination not because of the land but because of the activity.³⁰

5.43 Aside from producing seemingly incongruous cases (such as the remote Dampier Peninsula being defined as urban land rather than rural land), one submitter argued that, because agricultural industry was included in the FATA in terms of the 'rural land' definition, this has negative impacts on agricultural policy. This submitter, the Agribusiness Council of Australia (ACA), noted that:

The restrictive definition of 'agriculture' in the [FATA] restricts appropriate policy responses appropriate to Australia's competitive positioning of agriculture and agribusiness in the global marketplace.³¹

5.44 The ACA explained further that the restrictive scope of the definition limits the FATA to deal with important areas of the agricultural economy and policy debates regarding the broader agricultural sector:

The definition of 'agriculture' used by the FIRB is restricted, in the main, to agriculture or 'farming operations' and it consequently detrimentally affects much of the administration of the *Foreign Acquisitions and Takeovers Act 1975 (FATA)*. There is much more to agribusiness than farming. Therefore, contemporary approaches to analyses of the economy is restricted to that, and thus whole swathes of the wider 'agribusiness economic system' are absent. This is a major flaw in this and other modern policy debates on the Australian economy. Agribusiness is the world's largest industry – it is how the world feeds its entire peoples. In that regard, the smaller subset of agriculture or farming grossly understates the importance of the agribusiness sector (Australia's the 2nd largest industry), and effects its competitive stances in the global economy accordingly [i.e. there is a

30 *Committee Hansard*, 9 February 2012, p. 16.

31 *ACA, Submission 28 (supplementary)*, p. 7.

constant tendency to devise piecemeal rather than whole-of-system competitive stances (private sector) and policy responses (public sector)].³²

5.45 The ACA argued that the issue of definitions in the FATA should be reviewed to reflect agribusiness more broadly and to this end it recommends:

That the RRAT Committee recommends to the government that the FATA definition of “Australian Rural Land” be amended to reflect contemporary meaning of the term ‘agribusiness’ so as to improve the efficacy of the application of the [FATA] and its regulations in the national interest (i.e. to enable strategic assessments on a whole-of-industry/economic sector basis).³³

5.46 Concern about the issue of land definition in the FATA is emerging as an issue that also needs to be examined by the government as part of the set up a register on foreign ownership of agricultural land. A Treasury official summarised the alternative approaches to the definitions well:

It seems to me that if you were to come to a definition of agricultural land there are a couple of ways you could do that. You could adopt the land use definitions. There are a range of those. One of them you would be familiar with in the FIRB area—the rural land definition. That is just one. That is a regulatory definition. There are other definitions for land use that might go to the ABS methods that use the ANZSIC classification. When you step away from land use definitions you start to go into where land is located. That is another way you can define agricultural land. That might be based on a zoning arrangement that the states currently use. So there are a range of options that we will need to explore.³⁴

5.47 This diversity of approaches shows the complexity of defining rural land. The difficulty of applying the FATA definition of rural land appears to be tacitly acknowledged by the Treasury because it is seeking consultation on which definition should apply to the national foreign ownership register for agricultural land that the government has announced it will establish.³⁵

Committee view

5.48 The committee recognises that the FATA's definitions of 'urban land' and 'rural land' were developed in the context of concerns about foreign investment in urban real estate purchases in the 1980s. As a result, urban land came to be treated as all land not exclusively used for primary production—and, as noted in chapter two

32 ACA, *Submission 28 (supplementary)*, p. 8. The original footnotes from this quote have been omitted. To see the original footnotes refer to p.8 of the submission.

33 ACA, *Submission 28 (supplementary)*, p. 15.

34 Mr John Hill, Senior Adviser, Foreign Investment and Trade Policy Division, the Treasury, *Committee Hansard*, 16 August 2012, p. 25.

