Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Foreign Acquisitions Amendment (Agricultural Land) Bill 2010

12 April 2011

Question: 1

Topic: Five hectare Threshold

Question:

Senator XENOPHON—I will try not to go round in circles. The New Zealand legislation has a five hectare threshold. If Australia implemented a five hectare threshold, for instance, as foreshadowed in this bill, would that be in breach of any international obligations apart from the USFTA?
Mr Di Giorgio—In the agreements that we have with FTAs—and there is a range of them and they vary slightly—
Senator XENOPHON—We have Chile, New Zealand, Thailand. Who else?
Mr Di Giorgio—They typically have standstill clauses, which mean the situation at the time is the benchmark and there is no going back from the particular arrangements at the time.
Senator XENOPHON—But apart from those countries where we have FTA agreements, would we be in breach if we implemented a five hectare test?
Mr Di Giorgio—I would have to take advice on that, but to my knowledge I am not sure that we would.
Senator XENOPHON—You would agree that it is a pretty fundamental question isn't it? It would not be in breach of any WTO or bilateral agreements would it?
Mr Di Giorgio—It would not be in breach of agreements that do not exist.
Senator XENOPHON—No, but in terms of any other bilateral agreements, investment protection and promotion agreements.
Mr Di Giorgio—Could I take that on notice?

Answer:

Australia has free trade agreements with ASEAN and New Zealand, Singapore, Thailand, the United States, Chile and New Zealand. Australia has made commitments relating to national treatment[1] and screening thresholds in relation to the business acquisitions in its free trade agreements with Singapore, Thailand, the United States, Chile and, when in force, the recently signed Investment Protocol with New Zealand. Australia has no such commitments in its bilateral investment promotion and protection agreements.

As a member of the OECD, Australia is bound by the OECD Code of Liberalisation of Capital Movements (the OECD Code). The Code seeks to promote open markets by providing a balanced framework for gradual liberalisation of investment. The Code includes obligations to provide national treatment to foreign investors from

[1] National treatment is defined by the World Trade Organisation (WTO) as treating foreigners and residents equally. Typically the obligation is expressed in Australia's FTAs as follows:

"1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."

OECD countries (i.e. the same level of treatment as that afforded to domestic investors) and non-discrimination between OECD countries (i.e. the same level of treatment to investors from all OECD member countries). The imposition of a five hectare screening threshold may be inconsistent with Article 1 of the OECD Code, which obliges OECD countries to progressively liberalise capital movements. It also imposes a new requirement on foreign investors that is not required of domestic investors (i.e. that is national treatment-inconsistent).

Under the Code, OECD countries are required to notify the OECD of any additional restrictions imposed on investment. These are subject to scrutiny by the OECD Investment Committee. The Code does not have a binding dispute mechanism.

In relation to WTO commitments it is unlikely that the measure presents significant consistency issues.

Question: 2

Topic: Breaches without appropriate notification

Question:

Senator XENOPHON—You may want to take this on notice, have there been any breaches where there has been a foreign acquisition by a state owned enterprise without appropriate notification and scrutiny and were the divestiture powers used in those circumstances?
Mr Di Giorgio—I would have to take that on notice.
Mr J Hill—I do not think we are aware of any of those.

Answer:

The Treasury is not aware of any such acquisitions.

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12 April 2011

Question: 3
Topic: Screening Threshold

Question:

Senator XENOPHON—You asserted in your submission that having something similar to the New Zealand legislation in Australia could impede foreign investment in agricultural land. What evidence is there that it has had a negative effect on foreign investment in the New Zealand context?
Mr Di Giorgio—We make no judgment about the effectiveness or otherwise of New Zealand—
Senator XENOPHON—No, but you have—and I do not say this disrespectfully—in effect made a judgment because you have said that, if we do something along the lines of New Zealand, it could impede foreign investment. Is there evidence that the New Zealand model has impeded foreign investment?
Mr Di Giorgio—We have not looked at the efficacy of the foreign investment arrangements of New Zealand in New Zealand.
Senator XENOPHON—But you have made a judgment about the potential impact of that on Australia though.
Mr Di Giorgio—We have made some observations about the efficacy or otherwise of importing from one jurisdiction to another jurisdiction their arrangements, in particular the five hectare threshold—in other words, having a spatial arrangement as opposed to a monetary threshold. We have made some observations about that. In terms of the spatial arrangements we have made some observations based on the fact that our agricultural sector is obviously vastly different to the New Zealand sector, so grafting onto the Australian sector arrangements for New Zealand I guess could be quite problematic.
Senator XENOPHON—But spatial and monetary could be linked though. Presumably five hectares in New Zealand will not be worth $231 million unless it is a goldmine. Let us look at the whole issue of thresholds. A number of other countries have thresholds before they have any screening. This bill is about a screening threshold. You would agree with that fundamental principle. What is your understanding of China's screening threshold for foreign investment?
Mr Di Giorgio—What in particular—
Senator XENOPHON—If someone wants to invest in agricultural land in China, is there a threshold for screening? What is your understanding?
Mr Di Giorgio—I cannot answer that off the top of my head. I know that there are regional arrangements as well as national arrangements and those have recently changed.
Senator XENOPHON—I received some advice recently that their threshold for screening was $1.
Senator HEFFERNAN—And you cannot buy the freehold.
Senator XENOPHON—Can you take that on notice in case my information is incorrect.

