

Additional Comments by Senator Nick Xenophon

The 'known unknown'—our current vague national interest test for foreign investment

1.1 As has been made crystal clear by the committee's report, the current application of Australia's national interest test for foreign investment leaves a lot to be desired. The lack of available evidence as to the extent of foreign ownership in Australia's agricultural land is shocking and inexcusable. During the course of this inquiry the inadequacy of the national interest test as it applies to purchases of interests in Australian non-agricultural businesses was also revealed, demonstrated by the case of Etihad Airways' purchase of a \$40 million stake in Virgin Australia.

The current foreign investment information vacuum

1.2 Attempts by the Federal Government to shine a light on these foreign interests, such as the 2010 Australian Bureau of Statistics survey into foreign ownership of agricultural business, agricultural land and water entitlements, has, in my view, done little to allay public concern about the extent of foreign investment. For example, a glaring omission of the ABS survey was revealed during my questioning of Dr Jill Charker, Acting First Assistant Statistician at the ABS. During this line of questioning it was acknowledged the value of agricultural land was not taken into account:

Senator XENOPHON: Okay, but in terms of the overall value of agricultural production owned by partially or wholly foreign owned business, do we go to the 11 per cent figure [of agricultural land with some level of foreign ownership]...In terms of the actual value of—

Dr Charker: Value is a different concept.

Senator XENOPHON: Yes. Was that covered by the survey?

Dr Charker: No. What we have reported on here is number of businesses; proportion of land owned and proportion of water entitlements, not value of production.¹

1.3 The committee's report has explained in detail further serious limitations of the ABS survey, including the large number of small businesses (which are unlikely to be the target of foreign investors) which were included in the survey and the risk posed by the self-reporting nature of the survey. I fully support the committee's recommendation that the ABS not conduct further agricultural surveys on foreign investment, at least and until the shortcomings of the 2010 survey are fully addressed.

1 Dr Jill Charker, Acting First Assistant Statistician, *Committee Hansard*, 16 November 2011, p. 71.

The appropriate foreign investment threshold

1.4 The Foreign Acquisitions Amendment (Agricultural Land) Bill 2010 ('the Bill') which I introduced together with Senator Christine Milne in 2010 sought to make three key changes to the *Foreign Acquisitions and Takeovers Act 1975* ('the Act'): legislating a national interest test, requiring any interest in Australian agricultural land greater than 5 hectares to be subject to application to the Treasurer and requiring online publication of applications of interest in Australian agricultural land.

1.5 The committee has recommended that the threshold for private foreign investment in agricultural land be lowered to \$15 million and that cumulative purchasing by one private business or associated entities (broadly defined) of more than \$15 million be subjected to additional scrutiny.

1.6 While I welcome these recommendations as a step towards greater scrutiny of foreign investment in Australian agricultural land, I believe it does not go anywhere near far enough. Australia should take a lesson from our neighbour New Zealand in terms of drafting and enforcing appropriate foreign investment in agricultural land rules, as well as having a national interest test that is subject to a number of transparent guidelines.

1.7 New Zealand closely examines any purchases in 'sensitive' land above 5 hectares against a set of well-balanced criteria contained in their *Overseas Investment Act 2005* and the Overseas Investment Regulations 2005. The Foreign Acquisitions Amendment (Agricultural Land) Bill 2010 I co-sponsored with Senator Milne reflected those guidelines.

1.8 The Australian legislation compares poorly in terms of transparency with the New Zealand legislation. Sections 16 and 17 of the *Overseas Investment Act 2005* are set out below:

16 Criteria for consent for overseas investments in sensitive land

- (1) The criteria for an overseas investment in sensitive land are all of the following:
 - (a) the relevant overseas person has, or (if that person is not an individual) the individuals with control of the relevant overseas person collectively have, business experience and acumen relevant to that overseas investment:
 - (b) the relevant overseas person has demonstrated financial commitment to the overseas investment:
 - (c) the relevant overseas person is, or (if that person is not an individual) all the individuals with control of the relevant overseas person are, of good character:
 - (d) the relevant overseas person is not, or (if that person is not an individual) each individual with control of the relevant overseas person is not, an individual of a kind referred to in section 15 or 16 of the Immigration

Act 2009 (which sections list certain persons not eligible for visas or entry permission under that Act):

- (e) either subparagraph (i) is met or subparagraph (ii) and (if applicable) subparagraph (iii) are met:
 - (i) the relevant overseas person is, or (if that person is not an individual) all the individuals with control of the relevant overseas person are, New Zealand citizens, ordinarily resident in New Zealand, or intending to reside in New Zealand indefinitely;
 - (ii) the overseas investment will, or is likely to, benefit New Zealand (or any part of it or group of New Zealanders), as determined by the relevant Ministers under section 17:
 - (iii) if the relevant land includes non-urban land that, in area (either alone or together with any associated land) exceeds 5 hectares, the relevant Ministers determine that that benefit will be, or is likely to be, substantial and identifiable:
- (f) if the relevant land is or includes farm land, either that farm land or the securities to which the overseas investment relates have been offered for acquisition on the open market to persons who are not overseas persons in accordance with the procedure set out in regulations (unless the overseas investment is exempt from this criterion under section 20).