35 The Treasury, *Establishing a national foreign ownership register for agricultural land*, Consultation paper, November 2012, pp 6–7.
www.treasury.gov.au/~media/Treasury/Consultations%20and%20Reviews/2012/agricultural%20land/key%20documents/pdf/Consultation_Paper.ashx (accessed 7 November 2012).

there has been little change to the FATA since 1989.³⁶ However, the committee is of the view that these definitions lead to a range of unintended consequences in today's context as the definitions provide separate triggers for the application of the FIRB national interest test. First, the current definitions make it difficult for interested parties, including the public, parliamentarians, farmers and investors to interpret the nature and governance of foreign investment in Australia.

5.49 In addition, the existence of seemingly absurd cases, such as large tracts of outback and remote Australia being classed as urban land (and therefore requiring FIRB to undertake a national interest assessment), has the potential to erode public confidence in how the foreign investment review processes operates.

5.50 Finally, if the definitions of 'rural land' in the proposed national register on foreign interest in agricultural land and in the FATA are different, then the usefulness of the information that can be obtained from the register will be undermined. The committee considers that there is little value in having different definitions of rural land for the FATA and the national register, as the national register will be a key feature of assessing the ongoing effectiveness of Australia's foreign investment framework as it applies to the agriculture sector.

Recommendation 25

5.51 The committee recommends that the government update the definitions of 'Australian rural land' and 'Australian urban land' in the FATA with the aim of more accurately reflecting the common understandings of these terms.

Definition of "direct investment"

5.52 It emerged during the inquiry that the definition of foreign "direct investment" was somewhat imprecise despite an extensive definition of direct investment being articulated in the 2012 version of the AFIP. The case that brought this issue to light was Etihad's purchase of shares in Virgin Australia (Virgin) in June 2012. While not an agriculture-related example, the committee considered that the Etihad/Virgin issue could have a significant impact on the conduct of the general FIRB process which covers the sale of agricultural land and businesses to foreign entities.

5.53 At public hearings on 16 August 2012 and 11 October 2012, the committee questioned FIRB regarding Etihad's investment in Virgin. The questions related to Etihad's investment in June 2012 of a 4.99 per cent stake in Virgin and a subsequent approval by FIRB in July 2012 for Etihad to invest in up to 10 per cent of Virgin. FIRB was not notified by Etihad or Virgin about the initial investment of 4.99 per cent.³⁷ Because Etihad is a foreign government entity, the committee was interested in the operation of the \$0 threshold for FIRB reviews in such instances.

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

37 Mr Matt O'Sullivan, 'Etihad gets government nod to double Virgin stake', *Sydney Morning Herald* (online), 19 July 2012.

5.54 The debate centred on the issue of whether Etihad's investment was defined as "direct investment" in accordance with the AFIP (at the time). In the 2012 AFIP, the obligation of foreign governments and related entities to contact FIRB was stated as follows:

All foreign governments and their related entities should notify the Government and get prior approval before making a *direct investment* in Australia, regardless of the value of the investment.³⁸

5.55 The definition of "direct investment" in the 2012 version of the AFIP was:

A direct investment has the objective of establishing a lasting interest in an asset(s), or a strategic long-term relationship with a target enterprise. It may allow a significant degree of influence by the investor in the management of the target.

It is common international practice to consider any investment of 10 per cent or more as a direct investment. However, Australia's foreign investment regime is concerned with all investments that provide the investor with influence or control over the target, including any indirect acquisition.

Therefore, we consider that interests below 10 per cent may also be direct investments and must also be notified if the acquiring foreign government or related entity can use that investment to influence or control the target. In particular, investments of less than 10 per cent which include any of the following must be notified:

- preferential, special or veto voting rights;
- the ability to appoint directors; and
- contractual agreements including, but not restricted to, for loans, provision of services and off take agreements...³⁹

5.56 Based on the evidence the committee received at the hearing on 16 August 2012 (discussed below) it was unclear whether or not, in circumstances such as the Etihad investment in Virgin, FIRB should have been advised of the 4.99 per cent investment. Two competing views of whether this should have happened were explained to the committee.