Answer:

China reports in its entry in the Asia Pacific Economic Cooperation (APEC) guide to member country investment regimes that 'screening mechanisms apply to all cases of establishment of foreign investment and operate at different levels of government depending on specifics: including total investment, category of industries according to "Industrial Catalogue for Guiding Foreign Investment", and any other requirements indicated by relevant regulations or provisions'. The guide can be found at the following address: http://www.apec.org/Home/Groups/Committee-on-Trade-and-Investment/~/media/Files/Groups/IEG/07_cti_investment_Guide.ashx

The Industrial Catalogue for Guiding Foreign Investment divides foreign investment into industries based on whether they are encouraged, permitted, restricted or prohibited. These three categories are applicable in relation to various farming activities

In addition to the Catalogue, China recently implemented an interim security review system. This review system captures mergers and acquisitions involving domestic enterprises that are involved in 'major farm products'. 'Major farm products' is not defined.

China's entry in the APEC guide does not provide specific advice on applicable thresholds.

Question: 4
Topic: List of agricultural land reviewed that is sovereign acquired

Question:

Senator HEFFERNAN—Fair enough. We do not have much time. That is a bureaucratic answer. I apologise for my grumpiness. Could you provide to this committee a list of the agricultural land that you have reviewed that is sovereign acquired? Foreign sovereign wealth funds acquiring agricultural land in Australia— could you provide us with a list of who has owned up and how much land it was?
Mr Di Giorgio—If I may, I will take that on notice.

Answer:

The Government is unable to provide specific details of investment proposals, which are provided to the Government on a commercial-in-confidence basis.

The Government is bound to respect the privacy and sensitivity of personal and commercial information that is provided by applicants to the Foreign Investment Review Board, in accordance with the requirements of the relevant legislation, including the *Privacy Act 1988 and the Freedom of Information Act 1982.*

Question: 5
Topic: Ownership of Agriculture

Question:

Senator CAMERON—Thank you, Mr Di Giorgio. Is there any reason that there has been no attempt made over the last decade to understand the form of ownership in agriculture?
Mr Di Giorgio—Not to my knowledge.
Senator CAMERON—Given that agriculture is such a big contributor to the economy, why would you not do that for Treasury?
Mr Di Giorgio—It is fair to say that the Treasury looks at issues of importance over time, and the government is taking measures now to increase its awareness—
Senator CAMERON—You have already said that, but I am interested in why in the last decade Treasury has not given any advice to government to say, 'This could be an issue; this is an information asymmetry, and we need to deal with it.'
Mr Di Giorgio—I could not say definitively that Treasury has not. It may be the case that Treasury has provided advice on that in the past 10 years, but I could not say definitively whether it has or has not.
Senator CAMERON—Can you take on notice whether you have provided any advice over the last decade in relation to foreign acquisitions of agricultural land?
Mr Di Giorgio—Okay.

Answer:

The Foreign Investment and Trade Policy Division, that sits within Markets Group in the Treasury, provides secretariat services to the Foreign Investment Review Board and is responsible for day-to-day administration of the *Foreign Acquisitions and Takeovers Act 1975* and Australia's foreign investment policy. As part of the above, analysis of business cases, including those in relation to rural businesses, are provided to the Treasurer. In the past 10 years, advice has been provided in respect of proposed business acquisitions involving rural land.

