

The Senate

Economics
Legislation Committee

Foreign Acquisitions and Takeovers
Legislation Amendment Bill 2015 and related
bills [Provisions]

October 2015

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Chapter 1

Introduction

1.1 On 20 August 2015, pursuant to the Selection of Bills Committee's report, the Senate referred the Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015 and related bills (contingent upon their introduction in the House of Representatives) to the Economics Legislation Committee for inquiry and report by 12 October 2015.¹

1.2 Accordingly, the provisions of the following bills were referred to the committee following their introduction into the House of Representatives on 20 August 2015:

- Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015 (Foreign Acquisitions Bill);
- Foreign Acquisitions and Takeovers Fees Imposition Bill 2015 (Fees Imposition Bill); and
- Register of Foreign Ownership of Agricultural Land Bill 2015 (Register Bill).

1.3 The main reason for supporting the referral of this package of bills to a parliamentary committee was because the bills propose 'major changes to Australia's foreign investment regime which warrants parliamentary scrutiny'.²

Conduct of the inquiry

1.4 The committee advertised the inquiry on its website and wrote to relevant stakeholders and interested parties inviting submissions by 18 September 2015. The committee received 12 submissions, which are listed at Appendix 1. Given the short timeframe for this inquiry, the committee resolved it would draw on submissions to prepare this report.

1.5 The committee would like to acknowledge and convey its appreciation to those organisations that provided a submission to this inquiry.

Background to the bills

1.6 In March 2014, the Hon. Joe Hockey MP referred concerns about foreign investment in residential real estate to the House of Representatives Standing Committee on Economics for inquiry. A number of changes proposed by the bills have their origins in the Standing Committee's report into foreign investment in residential real estate, which was tabled in November 2014.

1.7 The government's consideration of changes to the rules governing the sale of agricultural land and agribusiness to foreign entities started in earnest in June 2011

1 Selection of Bills Committee, *Report No 10 of 2015*, 20 August 2015, [p. 3]; *Journals of the Senate*, 2013–15, no. 110 (20 August 2015), p. 3007.

2 Appendix 3, Selection of Bills Committee, *Report No 10 of 2015*, 20 August 2015.

when in opposition. At that time, the then leader of the Opposition announced the establishment of a Coalition Working Group to investigate options to strengthen these rules. In August 2012, following the findings of this group, the then shadow Treasurer released a discussion paper that identified matters for public discussion.³ They included: a national register of foreign ownership of agricultural land or agricultural businesses in Australia; a threshold for the acquisition of Agricultural land and for agricultural businesses; a national interest test; and, the composition of the Foreign Investment Review Board.

1.8 On 11 February 2015, the government announced changes to the screening threshold for agricultural land and the implementation of a foreign ownership register for agricultural land, established and maintained by the Australian Taxation Office (ATO).⁴

1.9 On 25 February 2015, the government announced proposed changes to the foreign investment framework for residential real estate as well as proposed application fees for all foreign investment applications.⁵ The proposed changes to the foreign investment framework were discussed in an options paper released by Treasury, titled 'Strengthening Australia's Foreign Investment Framework'.⁶ The government sought feedback from interested stakeholders on the proposed changes and received 192 submissions (including 58 confidential submissions).

1.10 Based on the results of this consultation process, the government, on 2 May 2015, outlined the proposed reforms to the foreign investment framework. They included: an expanded penalty regime; transfer of approval of real estate functions to the ATO (from Treasury); and, the imposition of application fees for all foreign investment applications.⁷ The government also announced further consultation on options to modernise the foreign investment framework to reduce the cost of red

3 The Coalition Party, *Foreign Investment in Australian Agricultural Land and Agribusiness*, August 2012, http://shared.liberal.org.au/Share/Foreign_investment_discussion_paper.pdf (accessed 31 August 2015).

4 The Hon. Tony Abbott, MP, Prime Minister of Australia, the Hon. Joe Hockey, MP, Treasurer, and the Hon. Barnaby Joyce, MP, Minister for Agriculture, 'Government tightens rules on foreign purchases of agricultural land', Media release, 11 February 2015.

5 The Hon. Tony Abbott, MP, Prime Minister of Australia, and the Hon. Joe Hockey, MP, Treasurer, 'Government to strengthen Australia's foreign investment framework', Media release, 25 February 2015.

6 Department of the Treasury, *Strengthening Australia's Foreign Investment Framework*, Options Paper, February 2015, <http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2015/Strengthening-Australias-foreign-investment-framework> (accessed 31 August 2015).

7 The Hon. Tony Abbott, MP, Prime Minister of Australia, and the Hon. Joe Hockey, MP, Treasurer, 'Government strengthens the foreign investment framework', Media release, 2 May 2015.

tape.⁸ On 15 May 2015, Treasury released a second options paper, titled 'Modernising Australia's Foreign Investment Framework', which discussed additional options to update and streamline existing provisions of the *Foreign Acquisitions and Takeovers Act 1975* (the Foreign Acquisitions Act). This options paper received 22 submissions, including 15 confidential submissions.⁹

1.11 On 6 July 2015, the government released exposure drafts of the Foreign Acquisitions Bill and the Register Bill and called for input from stakeholders. The government did not release an exposure draft of the Fees Imposition Bill because it is a standard tax imposition bill. Consultation occurred between 6 July 2015 and 17 July 2015, with 21 submissions received (including 4 confidential submissions).¹⁰

1.12 An exposure draft of the Foreign Acquisitions and Takeovers Regulations 2015 was also released as part of this consultation; the government has indicated that it intends to make the regulations later in 2015 following additional consultation.¹¹

1.13 This consultation process was reflected in Treasury's Regulation Impact Statement (RIS), which was released in September 2015.¹² The government released its official response to the House of Representatives Standing Committee's report into foreign investment in residential real estate in August 2015.¹³

Overview of the bills

1.14 Australia's foreign investment review framework consists of the Foreign Acquisitions Act, the *Foreign Acquisitions and Takeovers Regulations 1989* (the Foreign Acquisitions Regulations) and other associated regulations, and Australia's Foreign Investment Policy (which is a Ministerial statement providing an overview of, and sometimes expanding on, the Foreign Acquisitions Act).

8 The Hon. Tony Abbott, MP, Prime Minister of Australia, and the Hon. Joe Hockey, MP, Treasurer, 'Government strengthens the foreign investment framework', Media release, 2 May 2015.

