

Senate Rural and Regional Affairs and Transport References Committee

Questions on Notice – Thursday, 16 August 2012 CANBERRA

Inquiry into the Examination of the Foreign Investment Review Board National Interest Test

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**SENATE RURAL AND REGIONAL AFFAIRS AND TRANSPORT
REFERENCES COMMITTEE**

Inquiry into the Foreign Investment Review Board National Interest Test

Public Hearing Thursday, 16 August 2012

Questions Taken on Notice – Australian Taxation Office and the Treasury

1. HANSARD, PG 6

Senator NASH: Sorry to be pedantic. Say I am a sovereign entity, I have come over to Australia, I have bought 10,000 acres and I am growing wheat. I export that wheat back to my home nation for humanitarian purposes, not for sale at any point, to distribute as food. Would you provide on notice the different ways, if there are different ways, that that sovereign entity could be taxed. I know you have been talking about a mass of different things. I just want the different permutations of how that could be taxed.

Mr O'Neill: I am happy to take it on notice, but I think I can get to the point very quickly, if it is useful. The transfer-pricing rules will apply because there is an international transaction, in this theoretical example. The transfer-pricing rules will deem an arms-length consideration, whether or not there is a point of sale at any time.

Because of the deemed arms-length price, there is an apportionment of that profit to the Australian enterprise. So if the arms-length price is \$100, having regard to the business model and the functions, assets and risk in Australia as part of that business model, some part of that arms-length price of \$100 will be attributed to the Australian entity as profit, whether or not there was a sale at any time.

Senator NASH: On notice, could you add to that if there is any way they could effectively not pay tax.

Rural and Regional Affairs and Transport Reference Committee

ANSWERS TO QUESTIONS ON NOTICE

Australian Taxation Office

Foreign Investment Review Board National Interest Test

16 August 2012

Topic: Australian taxation for foreign sovereign entities.

Hansard Page: 6

Question: 1

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Because of the deemed arms-length price, there is an apportionment of that profit to the Australian enterprise. So if the arms-length price is \$100, having regard to the business model and the functions, assets and risk in Australia as part of that business model, some part of that arms-length price of \$100 will be attributed to the Australian entity as profit, whether or not there was a sale at any time.

Senator NASH: On notice, could you add to that if there is any way they could effectively not pay tax.

Answer:

The Australian Taxation Office (ATO) has never seen a sovereign entity, with Australian farm assets, seeking to avoid Australia's tax system by purporting to export its produce for non commercial purposes.

The tax implications for arrangements involving transfers of goods or services between parties operating within the Australian tax jurisdiction, or between parties operating in the Australian tax jurisdiction and a different (overseas) tax jurisdiction, depend on the specific facts. As such, the ATO can only provide general advice on this hypothetical scenario.

In the farming scenario, the conditions that can give rise to an Australian tax liability for sovereign or private investors are:

- there is a taxpayer
- the taxpayer is carrying on a business in Australia, and
- the taxpayer derives income as a result of business activity.

Where the transfer pricing rules adjust an amount to reflect the arm's length amount, it is the adjusted amount that is relevant for all purposes of the income tax law.

Where a sovereign entity invests in an Australian farm through an Australian company which carries on business here, the company is taxable on its profits.

Where a sovereign entity invests directly (that is, not through an Australian company) in an Australian farm, carries on business in Australia and derives income, Australia's international tax rules can apply to tax that income. The indicators of whether or not someone is carrying a

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ANSWERS TO QUESTIONS ON NOTICE

Australian Taxation Office

Foreign Investment Review Board National Interest Test

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business of primary production are discussed in detail in Taxation Ruling TR97/11, which is available on the ATO website at www.ato.gov.au.

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**Questions Taken on Notice – Foreign Investment Review Board and the
Treasury**

1. HANSARD, PG 16

Senator NASH: ... I would like to ask—in terms of it being in the national interest—what is not in the national interest?

Mr Wilson: I think there is a huge range of things. It could be something that materially damaged Australia's revenue. It could be something that involved the nature and character of an investor; so, a criminal organisation from a particular country, almost regardless of the economic benefits they might bring, would probably not be in the national interest. Something that might, on a stand-alone basis, be a positive economic development, but which damaged Australia's market credibility around the world, or its general market reputation in a particular commodity or its market position in a particular commodity—the pricing of that particular commodity—may not be in the national interest.