(2) See section 19 in relation to subsection (1)(c) and (d).

17 Factors for assessing benefit of overseas investments in sensitive land

(1) If section 16(1)(e)(ii) applies, the relevant Ministers—

- (a) must consider all the factors in subsection (2) to determine which factor or factors (or parts of them) are relevant to the overseas investment; and
- (b) must determine whether the criteria in section 16(1)(e)(ii) and (iii) are met after having regard to those relevant factors; and
- (c) may, in doing so, determine the relative importance to be given to each relevant factor (or part).

(2) The factors are the following:

- (a) whether the overseas investment will, or is likely to, result in—
 - (i) the creation of new job opportunities in New Zealand or the retention of existing jobs in New Zealand that would or might otherwise be lost; or
 - (ii) the introduction into New Zealand of new technology or business skills; or
 - (iii) increased export receipts for New Zealand exporters; or

- (iv) added market competition, greater efficiency or productivity, or enhanced domestic services, in New Zealand; or
 - (v) the introduction into New Zealand of additional investment for development purposes; or
 - (vi) increased processing in New Zealand of New Zealand's primary products:
- (b) whether there are or will be adequate mechanisms in place for protecting or enhancing existing areas of significant indigenous vegetation and significant habitats of indigenous fauna, for example, any 1 or more of the following:
- (i) conditions as to pest control, fencing, fire control, erosion control, or riparian planting:
 - (ii) covenants over the land:
- (c) whether there are or will be adequate mechanisms in place for—
- (i) protecting or enhancing existing areas of significant habitats of trout, salmon, wildlife protected under section 3 of the Wildlife Act 1953, and game as defined in sections 2(1) of that Act (for example, any 1 or more of the mechanisms referred to in paragraph (b)(i) and (ii)); and
 - (ii) providing, protecting, or improving walking access to those habitats by the public or any section of the public:
- (d) whether there are or will be adequate mechanisms in place for protecting or enhancing historic heritage within the relevant land, for example, any 1 or more of the following:
- (i) conditions for conservation (including maintenance and restoration) and access:
 - (ii) agreement to support registration of any historic place, historic area, wahi tapu, or wahi tapu area under the Historic Places Act 1993:
 - (iii) agreement to execute a heritage covenant:
 - (iv) compliance with existing covenants:
- (e) whether there are or will be adequate mechanisms in place for providing, protecting, or improving walking access over the relevant land or a relevant part of that land by the public or any section of the public:
- (f) if the relevant land is or includes foreshore, seabed, or a bed of a river or lake, whether that foreshore, seabed, riverbed, or lakebed has been offered to the Crown in accordance with regulations:
- (g) any other factors set out in regulations.

Recommendation 1

1.9 At first instance Australia should adapt closely the New Zealand approach to foreign investment in agricultural land and assets which has proved to be more robust, transparent and accountable.

Recommendation 2

1.10 The threshold for foreign investment in agricultural land and assets by non-state owned enterprises be reduced to \$5 million.

1.11 As was detailed in the dissenting report of Senator Milne and I for the Senate Economics Committee's inquiry into the Foreign Acquisitions Amendment (Agricultural Land) Bill 2010, a more conservative foreign investment threshold is not necessarily a deterrent to foreign investment. As was discussed during a hearing for that inquiry:

Mr Nees – In terms of your question, Senator Xenophon, on whether we have assessed the impact of the five-hectare threshold on FDI, again we have not done a systemic assessment of that. Through the recent review that we did of the act we heard from investors that in some cases our regime or that threshold was acting as a deterrent to investment. But it is very difficult to say what we are missing out on, because we simply do not know how many investors looked at our investment regime and decided not to seek approval. However, as I mentioned before, we know that of those investors who do make an application roughly 98 per cent are approved.

Senator XENOPHON – In terms of the mechanisms of this, how many applications would you get in a year, how quickly are they assessed and what is the process? Is it a fairly seamless process? Do you tick a few boxes as an initial screening? How efficient is it as a scheme and what feedback have you had from foreign investors who are subjected to this threshold?