9 Department of the Treasury, *Modernising Australia's Foreign Investment Framework*, Options Paper, May 2015, <http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2015/Modernising-Australias-foreign-investment-framework> (accessed 31 August 2015).

10 Department of the Treasury, *Implementing Foreign Investment Reforms*, Exposure Draft, July 2015, <http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2015/Implementing-Foreign-Investment-Reforms> (accessed 31 August 2015).

11 Department of the Treasury, *Regulation Impact Statement: Foreign Investment Proposals*, p. 39, 14 September 2015, <https://ris.govspace.gov.au/files/2015/09/Foreign-investment-reforms-RIS-web-accessible.pdf> (accessed 15 September 2015).

12 Department of the Treasury, *Regulation Impact Statement: Foreign Investment Proposals*, 14 September 2015, <https://ris.govspace.gov.au/files/2015/09/Foreign-investment-reforms-RIS-web-accessible.pdf> (accessed 15 September 2015).

13 Department of the Treasury, *Australian Government response to the House of Representatives Standing Committee on Economics report: Foreign Investment in Residential Real Estate*, August 2015, pp 2-3.

1.15 The bills aim to give effect to the government's intention to 'strengthen the integrity of Australia's foreign investment framework, ensuring Australia maintains a welcoming environment for foreign investment that is not contrary to Australia's national interest'.¹⁴

Foreign Acquisitions Bill

1.16 The Foreign Acquisitions Act currently imposes a number of obligations on foreign persons who are planning to invest in certain interests, including notifying the Treasurer of their proposed investment. The Treasurer is ultimately responsible for considering whether a particular investment is contrary to the national interest on a case-by-case basis. The Foreign Acquisitions Act takes a flexible approach to this test and does not prescribe what constitutes the national interest.¹⁵ In most cases, the Treasurer is satisfied the proposal is not contrary to the national interest and does not object to the proposal. If the Treasurer considers that the proposal is contrary to the national interest, the Treasurer may make an order prohibiting the proposed transaction or, if the transaction has already taken place, to direct the person to dispose of their interest (known as a disposal order).

1.17 The Foreign Acquisitions Bill will repeal all substantive provisions of the Foreign Acquisitions Act, and replace them with new and modernised provisions. The Foreign Acquisitions Bill, however, retains the key features of Australia's foreign investment framework and does not change the national interest assessment process. The Foreign Investment Review Board submitted that the changes are 'designed to strengthen the integrity of the framework'.¹⁶

1.18 The Foreign Acquisitions Bill leaves the definition of 'foreign persons' who are required to apply for foreign investment approval largely unchanged. Under the Foreign Acquisitions Act, foreign persons are currently defined as a natural person not ordinarily resident in Australia, or a corporation or trust estate where a foreign person holds a controlling or substantial interest.¹⁷ Under the Foreign Acquisitions Bill, the definition of foreign persons in the Act would be expanded to include foreign governments, who are currently required to fulfil some obligations in the Act through Australia's Foreign Investment Policy.¹⁸

'Significant actions'

1.19 The Foreign Acquisitions Bill enables the Treasurer to make a broad range of orders in relation to a 'significant action' that a foreign person is proposing to take or has already taken. Broadly, a significant action is an action to acquire interests in

14 Explanatory Memorandum, p. 7.

15 Foreign Investment Review Board, *Submission 5*, p. 1.

16 *Submission 5*, p. 1.

17 Foreign Acquisitions Act, section 5.

18 Foreign Acquisitions Bill, item 3, proposed section 4 of Schedule 1. Australia's Foreign Investment Policy currently applies some of the requirements under the Foreign Acquisitions Act to foreign governments.

securities, assets or Australian land, or otherwise taken in relation to corporations and unit trusts.¹⁹ An action is only a significant action if it meets any applicable interest and monetary thresholds, including a change in control for actions relating to entities and businesses.²⁰

1.20 One change from the existing provisions is that the substantial interest threshold for an entity or trust has been increased to 20 per cent (from 15 per cent), which means foreign persons acquiring a stake of less than 20 per cent will no longer need foreign investment approval.²¹ While the Foreign Acquisitions Bill establishes a framework for threshold tests, the value for some of the threshold tests (for example, for agricultural land) is to be prescribed in regulations.²²

1.21 If the Treasurer is notified a foreign person is proposing to take a significant action, the Treasurer may decide that:

- there is no objection to the action and give the person a no objection notification not imposing conditions;
- there is no objection to the action provided the person complies with one or more conditions and give the person a no objection notification imposing conditions; or
- taking the action would be contrary to the national interest and make an order prohibiting the proposed significant action.²³ If the significant action has already been taken and the Treasurer is satisfied it is contrary to the national interest, the Treasury may make a disposal order that is directed at unwinding the action.²⁴

'Notifiable actions'

1.22 A foreign person is only obliged to inform the Treasurer that they are proposing to take a significant action if the action is also a 'notifiable action'. Only some significant actions are notifiable actions. A foreign person who proposes to enter an agreement to make a notifiable action must notify the Treasurer before entering into the agreement. In broad terms, a notifiable action is a proposed action to:

- acquire a direct interest in an Australian entity or Australian business that is an agribusiness;
- acquire a substantial interest in an Australian entity; or
- acquire an interest in Australian land.²⁵

19 Foreign Acquisitions Bill, item 4, proposed sections 40 to 43 of Schedule 1.

20 Foreign Acquisitions Bill, item 4, proposed sections 51 to 55 of Schedule 1.

21 Foreign Acquisitions Bill, item 3, proposed section 4 of Schedule 1.

22 See Foreign Acquisitions Bill, item 4, proposed section 52 of Schedule 1.

23 Foreign Acquisitions Bill, item 4, proposed Part 3 of Schedule 1.

24 Foreign Acquisitions Bill, item 4, proposed section 69 of Schedule 1.

25 Foreign Acquisitions Bill, item 4, proposed section 47 of Schedule 1.

1.23 Generally, the action is only notifiable if the entity, business or land also meets the threshold test, with a different threshold applying in relation to agribusinesses. Unlike for a significant action,²⁶ there does not need to be a change in control for actions relating to entities and businesses to be notifiable actions.