If I can take three cases—and as Sam Reinhardt has said, we do not normally comment on cases—which were well-known rejections by the Treasurer—

Senator NASH: Sorry, I am talking about agricultural land and business. I should have been specific about that at the start. We are very short of time and I just want to make sure—

Senator STERLE: We were just getting to some good bits!

Senator NASH: That is right! Could you take what you were going to say on notice, because it still would be very interesting for the committee to have those examples of what you were talking about? But in the context of time, I really just want to stick to agricultural land and business.

2. HANSARD, PG 18-19

Senator NASH: So in terms of an oversight process, a foreign entity comes to you on a commercial basis and five or 10 years down the track that changes. They then go to the

security of supply issue and export grain directly back to another nation. What is the oversight that picks that up and what consequences are there for that company, given your comment that they should be operating on a commercial basis?

Mr Wilson: In that particular case, it would be around the transfer pricing.

Senator NASH: So you would expect the ATO to pick that up? Who would pick that up and what would the consequences be, given that in the first place you have said it should not happen?

Ms Reinhardt: If we have applied an undertaking for a condition we often require annual reporting on meeting that condition. The other thing is that if it is an ATO issue where they are actually flaunting the law and they are somehow trying to give away grain when they are actually a commercial entity, the ATO would also have an interest in it. We would also look very closely at any further acquisitions by that entity. If we felt they had not complied with their conditions, we might either not approve other ones or they could, in the most extreme case, be asked to divest.

Senator NASH: With that in mind, what is the oversight process of that, given that [Hassard] Australia and Qatari company were asked this last November and an undertaking had not been required? How do you, as the firm, make sure these things do not slip under the radar?

CHAIR: There are no borders put around the contract. I think we have a bit of work to do.

Senator NASH: Okay, perhaps I can ask you to take that on notice.

3. HANSARD, PG 19

Senator NASH: ... I have a question going to the FIRB approval of the Ebro takeover of Sunrise last year—I think it was in April. Obviously, FIRB looked at all of that and said it was in the national interest. A 100 per cent takeover of a Riverina-farmer owned company by a Spanish company—there are a number of concerns around that. Perhaps if you could provide on notice how you saw that 100 per cent takeover of an Australian rice company by a Spanish entity, with all of the obvious commentary around that about the loss of grower control, the company becoming a subsidiary of a foreign company and prices being based on the California paddy rice market, being in the national interest.

CHAIR: We could get the answer in camera, if you like. I was very vocal at the time!

Senator NASH: I am very happy for you to take that on notice.

CHAIR: It is an individual case.

Senator NASH: Yes, the individual case. And perhaps, on notice, confidentially. Thank you very much.

Mr Wilson: Perhaps we can answer this question in terms of the Ebro commitments that were given. I should point out, by the way, that the test under the act is not whether something is positively in the national interest but whether it is not contrary to the national interest—which is a subtle difference.

Senator NASH: I am very happy for you to take that on notice.

Mr Wilson: But the not-publicly-released commitments that Ebro made in relation to that transaction, which obviously did not proceed, were a medium-term purchase commitment for rice produced by growers; growing markets for Australian rice, through its existing global market network; and continuing Sunrise's support of the Rice Growers Association.

CHAIR: Which was all, in reality, a phony—and I said so at the time. And everyone has learnt that they nearly made a serious error because, as Senator Nash pointed out, the price here, despite the season here, was going to be set in California by someone who has a global monopoly.

Senator NASH: Could I ask you to take that on notice and perhaps provide as much detail as you can for the committee.

4. HANSARD, PG 26

Senator NASH: ... Please correct me if my figures are wrong, but my understanding is that last year FIRB rejected 43 applications for foreign investment. One was the sale of the Australian Stock Exchange, the other 42 were residential. I think over the past 10 years there have been 477 applications rejected, all of which were residential real estate but none of farms. Could you clarify that for me on notice, and perhaps give the committee some detail around the rejections of the residential and real estate transactions. I am very well aware you cannot give me any individual detail, but I want to get a sense of what was not in the national interest for a section of those rejections.

5. HANSARD, PG 26

Senator NASH: ... The national interest: under the guidelines you of course have to assess whether or not the foreign acquisition of the land is appropriate on a case-by-case basis, but how do you then determine whether the cumulative impact of the purchase of the many parcels of land by foreign entities is actually in the national interest?