Ms McClure – There are usually between 150 and 200 applications per year. Of course, not all of those are farmland applications. I would say probably half would be farmland applications.²

1.12 It is also apparent there needs to be greater scrutiny of the use of 'investment vehicles' in Australian agricultural assets which occurs when a private entity is effectively acting as a proxy for a state owned enterprise. It is clear the current level of scrutiny in terms of the real ownership of 'private' foreign entities is insufficient, and given the deficiencies of Australia's foreign investment register the level of sovereign investment in Australian agricultural land could be much higher than is currently anticipated.

1.13 Given Australia's enormous food production potential it is unsurprising many foreign entities have turned to investing in our land to shore-up their future food security. While the committee acknowledged that there are numerous potential benefits for Australia becoming a large part of the world's 'food bowl', it is concerning

2 Senate Economics Legislation Committee, Inquiry into the Foreign Acquisitions Amendment (Agricultural Land) Bill 2010, *Committee Hansard*, 12 April 2011, p. 35.

that our own government appears to lack the same foresight when it comes to our own food security. For example, in an opinion piece for the Australian Financial Review in 2012, David Farley, the Chief Executive Officer of AACo wrote:

Why isn't a pathway being engineered for local investment, ahead of international? Why has the government lost confidence in local agribusiness developing our agricultural future? There is no doubt that the world is facing an explosion in the demand for food, the global population forecast to peak at 9 billion within 38 years. Australia has a critical role to play in meeting the demand created from that expected 40 percent increase. Sixty percent of the food produced by our farmers is exported, something that is missed with the constant focus on Australia's role in the global mining boom.³

1.14 Mr Farley continued:

Our political and business leaders are arguing that we need to pay more respect to China and put more effort into our relations with the Chinese at the expense of our neighbouring South-East Asian countries. I would say more respect should be paid to the expertise contained in our own agricultural industry and more effort put into making sure that Australia is equipped to play its role in the global demand for food.⁴

1.15 On 21 June 2013 it was reported in the Australian Financial Review that Mr Anthony Pratt, Chief Executive of Visy believes Australia has the potential to become a "food superpower and quadruple its food exports to feed 200 million people in the region with the right government and industry strategies".⁵ He also pointed to New Zealand, which he says is a "good example of a government picking an industry in food that has a competitive advantage, backing it and making it world class".

1.16 This in conjunction with Mr David Farley's comments indicate we need to have policies in place that encourage local investment in food production, including unlocking the potential of superannuation funds investing in food production.

Cubbie Station

1.17 In 2012 it was revealed credible potential Australian purchasers for Cubbie Station were overlooked in favour of a Chinese based consortium. As was reported on the ABC program 'PM':

BRENDAN TREMBATH: ...PM has learned that an Australian consortium put forward a proposal to buy the vast irrigation property a year ago. It involved senior business leaders from the agriculture, resources and

3 Mr David Farley, 'We can feed the world ourselves', *Australian Financial Review*, 7 June 2012, p. 63.

4 Mr David Farley, 'We can feed the world ourselves', *Australian Financial Review*, 7 June 2012, p. 63.

5 John Stensholt, 'You can't eat a Commodore: "Food superpower" is Australia's future says Anthony Pratt', *Australian Financial Review*, 21 June 2013, available at www.afr.com/p/business/pratt_can_eat_commodore_food_superpower_Le9gTFj4zPrPwTIWkEo09Q, accessed 23 June 2013.

banking sectors, and the plan was backed by major global investment banks. But the bid was apparently not even considered.

It was also revealed today that Cubbie Station's founders put up a buy-back plan that was rejected. Earlier this month, the administrator signed a conditional contract to sell Cubbie to a Chinese-led consortium.

Economics correspondent Stephen Long joins me now with more on the story. Stephen, what do we know of the rejected proposal that's come to light?

STEPHEN LONG: Brendan, in October last year, the local consortium approached Goldman Sachs, who are vetting bids or were vetting bids on behalf of the administrators, with an indicative proposal to pay up to \$245 million for Cubbie Station.

They formalised that in December with an on-paper, formal, indicative offer. It was subject to due diligence, in other words looking at the books and the records of Cubbie Station.

They had support from two major investment banks. One to underwrite an equity raising, another to provide about \$100 billion in loans subject to that due diligence. But they didn't get a look in. They didn't get access to the books. Effectively, they were knocked back.

BRENDAN TREMBATH: Was this a credible bid?