1.24 Currently, a foreign person is required to notify the Treasurer of a proposal to acquire or increase an interest in Australian urban land,²⁷ unless an exemption applies.²⁸ Under the Foreign Acquisitions Bill, the requirements that currently apply to Australian urban land would apply to all land in Australia (including agricultural land) unless below the threshold, exempt, or specific rules apply.²⁹

1.25 If the Treasurer is given a notice that a significant action is proposed to be taken, the Treasurer must make a decision within a certain period (generally within 30 days of receiving the notice, or within an additional period of up to 90 days from the publication of an interim order).³⁰ If a notice has been given stating that a significant action is proposed to be taken, the action must not be taken before the end of a specified period (which is usually 40 days) unless the foreign person is given a no objection notification.³¹

1.26 In addition, the Foreign Acquisitions Bill provides for the issuing of an exemption certificate, which is a certificate given by the Treasurer that specifies an interest, or an interest of a kind, is not a significant action or notifiable action.³² Examples of exemption certificates include certificates for foreign persons buying established dwellings (which allow foreign persons to bid at multiple auctions without having to pay an application fee for each auction) and certificates allowing developers to sell new dwellings in a development to foreign persons.

Penalties

1.27 Currently, only divestment orders and criminal penalties apply to breaches of the Foreign Acquisitions Act. The maximum penalty that can be imposed for an offence under the Foreign Acquisitions Act committed by an individual is a fine of 500 penalty units (currently \$90,000), imprisonment for two years, or both.³³ Under the Foreign Acquisitions Bill, the maximum penalty for an individual who commits any of the most serious offenses is imprisonment for three years, a fine equivalent to

26 Foreign Acquisitions Bill, item 4, proposed subsection 41(5) of Schedule 1.

27 Australian urban land is defined as land situated in Australia that is not Australian rural land: see Foreign Acquisitions Act, section 5.

28 Foreign Acquisitions Act, subsection 21A.

29 Australian land means agricultural land, commercial land, residential land or a mining or production tenement: see Foreign Acquisitions Bill, item 3, proposed section 4 of Schedule 1.

30 Foreign Acquisitions Bill, item 4, proposed sections 68 and 77 of Schedule 1.

31 Foreign Acquisitions Bill, item 4, proposed section 82 of Schedule 1.

32 Explanatory Memorandum, paragraph 3.10.

33 For example, see Foreign Acquisitions Act, subsection 25(1C).

750 penalty units (currently \$135,000), or both.³⁴ If a body corporate commits any of these offences the maximum penalty is 3,750 penalty units (compared with 2,500 penalty units under the current provisions).³⁵

1.28 In addition to divestment orders and criminal penalties, the Foreign Acquisitions Bill would also make it possible for civil penalty orders to be made and infringement notices to be issued. A person may commit an offence or contravene a civil penalty provision if:

- the person fails to notify the Treasurer before taking a notifiable action;
- the person takes an action that has been notified, before the end of the applicable time limit;
- the person contravenes an order made by the Treasurer which prohibits a proposed significant action, an interim order or a disposal order;
- the person contravenes a condition in a no objection notification imposing conditions or an exemption certificate; or
- the property developer fails to advertise the sale of new dwellings in Australia.³⁶

1.29 There would be additional civil penalties for breaches of the obligations imposed by the Foreign Acquisitions Bill in relation to residential land.³⁷ Some of these penalties would be calculated by reference to the market value of, or consideration for, the acquisition of the interest in the residential land or the capital gain from disposing of the interest.

1.30 Liability for breaches of the civil penalty provisions would extend to officers of corporations, and criminal offences may also apply as well to certain persons, including officers of corporations, under Part 2.4 of the *Criminal Code Act 1995*.³⁸ In addition, each civil penalty provision would be enforceable under Part 4 of the *Regulatory Powers (Standard Provisions) Act 2014*, which also provides for infringement officers to issue infringement notices.

Application fees

1.31 Currently, no fees or charges are payable when making an application or giving a notice under the Foreign Acquisitions Act. The Foreign Acquisitions Bill would impose fees for:

- applying for an exemption certificate or a variation of an exemption certificate;

34 For example, see Foreign Acquisitions Bill, item 4, proposed section 86 of Schedule 1.

35 Explanatory Memorandum, p. 74.

36 Foreign Acquisitions Bill, item 4, Part 5, Division 2 of Schedule 1.

37 Foreign Acquisitions Bill, item 4, Part 5, Division 3 of Schedule 1.

38 Foreign Acquisitions Bill, item 4, proposed sections 102 and 103 of Schedule 1.

- giving a notice of a notifiable action;
- giving a notice relation to an action that is not a notifiable action;
- applying for a variation of a no objection notification; and
- situations where the Treasurer makes a decision or order relating to a significant action and a person has not notified the Treasurer of the action.³⁹

1.32 Where a fee is payable, a person is not taken to have given notice or made the application until the fee has been paid or the fee has been waived.⁴⁰ The Treasurer has the power to waive or remit the fee if the Treasurer is satisfied that it is not contrary to the national interest to do so.⁴¹ In effect, the Treasurer is not required to take any action before the fee is paid.

1.33 The amounts of the fees are set out in the Fees Imposition Bill (discussed below).

Other provisions

1.34 Under the Foreign Acquisitions Bill, the Treasurer may delegate all of the Treasurer's powers or functions to the Secretary of the Treasury, the Commissioner of Taxation or a public servant employed by Treasury or the ATO.⁴² In addition to enabling the Treasurer to require a person to give information or produce documents (as occurs under the Foreign Acquisitions Act), the Foreign Acquisitions Bill would enable officers from the ATO to exercise broad ranging investigatory powers.⁴³

1.35 The Explanatory Memorandum states that it is anticipated that the Treasurer will delegate the powers and functions relating to residential land to the Commissioner of Taxation.⁴⁴ The government has stated that the functions related to residential land would be transferred to the ATO (from Treasury) to improve compliance and enforcement through 'sophisticated data-matching systems and specialised staff with compliance expertise'.⁴⁵

1.36 Part 7 of Schedule 1 of the Foreign Acquisitions Bill imposes record keeping obligations as well provisions about the confidentiality of information.

39 Foreign Acquisitions Bill, item 4, proposed section 113 of Schedule 1.

40 Foreign Acquisitions Bill, item 4, proposed section 114 of Schedule 1.

41 Foreign Acquisitions Bill, item 4, proposed section 115 of Schedule 1.

42 Foreign Acquisitions Bill, item 4, proposed section 137 of Schedule 1.

43 Foreign Acquisitions Bill, item 4, proposed section 138 of Schedule 1.

44 Explanatory Memorandum, paragraph 7.21.

45 The Hon. Tony Abbott, MP, Prime Minister of Australia, and the Hon. Joe Hockey, MP, Treasurer, 'Government strengthens the foreign investment framework', Media release, 2 May 2015.