Question: 6

Topic: Creeping acquisitions

Question:

Senator CAMERON—Also, there is the issue of what could be described as creeping acquisitions which Senator Williams has raised. Has there been any discussion, to your knowledge, about the problems that creeping acquisitions could create within Treasury?
Mr Di Giorgio—We discuss policy issues on an ongoing basis within Treasury. It is an issue on which there has been internal discussion, but that is as far as it has gone.
Senator HEFFERNAN—Can we come down there and have a go?
Senator CAMERON—So there has been no advice to government on that issue—creeping acquisitions— but you have looked at it internally?
Mr Di Giorgio—My colleague has just reminded me that creeping acquisitions more generally, as opposed to the foreign investment area, is an issue that the competition area has been looking at. So, as a general policy issue, creeping acquisitions and competition is an issue that we have been looking at.
Senator HEFFERNAN—Who was looking at it? The ACCC?
Mr Di Giorgio—It would be the competition area of Treasury, as I understand it.
Senator CAMERON—Has there been any advice over the last decade? Is this a new analysis or is it an analysis that has taken place over, say, the last decade?
Mr Di Giorgio—Again I am not in a position to answer that.
Senator CAMERON—Could you take that on notice?

Answer:

The Government reviews foreign investment proposals against the national interest on a case-by-case basis.

The foreign ownership data gathering and analysis work underway in the Australian Bureau of Statistics, the Rural Industries Research and Development Corporation and the Australian Bureau of Agricultural and Resource Economics and Sciences is intended to help address questions of foreign ownership accumulation within the agriculture sector as raised by Senator Williams.

This work will consider the role and history of foreign investment in the development of agriculture in Australia, the extent of foreign ownership of Australian agricultural land and the factors driving foreign investment in Australia. It will also examine ownership structures over time for a subset of agribusiness firms such as meat processing, sugar refining, dairy marketing and other high profile sectors.[2]

Creeping acquisitions as a competition policy matter is distinct from the scenario raised by Senator Williams. In a competition policy context, creeping acquisitions are generally defined to be series of small scale acquisitions that individually do not

[2] Joint Media Release of the Assistant Treasurer and Minister for Agriculture, 23 November 2010, DAFF 10/053LSJ.

substantially lessen competition in a market in breach of section 50 of the *Competition and Consumer Act 2010*, but collectively may have that effect over time.

Question: 7

Topic: Free Trade Agreements

Question:

Senator CAMERON—Could you take that on notice? I would like to know how long you have been looking at this. Can you take on notice—I do not want you to answer this question now—whether you can provide an analysis of the implications that this bill would have for our obligations under each individual so called 'free trade' agreement that we have? I am still not clear about what the implications are.
You also indicated that you give the best analysis and the best policies at the time. That is what you said— you provide government with advice; the best analysis and the best policies for the time—so I suppose you gave some analysis and some advice to sign up to all these trade agreements. Given that you give a policy for the time and given that Dominique Strauss-Kahn has said there is a 'dark side' to this globalisation in a speech last week, what are we supposed to do as legislators if we have a situation where—assuming that theoretically this bill is in the national interest, though I am not making a judgement on that, or any bill is in the national interest—a bill breaches our trade obligations? How do we deal with that?
CHAIR—I do not know that that is a question for Mr Di Giorgio.
Senator CAMERON—Mr Di Giorgio is giving advice. The Treasury gives advice on these trade agreements as we sign up to them.
Mr Di Giorgio—I guess that is pretty much a legal question. I would like to take advice on it, if that is okay.
Senator CAMERON—You will take it on notice then?
Mr Di Giorgio—Yes, thank you.

Answer:

Australia has free trade agreements with ASEAN and New Zealand, Singapore, Thailand, the United States and Chile. Australia has made commitments relating to national treatment[3] and its screening thresholds in relation to the business acquisitions in its free trade agreements with Singapore, Thailand, the United States, Chile and, when in force, the recently signed Investment Protocol with New Zealand.

If Australia were to adopt a measure that is inconsistent with commitments provided in its free trade agreements this could lead to recourse via the dispute mechanism under these agreements. Chile, Singapore, Thailand and the United States could enforce such commitments.

While each free trade agreement provides for a slightly different dispute mechanism, the process would generally begin with bilateral consultations. If the issue is not

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2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."

resolved to the satisfaction of both parties through consultations, this would trigger the next stage in dispute settlement which is generally binding arbitration. If the arbitration panel or tribunal makes findings against Australia that a measure is inconsistent with its commitments, Australia would be obliged under the free trade agreements to address those findings. How these matters are addressed are determined in consultation with the other treaty partner and could include the offer of compensation or an undertaking to remove or change the measure that is inconsistent with our commitments. If Australia fails to appropriately address the findings of the arbitration panel or to otherwise rectify the breach, a treaty partner could retaliate by denying benefits available to Australian businesses under the agreement.