STEPHEN LONG: On paper, it seems to be. It looks as if it was credible. It certainly had the backing of some major Australian business people, some who had backgrounds in banking, others in agriculture, and it had the support of those investment banks, subject to the due diligence, which they didn't get a chance to do.

Now after the Foreign Investment Review Board (FIRB) approved the Shandong RuYi consortium's bid, the Australian local consortium came forward again and raised directly with the administrator, and indeed the banks who are owed money, their proposal, but by then it seems it was considered too late.

BRENDAN TREMBATH: Senate Estimates was examining the sale of Cubbie Station today. Was this issue raised?

STEPHEN LONG: Indeed. Senator Nick Xenophon grilled Treasury officials, including their general manager of foreign investment and trade policy, Samantha Reinhardt, and the Finance Minister, Penny Wong, about what appears to be exactly this bid.

Here's an extract from that exchange.

NICK XENOPHON: I'm just trying to establish whether in respect of Cubbie Station there were credible alternative bids and if that was considered?

PENNY WONG: Yeah, and Ms Reinhardt has answered that question.

NICK XENOPHON: Well I'm not sure that she has, with respect to Ms Reinhardt.

UNIDENTIFIED OFFICIAL: Well I think she has.

SAMANTHA REINHARDT: Were aware of the situation you have listed and we followed up with the receiver. We were not concerned about the pro...

NICK XENOPHON (interrupting): And because the receiver said no, stick to Shandong RuYi, is that what you relied on?

SAMANTHA REINHARDT: No that's not what-

UNIDENTIFIED OFFICIAL: No, no.

SAMANTHA REINHARDT: We were aware of the situation you refer to, we were aware of a bidder who said they weren't able to access the books. We went to the receiver and said, 'Can you assure us that there are no concerns in terms of how this bidder is being treated?'

So in effect, we were reassured that there wasn't someone, a viable Australian bidder, that was being blocked from pursuing their bid.

NICK XENOPHON: But what I'm trying to establish is that when you were given those assurances that that bidder wasn't being frozen out of key information in respect of making a bid, was it then followed through with that potential bidder that they received the information that you were assured by the administrator they would receive?

SAMANTHA REINHARDT: We didn't have an application with that bidder. I wasn't in contact, direct contact with that bidder, and I would see that as...

NICK XENOPHON (interrupting): That's a catch-22, isn't it?

PENNY WONG: No, no, no, it's not, because the assumption that you are asking FIRB to make is that the receiver is not acting according to their obligations under the law.

NICK XENOPHON: Correct.

PENNY WONG: And we cannot act under that assumption, Senator, and if you have an allegation to that effect, there are compliance mechanisms, as you are well aware of, that can be initiated and the matter should be referred elsewhere.⁶

1.18 The sale of Cubbie Station revealed that Australian buyers may not have been given a level playing field for the purchase of this major agricultural production and water asset.

Application of the national interest test for non-agricultural businesses

1.19 In June 2012 it was shown the Foreign Interest Review Board had been asleep at the joystick after failing to act on a purchase by Etihad Airways of a four per cent stake in Virgin Australia.

1.20 According to the 2012 FIRB guidelines, Etihad Airways which is owned by the Government of Abu Dhabi, comes within the definition of a 'foreign government

6 Stephen Long, 'Aust consortium bid not considered for Cubbie', *PM*, 18 October 2012, available at www.abc.net.au/pm/content/2012/s3613575.htm, accessed 23 June 2013.

and their related entities.’⁷ The guidelines indicate that unless there is a ‘direct investment’ judged to be 10 per cent, there is generally no need for FIRB approval.⁸

1.21 However, the guidelines also state that a direct investment could be below the 10 per cent ‘common international practice’ if a ‘direct investment has the object of establishing a lasting interest in an asset(s), or a strategic long-term relationship with a target enterprise.’⁹

1.22 Given Etihad’s statement that ‘this equity investment in Virgin Australia’s domestic operations significantly strengthens the 10-year strategic partnership forged by the two carriers in August 2010’,¹⁰ it is unfathomable that the FIRB did not classify this as a ‘direct investment’.

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7 Treasurer, *Australia’s Foreign Investment Policy*, 2012, available at: www.firb.gov.au/content/Publications/AnnualReports/2011-2012/06_Appendix_A.asp, accessed 14 May 2013.

8 Ibid.

9 Ibid.

10 Etihad Airways, *Fast Facts and Figures*, December 2012, available at <http://resources.etihadairways.com/etihadairways/images/fast-facts-and-figures/dec12/en/files/assets/basic-html/page3.html>, accessed 14 May 2013.