- 1.37 In addition, the Foreign Acquisitions Bill would make amendments through:
- Schedule 2, which contains amendments to the Foreign Acquisitions Act which are contingent on the commencement of the *Acts and Instruments (Framework Reform) Act 2015*;
 - Schedule 3, which provides application and transitional provisions for Schedules 1 and 2 and the Fees Imposition Bill; and
 - Schedule 4, which includes consequential amendments to the confidentiality provisions in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, the *Income Tax Assessment Act 1997*, the *Income Tax Assessment Act 1997*.

Fees Imposition Bill

1.38 The Fees Imposition Bill sets out the rates of the fees that would apply, with the rates of the fees subject to annual indexation from 1 July 2016. The fees range from \$5,000 to \$100,000, depending on the type of application or action.⁴⁶ The imposition of the fees is a tax under section 55 of the Australian Constitution.⁴⁷

1.39 In addition, the Fees Imposition Bill provides tie breaker rules for situations where multiple fees could apply.⁴⁸

1.40 The Fees Imposition Bill includes a regulation making power allowing for regulations to prescribe specified circumstances where a lower fee applies, or to prescribe a method of ascertaining the lower amount.⁴⁹

Register Bill

1.41 The Register Bill would establish a register (established and maintained by the ATO) from 1 July 2015 of foreign persons with interests in Australian agricultural land. Agricultural land means land in Australia that is used, or that could reasonably be used, for a primary production business.⁵⁰ There are two types of interests, or changes to interests, in agricultural land that a foreign person must report:

- freehold interests; and
- rights to occupy agricultural land under a lease (including a sublease) or licence where the term of the lease or licence (including any extension or renewal) is reasonably likely to exceed five years.⁵¹

46 Fees Imposition Bill, clauses 6, 7 and 8.

47 Fees Imposition Bill, clause 5.

48 Fees Imposition Bill, clause 9.

49 Fees Imposition Bill, clauses 11 and 13.

50 Register Bill, clause 4.

51 Register Bill, clause 19.

1.42 The register would be composed of two parts:

- the basic part, which would contain all information reported to the Commissioner of Taxation by persons with foreign holdings of agricultural land on or after 1 July 2015 (or information otherwise obtained by the Commissioner); and
- the statistical part, which contains statistics derived from the basic part of the register. The ATO is required to publish the statistical part of the register on a website and provide an annual report on the operation of the Act, including the statistical part of the register, to the Minister for presentation to the Parliament.⁵²

1.43 There are two reporting requirements under the Register Bill:

- foreign persons who hold interests in agricultural land at 1 July 2015 are required to report those interests to the ATO on or after the commencement of the Register Bill;⁵³ and
- foreign persons (and persons who have since ceased to be foreign persons) who acquire interests in agricultural land, or who experience changes to holdings of interests in agricultural land, are required to report those interests or changes which occur after 1 July 2015 to the ATO, generally within 30 days.⁵⁴ Similarly, agricultural landholders and leaseholders whose foreign person status changes are also required to report those interests or changes which occur 1 July 2015 to the ATO, generally within 30 days.⁵⁵ However, foreign persons are able to notify the ATO prior to the commencement of the Register Bill and they will generally be taken to have complied with the requirements under the Register Bill.⁵⁶

1.44 The Commissioner of Taxation has the general administration of the Register Bill, which makes it a taxation law under the *Taxation Administration Act 1953* (the Taxation Administration Act).⁵⁷ As such, the various provisions of the Taxation Administration Act apply including the uniform penalty regime, access and information gathering powers, confidentiality of taxpayer information and the power of the Commissioner to determine the content of the approved forms used to notify the ATO about interests in agricultural land.⁵⁸

52 Register Bill, clauses 14, 15, 16, 17 and 34.

53 Register Bill, clause 19.

54 Register Bill, clause 20.

55 Register Bill, clause 20.

56 Explanatory Memorandum, p. 161.

57 Register Bill, clause 32.

58 Explanatory Memorandum, p. 161.

Commencement

1.45 The majority of the changes in the Foreign Acquisitions Bill (in Schedules 1, 3 and 4) are scheduled to commence on 1 December 2015.⁵⁹ Schedule 2 of the Foreign Acquisitions Bill commences immediately after the commencement of Schedule 1 to the *Acts and Instruments (Framework Reform) Act 2015*.⁶⁰

1.46 The Register Bill commences at the same time as the Foreign Acquisitions Bill.⁶¹ Under the Fees Imposition Bill, fees apply from the later of the date after Royal Assent or 1 December 2015; however, no fees will apply if the Foreign Acquisition Bill does not receive Royal Assent.⁶²

Financial impact

1.47 It is expected that the package of bills will result in a \$667.2 million increase to consolidated revenue over four years, with \$735.0 million raised from the introduction of fees for foreign investment applications.⁶³ The 2015–16 Budget included additional funding for the Treasury (\$19.7 million over four years), the ATO (\$47.5 million over four years) and the Department of Agriculture (\$0.6 million over four years) to support additional work associated with the reforms.⁶⁴

Issues raised by scrutiny committees

1.48 The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) raised a number of concerns in relation to the Foreign Acquisitions Bill. The Scrutiny of Bills committee asked the Treasurer for advice on the rationale for the delegation of legislative power in regards to regulation-making powers that permits regulations to be made that provide:

- for a number of exceptions to the operations of the Foreign Acquisitions Bill;⁶⁵
- that a specified action is a 'significant action' for the purposes of the Foreign Acquisitions Bill;⁶⁶ and
- that a specified action is a 'notifiable action' for the purposes of the Foreign Acquisitions Bill.⁶⁷

59 Foreign Imposition Bill, clause 2.

60 Foreign Imposition Bill, clause 2.

61 Register Bill, clause 2.

62 Fees Imposition Bill, clause 2.

63 Explanatory Memorandum, p. 8.

64 Explanatory Memorandum, p. 8.

65 Foreign Acquisitions Bill, item 3, proposed section 37 of Schedule 1.

66 Foreign Acquisitions Bill, item 4, proposed section 44 of Schedule 1.

67 Foreign Acquisitions Bill, item 4, proposed section 48 of Schedule 1. See Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 9 of 2015*, 9 September 2015, pp. 6–8.