In addition to providing for state-to-state dispute settlement, Australia's free trade agreements with Singapore, Thailand and Chile include investor-state dispute settlement provisions. However, in all of these agreements other than the agreement with Singapore, the investor-state dispute settlement provisions will not cover the application of Australia's foreign investment screening regime as they are limited to post-establishment[4] matters and/or a requirement that the investor establish that the measure has caused them loss or damage.

[4] That is, under these agreements, the investor-state dispute settlement provisions only apply to breaches of the agreements in respect of investments already established in Australia.

Question: 8

Topic: Formula used to establish threshold

Question:

Senator O'BRIEN—Please take on notice and supply the committee with the details of the sensitive sectors and the source of that information. In relation to the current position of assessment of foreign acquisition of agriculture, can you take on notice and advise how long that policy position has been in place and over how many governments? I am pretty sure it has been over the current government, the previous government and, probably, the one before that. Please advise us whether there has been any change in that position historically—whether Australia has taken a lesser position in terms of protecting Australian agricultural assets. Perhaps you can tell us what you know now on that.
Mr Di Giorgio—My colleague and I can give you a little bit of an insight into what has happened there.
When the first foreign takeovers act was introduced, in 1975, there was a rural land threshold of $1 million, and the general business threshold was $2 million. That remained the case until 1985, when the general business threshold was increased to $5 million while, as I understand it, the rural land threshold remained at $1 million. That changed again in April 1986, when the rural threshold was increased to $3 million—so it went to $3 million and the business threshold stayed at $5 million. As I understand it, that essentially remained the case, though I will probably have to check this, until September 1999, when the two thresholds were harmonised at $50 million. In 2005 there were higher thresholds for the US enterprises. In December 2006, both thresholds were increased to $100 million.
Senator O'BRIEN—So agriculture moved from being $3 million in 1986 to—
Mr Di Giorgio—In 1986 it was $3 million. Then you fast forward to 1999, and they are both the same.
Senator O'BRIEN—It went to $50 million.
Mr Di Giorgio—That is right.
Senator O'BRIEN—So in 1999 it went to $50 million, and then in 2005 there was a higher threshold figure for the United States, which was part of the US FTA provision. Then, after that, when did it go to $100 million?
Mr Di Giorgio—It went to $100 million in December 2006. In September 2009 it went up to $219 million, and from then on it has been indexed, hence the changed figure.
Senator O'BRIEN—I suppose it is fair to say that there has been a progression in value. Do you know what the basis of that threshold is? What formula or what basket of property et cetera has been used to establish that threshold?
Mr Di Giorgio—I will have to get back to the committee on that, if that is okay. I know that there is a particular formula that is used.

Answer:

Under Australia's Foreign Investment Policy, for the purposes of United States investors prescribed sensitive sectors are:

- media;
- telecommunications;

- transport (including airports, port facilities, rail infrastructure, international and domestic aviation and shipping services provided within, or to and from, Australia);
- the supply of training or human resources, or the manufacture of supply of military goods or equipment or technology, to the Australian Defence Force or other defence forces;
- the manufacture or supply of goods, equipment or technology able to be used for a military purpose;
- the development, manufacture or supply of, or the provision of services relating to, encryption and security technologies and communications systems; and
- the extraction of (or the holding of rights to extract) uranium or plutonium or the operation of nuclear facilities.

The rationale for changes to the monetary threshold applying to acquisitions of rural land and/or rural businesses is generally contained in the relevant Government or ministerial announcement.

When the Foreign Takeovers Act passed into law in 1975, there were no dollar thresholds in the Act itself – rather there were administrative thresholds issued by way of a policy statement. Prior to the Act being introduced, the then Treasurer noted that the Government's general administrative practice was to not intervene in takeovers of companies with total assets of $1 million or less, except where special considerations apply and that the Government would continue to do adhere to this practice.

In April 1976 the Government designated agricultural and pastoral projects and forestry and fishing projects as key areas of the economy where generally 50 per cent Australian participation would be required for projects involving investment of $1 million or more by foreign interests.