6. HANSARD, PG 26

Senator NASH: ... My last question goes back to Ebro and the approval by FIRB. At the time did you know of the information on the apparent court action by Spanish growers against Ebro regarding a contractual issue, and if you did then did you take it into account? There are some real issues around that apparently for Spanish growers. I am saying 'apparently' because I am not sure, but if you were aware of it at the time did you take that into account in the context of the eventual approval of the take over of SunRice by Ebro?

7. HANSARD, PG 26

Senator McKENZIE: I have a couple of questions around data. When you are looking at assessing the effect in the national interest test—when you are looking at the effect on the community, the types of datasets you use, how you collect that, where you source that, how you use it—what weighting do you give it in your decisions? Similarly, the environment and the effects on the economy.

8. HANSARD, PG 26

Senator McKENZIE: ... The other issue I would like to put on notice is: yes, you have rejected or, yes, you have agreed, but are there any instances where you have made decisions and put caveats or recommendations where you have changed? I would like some detail around that too.

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ANSWER

Shell/Woodside

On 23 April 2001, the then Treasurer, Peter Costello, announced that the sale of Woodside to Shell had been prohibited. The reasons for the then Treasurer's decision were outlined in his press release of 23 April 2001.

Minmetals/Ozminerals

On 27 March 2009, the Treasurer announced that a takeover proposal by Minmetals for Oz Minerals could not be approved if it included the Prominent Hill mine, located within the Woomera Prohibited Area.

On 23 April 2009, the Treasurer announced that he had approved a revised proposal from Minmetals that did not include the Prominent Hill mine.

SGX/ASX

On 8 April 2011, the Treasurer, announced that he had prohibited the proposal by the Singapore Stock Exchange to take over the Australian Securities Exchange. The reasons for the Treasurer's decision were outlined in his press release of 8 April 2011.

2. HANSARD, PG 18-19

Senator NASH: So in terms of an oversight process, a foreign entity comes to you on a commercial basis and five or 10 years down the track that changes. They then go to the security of supply issue and export grain directly back to another nation. What is the oversight that picks that up and what consequences are there for that company, given your comment that they should be operating on a commercial basis?

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undertaking had not been required? How do you, as the firm, make sure these things do not slip under the radar?

CHAIR: There are no borders put around the contract. I think we have a bit of work to do.

Senator NASH: Okay, perhaps I can ask you to take that on notice.

ANSWER

Foreign investors are required to observe all Australian laws and policies in the conduct of their business and investment activities in Australia. This includes in areas such as corporate and environmental conduct, labour relations and taxation affairs.

There is also scope for decisions to be made subject to conditions or undertakings, wherein a foreign investor's failure to meet such conditions or undertakings can have significant compliance implications for the investor.

As part of the Foreign Investment Review Board's compliance procedures, the extent to which any earlier conditions, understandings or commitments have been observed by foreign investors is monitored closely by the Foreign Investment Review Board.

3. HANSARD, PG 19

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ANSWER

The Foreign Investment Review Board does not comment on the details of individual cases where they remain confidential. Where the circumstances of an individual application give rise to concerns, conditions or undertakings may be appropriate to resolve those concerns.

This proposal ultimately did not proceed as it was defeated by a shareholder vote in May 2011.

4. HANSARD, PG 26

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ANSWER

In financial year 2010-11, 43 proposals were rejected (Foreign Investment Review Board Annual Report 2010-11, p. 19). Of the 43 proposal rejected, 42 related to real estate purchases. The applications were rejected on the grounds that the applicant did not meet the eligibility criteria for the particular type of property they were seeking to acquire. Reasons included the applicant was not in the country when they applied, they did not have an appropriate visa (they were on a tourist visa or short term business visa) at the time they applied or they would not agree to the standard conditions to be

imposed on their acquisition (for example that construction commences on vacant land for residential development within 24 months).

5. HANSARD, PG 26

Senator NASH: ... The national interest: under the guidelines you of course have to assess whether or not the foreign acquisition of the land is appropriate on a case-by-case basis, but how do you then determine whether the cumulative impact of the purchase of the many parcels of land by foreign entities is actually in the national interest?

ANSWER

Determination of the national interest effects of agricultural land accumulations takes into account the extent to which different individual investments impact on local businesses, regions and markets, both individually or as part of a broader pattern of agricultural land investment. This reflects that the economic and other effects of foreign investment are not always uniform between locations, investors or how land acquisitions are intended to be used.

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ANSWER

The Foreign Investment Review Board's examination of proposed investments is rigorous and comprehensive. The assessment process seeks to ensure that foreign investment is consistent with Australia's national interest. In fulfilling this objective, the Board examines proposals with a view to identifying any national interest concerns and determining whether these concerns can be mitigated or managed.