1.49 As at 14 October 2015, the Scrutiny of Bills committee had not yet tabled a report outlining the Treasurer's response. In addition, the Scrutiny of Bills committee also drew Senators' attention to a number of other provisions which raised issues around:

- the availability of merits and judicial review;
- trespass on personal rights or liberties—strict liability offence;
- trespass on personal rights or liberties—onus of proof;
- the delegation of legislative power; and
- trespass on personal rights or liberties—absolute liability.⁶⁸

1.50 The Scrutiny of Bills committee had no comments in relation to the Fees Imposition Bill and the Register Bill.⁶⁹ The Parliamentary Joint Committee on Human Rights considered that the package of bills did not require additional comment as the bills contain justifiable limitations on human rights.⁷⁰

Scope and structure of this report

1.51 This report comprises two chapters. The following chapter considers the issues raised by key stakeholders in submissions. The committee's overall conclusion can be found at the end of the next chapter.

1.52 As the committee has been asked to examine the provisions of the bills, this report does not examine issues that are beyond the scope of the primary legislation except to note some concerns raised about drafts regulations which will accompany the package of bills.

68 See Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 9 of 2015*, 9 September 2015, pp. 5–14.

69 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 9 of 2015*, 9 September 2015, pp. 15 and 19.

70 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report: Twenty-seventh report of the 44th Parliament*, 8 September 2015, pp. 1–2.

Chapter 2

Views on the bill

Purpose of the bill

2.1 As a small open economy, maintaining strong (inbound) foreign investment is essential to Australia's economic growth and development. When introducing the bills, the Treasurer indicated that the bills would:

...ensure Australia maintains a welcoming environment for investment—but one that ensures that the investment is not contrary to our national interest.

...

The package delivers a robust and enforceable regulatory framework and provides a predictable and welcoming environment for investors.¹

2.2 A number of changes made by the bills have their origins in a report by the House of Representatives Standing Committee on Economics on foreign investment in residential real estate, tabled in November 2014. The Hon. Joe Hockey MP referred this matter to the Standing Committee in March 2014. Under the terms of reference, the committee was to examine: the benefits of foreign investment into residential real estate; the impact of foreign investment on the supply of new housing; international regulatory comparisons; and, whether the administration of Australia's foreign investment policy relating to residential real estate could be enhanced.²

2.3 As noted in the previous chapter, the Coalition in opposition had also conducted broad ranging consultation on options to change the rules governing the sale of agricultural land to foreign entities.

2.4 On the Fees Imposition Bill, the Hon. Joe Hockey MP noted that the introduction of application fees would 'ensure Australian taxpayers are no longer required to fund the costs of the administration and enforcement of the foreign investment regime'.³

2.5 On the Register Bill, the Hon. Joe Hockey MP stated:

The register bill complements the lower agricultural screening thresholds that the government has put in place to deliver better scrutiny and transparency around foreign investment into Australia's agricultural sector.

...

1 The Hon. Joe Hockey, MP, *House of Representatives Hansard*, 20 August 2015, p. 8984.

2 House of Representatives Standing Committee on Economics, *Report on Foreign Investment in Residential Real Estate*, November 2014, pp. 2–3.

3 The Hon. Joe Hockey, MP, *House of Representatives Hansard*, 20 August 2015, p. 8986.

For the first time, the land register will provide a clear picture on the actual levels of foreign ownership of agricultural land in Australia.⁴

Evidence before the committee

2.6 The introduction of the bills follows extensive consultation undertaken by Treasury with industry stakeholders and state and territory governments on two options paper and exposure draft bills. The committee received evidence from a range of organisations, including:

- industry bodies;
- professional associations;
- commercial law firms; and
- the Foreign Investment Review Board.

2.7 Some submitters informed the committee that they had received a number of opportunities to express their views on Australia's foreign investment framework.⁵ However, stakeholders advised that certain issues of concern to them have not been addressed in the bills or have arisen following the consultation process.

2.8 During the inquiry, submitters considered the following main topics:

- the high regard for Australia's foreign investment framework;
- the imposition of application fees on all foreign investment applications;
- the importance of an appropriate penalty regime;
- enhanced compliance and enforcement capabilities;
- the importance of the register of foreign investment in agricultural land; and
- issues raised in relation to the Foreign Acquisitions and Takeovers Regulations 2015.

2.9 In this chapter, the committee discusses each specific topic including its findings on the matter. The committee's overall conclusion is at the end of this chapter.

High regard for Australia's foreign investment framework

2.10 Almost all submissions highlighted stakeholders' high regard for Australia's foreign investment framework. In particular, stakeholders recognised the importance of ensuring the foreign investment framework delivers investment that is in the national interest.

2.11 The Cattle Council of Australia highlighted the long history of foreign investment in the Australian beef industry and noted its support for the 'case-by-case assessment of foreign investments against the national interest test with powers vested

4 The Hon. Joe Hockey, MP, *House of Representatives Hansard*, 20 August 2015, p. 8986.

5 Real Estate Institute of Australia, *Submission 3*, p. 2; Property Council of Australia, *Submission 7*, p. 1.

in the Treasurer'.⁶ Similarly, the Urban Development Institute of Australia (Institute) considered that Australia's current foreign investment framework supports beneficial investment in the supply of new housing by 'directing foreign investment into newly constructed dwelling'.⁷

2.12 In regards to the reasons for changing Australia's foreign investment framework, the Foreign Investment Review Board observed:

While the framework has generally worked well since it was introduced, heightened community sensitivity over certain types of foreign investment (in particular agriculture and residential real estate), and shifts in global investment patterns are increasing community focus on the framework. These concerns have the potential to undermine confidence that foreign investment is in the national interest.⁸

2.13 One stakeholder, however, did express caution about the need to convey clearly to the Australian public the intentions behind the foreign investment framework. The Electronic Conveyancing Group (ECG), a collaboration between the Australian Bankers' Association, Australian Institute of Conveyances and the Law Council of Australia, expressed reservations about the changes, particularly in relation to residential real estate transactions:

The ECG accepts that there may be parts of the community who perceive that there is a compliance problem although this perception is not generally shared, or supported, in its view, by the members of its constituent bodies. The ECG suspects that the perception is being driven by unsuccessful auction bidders despairing at the affordability of dwelling prices and assuming that the successful buyer may be purchasing illegally. The underlying problem is the current real high price of dwellings in large capital cities.⁹

2.14 There was a general acceptance among submitters of the need to modernise Australia's foreign investment framework and ensure community confidence in the government's processing of foreign investment applications. Reflecting these considerations, the Institute noted that it supported:

...aspects of the Legislation Amendment Bill designed to strengthen enforcement of the existing foreign investment framework to reduce incidences of non-compliance, and improve community confidence in the policy.¹⁰

6 Cattle council of Australia, *Submission 2*, p. 2.

7 Urban Development Institute of Australia, *Submission 9*, p. 1.

8 Foreign Investment Review Board, *Submission 5*, p. 1.

9 Electronic Conveyancing Group, *Submission 12*, pp. 3–4.

10 *Submission 9*, p.1.