In April 1986, as part of the Government's Economic and Rural Policy Statement, the then Acting Treasurer announced changes to threshold for screening foreign investment relevant to rural businesses. Specifically, the Government relaxed the rules applying to foreign investment such that only proposals over $3 million (previously $1 million) would be subject to Australian participation or benefits. The rationale for this was as follows:

"In view of the concern that has been expressed that the $1 million threshold might dampen demand from foreign buyers and therefore disadvantage Australian vendors, the Government has decided to increase it to $3 million."[5]

In September 1999 this threshold was increased from $3 million to $50 million. This followed an announcement in August 1999 by the Prime Minister to lift its existing threshold for business acquisitions from $5 million ($3 million for rural) to $50 million on a unilateral basis. This was designed to lower compliance costs for trans Tasman, as well as other, investors. [6]

US investor specific thresholds agreed under the Australia-United States Free Trade Agreement came into effect on 1 January 2005. The $50 million threshold was superseded by a $100 million threshold in December 2006. The changes took place within the context of a review of Australia's Foreign Investment Policy conducted under a commitment made by Australia in the Australia-United States Free Trade Agreement. The explanatory statement accompanying the relevant amending regulations noted that:

"Previously, Australia required foreign investors to submit detailed notifications in relation to proposed transactions valued at between $50 million and $100 million, but did not generally subject these transactions to detailed scrutiny. The increased threshold will reduce the costs to business of complying with screening obligations in relation to proposals that are routinely approved." [7]

In September 2009, the $100 million threshold increased to $219 million. When announcing this change the Treasurer noted that some screening requirements on foreign investors impose unnecessary compliance costs on businesses. [8]

The $219 million business acquisition threshold has been indexed since 1 January 2010 and is currently $231 million. Indexation is to ensure that the threshold keeps pace with inflation.[9] The screening thresholds provided under the Australia-United States Free Trade Agreement have also been indexed from implementation.

Regulation 13 of the *Foreign Acquisitions and Takeover Regulations 1989* provides the formula for indexing particular thresholds, including the business threshold applying to acquisitions of rural businesses, on an annual basis. The formula uses the Gross Domestic Product implicit price deflator, which comes from Australia's national accounts.

[5] Treasurer's Press release, No. 36 of 1986, page 2.
[6] Joint Prime Ministerial Communiqué with New Zealand, 4 August 1999.
[7] Explanatory Statement - Select Legislative Instrument 2006 No. 316.
[8] Treasurer's Press release, No. 89 of 2009.
[9] Treasurer's Press release, No. 89 of 2009.

Question: 9

Topic: list of all applications that have gone over the threshold

Question:

Senator HEFFERNAN—Can I just get you to confirm, on notice, that you are going to give us a list of all sovereign fund land acquisition notifications?
Mr Di Giorgio—Correct.
Senator HEFFERNAN—Could you also give us a list of all applications that have gone over the threshold of $231 million and the previous threshold?
Senator XENOPHON—That is, non sovereign.
Senator HEFFERNAN—Non sovereign, yes.
Mr J Hill—That is private, Senator.
Mr Di Giorgio—If it is private, we might have some privacy concerns about details of individual—
Senator HEFFERNAN—Can we do that in camera?
Mr J Hill—We are dealing with FIRB applications here, and I think it will be sensitive material. We do not publish that information.
Senator HEFFERNAN—Could you tell us how many?
CHAIR—Can you take that on notice?
Mr J Hill—I think Mr Di Giorgio did take on notice that we will check—

Answer:

The table below provides publicly available data for the last five financial years in respect of applications received by the Foreign Investment Review Board in relation to the agriculture, forestry and fishing sector.[10]

Financial year	Number of agriculture, forestry and fishing proposals	Value of agriculture, forestry and fishing proposals	Percent of total proposed investment in the financial year
2009-10	17	$2.3 billion	1 per cent
2008-09	12	$2.78 billion	1.5 per cent
2007-08	11	$2.49 billion	1.3 per cent
2006-07	4	$0.1 billion	0.06 per cent
2005-06	2	$0.01 billion	0.01 per cent

Business proposals are classified on the basis of the dominant business activity. Proposals within the agriculture, forestry and fishing sector may include rural land as a business asset, however, the value of agriculture, forestry and fishing proposals cannot be equated with the value of the rural land involved in these proposals.

[10] The classification used for this data is the Australian and New Zealand Standard Industrial Classification. The Agriculture, Forestry and Fishing classification encapsulates agriculture, services to agriculture, forestry and logging and commercial fishing.

The Treasury is not able to provide more specific information as this could be used to identify specific investment proposals, which are provided to the Government on a commercial-in-confidence basis.

The Government is required to respect the privacy and sensitivity of personal and commercial information that is provided by applicants to the Foreign Investment Review Board, in accordance with the requirements of the relevant legislation, including the *Privacy Act 1988 and the Freedom of Information Act 1982*.