An integral part of the assessment process is consultation with relevant government departments and authorities (at both the Commonwealth and State level). Advice and comments provided by such agencies are important in assessing the implications of proposals and, in particular, in determining whether they raise any national interest issues. These agencies have access to an extensive range of databases and other relevant information.

The applicants or their representatives may also be contacted to discuss their proposal and provide additional information. This is particularly likely where a proposal is complex or the information provided is unclear.

Once all this information is considered, the Foreign Investment Review Board provides its advice to the Treasurer. Responsibility for making decisions on proposals rests with the Treasurer.

8. HANSARD, PG 26

Senator McKENZIE: ... The other issue I would like to put on notice is: yes, you have rejected or, yes, you have agreed, but are there any instances where you have made decisions and put caveats or recommendations where you have changed? I would like some detail around that too.

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Inquiry into the Foreign Investment Review Board National Interest Test

Public Hearing Thursday, 16 August 2012

**Questions Taken on Notice – Working Group on the Commonwealth Foreign
Ownership Register for Agricultural Land (The Treasury)**

1. HANSARD, PG 24

Senator BACK: That was really the origin of my question. When you get, for example, pastoral land, which very often is leasehold—in fact, most pastoral land in Australia is leasehold—traditionally there are state mainly, more than federal, requirements of pastoral boards that the land be used for certain purposes, including feral animals and whatever. But, increasingly, there are mining companies. In fact, I would venture the opinion that most pastoral land in Western Australia is controlled by mining companies, whose primary business, again, is not agriculture. In fact, very often they have to have managers on their places and run stock, if the dogs have not eaten them out, simply because they have to comply with the Pastoral Lands Board requirements. I am placing this on notice rather than asking a question, but in framing the recommendations of your working party are those sorts of factors taken into account so that—

Mr Murphy: We are doing some preliminary work with other departments, like the department of agriculture, and other people and talking to peak organisations. We put out a discussion paper and then we will learn from what people tell us and then put forward realistically a viable proposition to the government. It is for them to decide what they want to do. But our brief is to try to put forward something that works.

2. HANSARD, PG 25-26

CHAIR: You may be able to assist us, and I am sorry that we have made you a bit grumpy today. We were given an answer that the politicians have been guided by the ABS survey which informed ABARES on the percentage of businesses in agriculture and the percentages of land ownership. It is a complete fraud, because it did not take trust, it did not take shelf companies and it did not take mining companies. But what it did do was to trigger it with a \$5,000 threshold. You had to have an ABN and you had to be registered for agriculture; that was the trigger point for the 11,000 surveys which have informed all the commentary made. The lower trigger point was \$5,000. I asked what I thought was a reasonable question: is that turnover against the ABN or profit? We were told it is neither.

Mr Murphy: I am not sure.

Ms Gerathy: I understand that it is neither. I understand that it is also the same \$5,000 they use for all their agricultural measures across the ABS for all their surveys.

Senator NASH: Great. You can tell us what it is. We are really struggling.

CHAIR: To go from there, could we clarify this figure. When I had asked whether it was profit or turnover, they told us:

The estimated value of agricultural operations is a modelled value which allows us to provide a size for a business which helps in the stratification or the grouping of the businesses on our frame ...

For the purposes of an ABN, the tax office does not actually know the stock numbers and they do not know whether I have five acres of irrigated Lucerne or five acres of rocky granite shit. How the hell do they arrive at that figure to send me the questionnaire?

Ms Reinhardt: I cannot, unfortunately, speak for the ABS.

CHAIR: We have not found anyone who can. They cannot speak for themselves.

Ms Reinhardt: I have read the transcript. I can say it is the same \$5,000 they use for all their surveys, and what they do is to say that anything that they calculate to be over \$5,000, right up to the—

CHAIR: But what is the \$5,000?

Ms Reinhardt: It is their measure of what could be produced on the land. I cannot offer you any more than that. I can take a question on notice.

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ANSWER

The Working Party will consider the issue of whether foreign leasehold interests should be captured in any national foreign ownership register for agricultural land.

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Ms Reinhardt: It is their measure of what could be produced on the land. I cannot offer you any more than that. I can take a question on notice.

ANSWER

This question has been referred to the Australian Bureau of Statistics and will be addressed in the context of questions on notice received separately by the Bureau.