Lowering compliance costs for investors

2.15 Some stakeholders highlighted the importance of streamlining existing provisions and processes to ensure the application processes under the foreign investment framework are as efficient as possible so the impact on the level of foreign investment is close to zero. Hickey Lawyers, for example, noted that Australia must compete on the international stage for foreign investment: '[f]oreign investors are continually looking to invest their money into offshore projects and opportunities, and Australia is just one of many places that is attracting these investment dollars'.¹¹ Noting that the lowering of the value of the threshold test for purchases of agricultural land would increase the number of applications, the Cattle Council of Australia emphasised that 'there must be focus on ensuring that the administrative procedures for processing applications are efficient, timely and not bureaucratic'.¹²

2.16 The Foreign Acquisitions Bill updates and streamlines a number of the existing provisions of the Foreign Acquisitions Act, which has not been significantly updated since it was introduced in the 1970s.¹³ The Foreign Investment Review Board asserted that the package of bills would reduce compliance costs and complexity through a number of changes:

Compliance costs and complexity will be reduced by removing routine cases from the system and more closely aligning key concepts and definitions with other corporate legislation such as the *Corporations Act 2001*. For example, the substantial interest threshold will be raised from 15 to 20 per cent to align with Australia's takeover rules. This means investors acquiring a stake of less than 20 per cent will no longer need foreign investment approval.¹⁴

2.17 The modernisation of Australia's foreign investment framework was supported by a number of stakeholders, including the Financial Services Institute of Australia (Finsia) who submitted that:

The proposed modernisation of Australia's foreign investment laws address a number of the problems in the existing regime. Finsia is of the belief that enacting these reforms will, for the most part, do much to improve Australia's reputation internationally as a place to do business.¹⁵

2.18 In addition, the Foreign Investment Review Board noted that one of the key improvements made by the package of bills is the incorporation of all types of foreign investment applications into the legislative framework:

Australia's foreign investment framework currently includes some non-legislative prior approval requirements that are set out in Australia's

11 Hickey Lawyers, *Submission 1*, attachment 1, p. 2.

12 *Submission 2*, p. 3.

13 *Submission 5*, p. 2.

14 *Submission 5*, p. 2.

15 Financial Services Institute of Australia, *Submission 10*, p. 1.

Foreign Investment Policy (Policy-only requirements). The reforms ensure that these Policy-only requirements (such as those relating to foreign government investors) are incorporated into the legislative framework to increase legal certainty for investors, legal advisers and Government.¹⁶

2.19 Thus, while there was general support for the current foreign investment regime, submitters identified scope for further improvement.

The imposition of application fees on all foreign investment applications

2.20 The Foreign Acquisitions Bill provides the framework for the types of applications foreign persons must submit for approval, while the Fees Imposition Bills sets out the rates of the fees that would apply for each application. The fees range from \$5,000 to \$100,000, depending on the type of application or action.¹⁷

2.21 The House of Representatives Standing Committee, in its report on foreign investment in residential real estate, recommended that the government apply a modest administrative fee to the screening for all foreign purchases of residential real estate.¹⁸ The Standing Committee suggested that a fee of between \$500 and \$1,500 per residential real estate application could be considered to enhance compliance activities and data collection.¹⁹

2.22 Some stakeholders supported the introduction of application fees but indicated that the fees should seek only to cover the cost of processing foreign investment applications. For example, the Cattle Council of Australia supported the introduction of application fees but was of the view that:

...these fees must be imposed on a purely cost-recovery basis, consistent with the *Australian Government Cost Recovery Guidelines*...any measures to increase consolidated revenue from application fees would act [as] a deterrent for investment and should not be considered.²⁰

2.23 The National Farmers' Federation expressed a similar sentiment:

The NFF does not support the proposed fee rates. The NFF maintains its support for a full cost-recovery model, whereby investors are charged only for the cost required to screen their investment proposals. In the NFF's view, such an approach will work to drive efficiency and transparency within the FIRB [Foreign Investment Review Board].²¹

2.24 More specifically, the Property Council of Australia commented in relation to residential real estate:

16 *Submission 5*, p. 2.

17 Fees Imposition Bill, clauses 6, 7 and 8.

18 House of Representatives Standing Committee on Economics, *Report on Foreign Investment in Residential Real Estate*, November 2014, p. 39.

19 House of Representatives Standing Committee on Economics, *Report on Foreign Investment in Residential Real Estate*, November 2014, p. 38.

20 *Submission 2*, p. 3.

21 National Farmers' Federation, *Submission 11*, p. 9.

The Property Council remains opposed to the FIRB [Foreign Investment Review Board] application fees proposed, particularly as they apply to residential property. The fees are unjustifiably high, and in our view do not accurately reflect the administrative cost of the new processes.²²

2.25 Also in relation to real estate, the Institute submitted that it 'was unclear why the cost of administering an application should be positively correlated to the value of the property, as suggested by the fee regime'.²³ The Institute observed that the proposed fee structure was 'unlikely to be reflective of the true costs borne by the Government in administering the foreign investment regime'.²⁴ The Institute proposed that there be no application fee for new residential dwellings, but that fees for other types of investment could be increased to reflect their higher compliance costs.²⁵

2.26 The government has repeatedly indicated its intention to introduce application fees on all foreign investment proposals throughout the consultation process on options to reform Australia's foreign investment framework. According to the Explanatory Memorandum, the imposition of fees for foreign investment applications will:

...ensure that those who undertake activities regulated by the *Foreign Acquisitions and Takeovers Act 1975* (Act) rather than the general community bear the costs relating to the administration of the Act, including the costs of monitoring compliance with the legislation, investigating alleged breaches and commencing enforcement proceedings in appropriate cases.²⁶

2.27 Some submissions contended that the nature of the application fee (that is, being an application fee for a potential investment rather than payment for an actual investment) would put Australia at a disadvantage for attracting foreign investment compared with other similar jurisdictions. For example, the ECG concluded (succinctly) that the 'proposed fees should be approval, not application, based'.²⁷

2.28 Echoing these concerns, Hickey Lawyers noted that:

...apart from New Zealand (which itself only applies to 'sensitive land'), Australia will be the *only* jurisdiction to require an upfront, non-refundable application fee on foreign investment.