5.57 The first view was that FIRB should have been notified of the 4.99 per cent purchase. Mr Murphy, Executive Director, Markets Group, the Treasury stated that although the AFIP was a 'little unclear in terms of direct and portfolio investment', it was nevertheless 'the preference of the government and the rule under the policy that

38 FIRB, *Australia's Foreign Investment Policy*, January 2012, p. 2, www.firb.gov.au/content/downloads/AFIP_Aug2012.pdf, emphasis added. The 2013 version of the AFIP uses the term foreign government investors. This definition is briefly discussed in chapter two of this report, or can be found at: FIRB, *Australia's Foreign Investment Policy*, 2013, p. 15.

39 FIRB, *Australia's Foreign Investment Policy*, January 2012, p. 12.

all investments by state owned enterprises are notified to the government as of zero dollars.⁴⁰

5.58 This first view also appears consistent with information on the FIRB website (in 2012) that stated that proposals for the acquisition of assets or shares should be notified to the government 'where any doubt exists as to whether they are notifiable.'⁴¹

5.59 The alternative view was that FIRB did not need notification of such an investment because it did not qualify as 'direct investment'. Under this view, the 4.99 per cent purchase (because it was less than a 10 per cent stake) would be direct investment only if it 'has the objective of establishing a lasting interest in an asset(s), or a strategic long-term relationship with a target enterprise.'⁴²

5.60 The FIRB Chair told the committee that 'Etihad *already had* a strategic and long-term interest in Virgin... [including] a codeshare agreement and a cooperation agreement'.⁴³ Because this condition existed, it was open to interpretation that the 4.99 per cent purchase was not a direct investment because it was not *establishing* the strategic interest (and it was less than 10 per cent investment).

5.61 At the public hearing on 16 August 2012, the FIRB Chair indicated that information would be published on the FIRB website to clarify the issue discussed above.⁴⁴ The committee followed up on the issue of website information at the hearing on 10 October 2012. To this the FIRB Chair responded:

Yes, we have looked hard at the definition... In looking at the definition we considered that there were a number of aspects that needed to be worked through so that we have something that is watertight. When you have these definitions, particularly when some of the issues are those that are subtle, to the extent we are codifying it, it is important to get it right. To get it absolutely right this time we are working through that. We are consulting widely in a legal sense, and the like, to ensure that when we do get it up on the site it is absolutely clear.⁴⁵

5.62 The 2013 version of the AFIP has changed the definition of 'direct investment'. These changes include the addition of 'building or *maintaining* a strategic

40 Mr Jim Murphy, Executive Director, Markets Group, the Treasury, *Committee Hansard*, 16 August 2012, p. 20, emphasis added.

41 FIRB website: www.firb.gov.au/content/other_investment/acquisition.asp?NavID=29 (accessed 11 October 2012).

42 FIRB, *Australia's Foreign Investment Policy*, January 2012, p. 12.

43 Mr Brian Wilson, Chair, Foreign Investment Review Board, *Committee Hansard*, 16 August 2012, p. 20, emphasis added.

44 Mr Brian Wilson, Chair, Foreign Investment Review Board, *Committee Hansard*, 16 August 2012, p. 20.

45 Mr Brian Wilson, Chair, Foreign Investment Review Board, *Committee Hansard*, 11 October 2012, pp 9–10.

or long-term relationship with a target entity' to the definition of direct investment [emphasis added].⁴⁶

Committee view

5.63 The committee is pleased that the FIRB has recognised that the previous definition of direct investment was an issue that required further examination. The committee is also pleased that the government subsequently updated the definition of 'direct investment' in the 2013 version of the AFIP. Had the government not made this change, the committee would have recommended that it did so. The committee considers that the FIRB should continue to monitor the issue to ensure that the updated definition effectively prevents similar misinterpretations (as discussed in the case above) from occurring in the future.

46 FIRB, *Australia's Foreign Investment Policy*, 2013, p. 14. The full new definition can also be found on this page.