...[the application fee] appears to be a non-refundable tax levied against foreign investments which only allows the investor the right to enter into

22 *Submission 7*, p. 1.

23 *Submission 9*, p. 2.

24 *Submission 9*, p. 2.

25 *Submission 9*, p. 2.

26 Explanatory Memorandum, paragraph 12.4.

27 *Submission 12*, p. 5.

the property market. It is not linked to, nor does it guarantee, investment approval or the ultimate settlement of the proposed acquisition.²⁸

2.29 Hickey Lawyers recommended the government consider the foreign investment approval processes in Hong Kong and Singapore, which Hickey Lawyers contended have a 'much simpler system of "payment per acquisition" and does not carry the same level of negative undertone as is inferred by an upfront application fee'.²⁹

2.30 Hickey Lawyers opposed the introduction of any fees for foreign investments applications or approvals on the grounds that they would have a negative effect on the level of foreign investment:

The Government should fund the enforcement area from other sources rather than through a new tax system targeted on one class of investor.

We urge the Government to abandon new fees for property purchases. Should the Government wish for Australia to continue to prosper from foreign investment, it should maintain its current status quo in this regard.³⁰

2.31 Further, stakeholders raised concerns about the impact of the application fees on particular groups, including foreign investors searching for residential real estate over a substantial period of time and property developers seeking approval for off-the-plan developments, which will be explored below.

Section 59 certificates for established dwellings—concerns over the time period for foreign investors buying property at auction

2.32 The Real Estate Institute of Australia (REIA) raised concerns in its submission about the timeframe—for each application fee—for foreign investors who are bidding at multiple property auctions over a period of time.³¹ REIA had initially suggested, in response to Treasury's February 2015 options paper, that an additional provision was required to ensure foreign investors did not have to pay an application fee for each real estate auction they attended. A provision was inserted into the Foreign Acquisitions Bill to allow foreign investors to bid at multiple auctions for established dwellings over a specified period of time (known as a 'section 59 certificate'):

The new section 59 certificate for established dwellings allows a foreign person to bid at multiple auctions over a specified period (such as six months) while only paying one application fee. In the absence of such a certificate, foreign persons bidding at auctions would need prior foreign investment approval because bids at auction normally have to be unconditional. Only one property will be allowed to be purchased under each certificate and it will be a condition of the certificate that the foreign

28 *Submission 1*, attachment 1, p. 2.

29 *Submission 1*, attachment 1, p. 3.

30 *Submission 1*, attachment 1, p. 7.

31 Real Estate Institute of Australia, *Submission 3*, p. 3.

person notifies the Australian Taxation Office (ATO) once they have purchased a property.³²

2.33 The RIS for the package of bills provided the following explanation of the purpose of the section 59 certificate:

This [section 59 certificate] would alleviate the need for individual foreign investors to pay multiple application fees.

This is appropriate where a foreign person is in the unique competitive environment of an auction. Sales of residential real estate by a negotiation or 'for sale' arrangement are typically subject to the purchaser receiving approval under the [Foreign Acquisitions] Act should it be required. It would be expected that such arrangements would continue.³³

2.34 REIA, in its submission, expressed satisfaction that the provision had been inserted into the Foreign Acquisitions Bill following consultation but indicated that the six month timeframe mentioned in the explanatory materials would not be reasonable for a potential foreign investor:

REIA does not think that this [six month timeframe] is reasonable for a potential buyer who has been active in seeking a property. The lack of success is most likely attributable to failing to find the right property at the budgeted price.... After consultation with our members we have ascertained that it is not uncommon for this to take much longer than six months. A further complication may arise if a long settlement period is agreed to.³⁴

2.35 REIA recommended that where a foreign investor, having already paid the requisite application fee, requires additional time to purchase a property they should be permitted to do so—without incurring an additional application fee—after seeking approval for an extension.

2.36 Importantly, the Foreign Acquisitions Bill itself does not provide that the time period for section 59 certificates is a six month time period. Instead, the Foreign Acquisitions Bill provides that the section 59 certificate (in addition to other exemption certificates) may specify a period during which the certificate is in force.³⁵ In effect, the timeframe is not set out in the bills or in the regulations and is up to the discretion of the ATO when they issue the section 59 certificate.

Committee view

2.37 The committee draws to the attention of the ATO the concerns about the timeframe for section 59 certificates for established dwellings, so that the concerns can be considered when section 59 certificates are issued to foreign persons.

32 Explanatory Memorandum, paragraph 3.32.

33 Department of the Treasury, *Regulation Impact Statement: Foreign investment proposals*, 14 September 2015, paragraphs 1.228 and 1.229, <http://ris.dpmc.gov.au/2015/09/14/strengthening-australias-foreign-investment-framework/> (accessed 15 September 2015).

34 *Submission 3*, p. 3.

35 Foreign Acquisitions Bill, item 4, proposed paragraph 60(1)(b) of Schedule 1.

2.38 Section 59 certificates should specify a realistic time period which takes into consideration the difficulty foreign persons may have in purchasing a suitable established dwelling, particularly when the housing market is booming, in order to alleviate the need for foreign persons to pay multiple application fees.

Application fees for section 57 exemption certificates for new dwellings (off-the-plan developments)

2.39 Section 57 of the Foreign Acquisitions Bill allows property developers (Australian or foreign) to apply for an exemption certificate allowing them to sell all new dwellings in a development of 100 or more dwellings to foreign persons. Foreign persons purchasing dwellings in a section 57 development do not require separate approval.³⁶ To obtain a section 57 exemption certificate, property developers will need to pay an application fee of \$25,000 as well as a six monthly reconciliation of properties sold to foreign persons based on the usual fees for residential real estate.³⁷

2.40 In effect, property developers will pay \$25,000 in advance for the exemption certificate and then pay the relevant residential real estate application fees for any properties sold to foreign investors.

2.41 Hickey Lawyers raised concerns about the ability of property developers to fund an exemption certificate under section 57 of the Foreign Acquisitions Bill, which is required to market off-the-plan developments.³⁸ Similarly, the ECG noted that the introduction of application fees would increase costs for businesses, 'especially for off-the-plan bulk approvals'.³⁹

2.42 The Institute also had reservations about the cost of section 57 exemption certificates and submitted that:

...the overall administrative cost to the Government of issuing an advanced off the plan certificate for a particular development should be less than granting approval for every unit in that development on an individual basis...

This is not reflected in the Fees Imposition Bill, which proposed the introduction of a \$25,000 upfront application fee on developers, in addition to the per dwelling fee structure, which would imply a much larger administrative cost from using advancing off the plan certificates, when this is not the case.⁴⁰

2.43 Further, the Institute warned the committee that the cost of section 57 exemption certificates may encourage developers to forego applying for a section 57

36 Foreign Acquisitions Bill, item 4, proposed section 45 of Schedule 1.

37 Fees Imposition Bill, clause 6. The fee for residential properties valued at \$1 million or less is \$5,000, while the fee for residential properties valued at greater than \$1 million is \$10,000 then \$10,000 incremental fee per additional \$1 million in property value.

38 *Submission 1*, p. 3.

39 *Submission 12*, p. 4.

40 *Submission 9*, p. 3.

exemption certificate.⁴¹ Instead, the government would likely incur higher administrative costs if foreign persons seek approval on an individual basis for new dwellings they purchase.⁴² Property developers will need to weigh up the compliance and administrative costs of each option.

Committee view

2.44 The government has consistently indicated its intention to introduce an application fee on all foreign investment proposals to ensure that Australian residents are not required to cover the cost of administering the foreign investment framework. By transferring some compliance functions to a specialised investigative and enforcement area in the ATO, the community will benefit from significantly stronger compliance, information gathering powers and data collection. The cost of these auditing, compliance and enforcement activities should not be a financial burden to the Australian community.

2.45 The changes to the foreign investment framework will lower the compliance burden for investors and business in a number of ways, and cutting red tape on foreign investment applications will help to ensure the changes to Australia's foreign investment framework will not significantly deter future foreign investment. For example, the committee considers that creating a comprehensive legislative framework is an important step to lowering compliance costs for investors.

The importance of an appropriate penalty regime

2.46 The Foreign Acquisitions Bill increases the maximum criminal penalty that would apply to breaches of the foreign investment framework and introduces civil penalty orders and infringement notices. The Treasurer also retains other powers such as divestment orders to respond to breaches of the foreign investment approvals process.

2.47 The House of Representatives Standing Committee, in its report on foreign investment in residential real estate, recommended that the government introduce these enhanced and additional penalties to motivate better compliance and provide more options for enforcement activities.⁴³

2.48 Support among stakeholders for the increased maximum penalties and the introduction of civil penalty provisions and infringement orders was mixed. In regard to the agricultural sector, the Cattle Council of Australia indicated they supported the new penalty regime:

While we acknowledge there is little evidence to suggest non-compliance with conditions imposed on approved agricultural investments, the

41 *Submission 9*, p. 3.

42 *Submission 9*, p. 3.

43 House of Representatives Standing Committee on Economics, *Report on Foreign Investment in Residential Real Estate*, November 2014, pp. 39–41.

imposition of civil pecuniary penalties would provide additional remedies to the government to pursue non-compliance.⁴⁴

2.49 In contrast, the ECG considered that there was 'no evidence to support additional civil penalties at this time'.⁴⁵

2.50 Hickey Lawyers opposed key aspects of the new penalty regime because of the message it sends to potential foreign investors:

Whilst we accept that breaches of the foreign investment review rules need to be properly enforced, and appropriate deterrents need to be in place, a penalty regime of this nature runs the risk of becoming a *blanket* deterrent to investment on the whole, rather than a *targeted* deterrent to those actively looking to breach the rules.

For example, imposing criminal sanctions on property developers marketing [new dwellings] exclusively overseas send the message that Australia is not 'open for business'...⁴⁶

2.51 The Foreign Acquisitions Bill introduces civil penalties for officers of corporations who authorise, permit or fail to prevent contraventions of requirements under the Foreign Acquisitions Bill.⁴⁷ In addition, Part 2.4 of the *Criminal Code* extends criminal liability to a person who may not directly or individually have committed an offence, for example through being an accomplice.⁴⁸ The ECG raised concerns with this approach:

The ECG is opposed to any suggestion of making third parties liable for the acts or omissions of the principal parties other than for the current penalties for aiding and abetting the commission of an offence. There will be a substantial transaction cost to all Australians to the extent that lawyers, conveyancers, and financiers are burdened by additional risk and compliance obligations.⁴⁹

2.52 The House of Representatives Standing Committee recommended that third parties who knowingly assist a foreign investor to breach the foreign investment framework should also be subject to civil and criminal penalties.⁵⁰

Committee view

2.53 The committee considers that the enhanced and expanded penalty regime will provide the government with useful tools to ensure compliance, even though there is

44 *Submission 2*, p. 2.

45 *Submission 12*, p. 5.

46 *Submission 1*, attachment 1, p. 5.

47 Foreign Acquisitions Bill, item 4, proposed sections 101 and 102 of Schedule 1.

48 Foreign Acquisitions Bill, item 4, proposed sections 102 and 103 of Schedule 1.

49 *Submission 12*, p. 4.

50 House of Representatives Standing Committee on Economics, *Report on Foreign Investment in Residential Real Estate*, November 2014, pp. 39–40.

currently limited evidence of non-compliance. These changes also bring the penalties for the foreign investment framework into line with penalty regimes for other regulatory regimes such as the *Corporations Act 2001*.

Enhanced compliance and enforcement capabilities

2.54 The changes to the foreign investment framework are complemented by an increased focus on compliance functions and an increase in funding to improve compliance and monitoring. In its report on foreign investment in residential real estate, the House of Representatives Standing Committee recommended that appropriate processes for the purposes of audit, compliance and enforcement of the foreign investment framework be put in place by the Foreign Investment Review Board.⁵¹

2.55 The government announced the transfer of approval of real estate applications to the ATO (from Treasury) on 2 May 2015, effective from that date.⁵² This includes the upfront screening, compliance and enforcement for foreign investment in residential real estate, as well as the collection of fees for all foreign investment applications (including residential real estate, business, agriculture and commercial real estate applications).⁵³

2.56 The government considered that the transfer of functions to the ATO would provide stronger enforcement of the foreign investment framework because of the ATO's 'sophisticated data-matching systems and specialised staff with compliance expertise'.⁵⁴ The Foreign Acquisitions Bill would allow the Treasurer to delegate all of the Treasurer's powers or functions to the Secretary of the Treasury, the Commissioner of Taxation or a public servant employed by Treasury or the ATO, providing flexibility to delegate to the most appropriate agency in the Treasury portfolio. The Foreign Investment Review Board emphasised the benefits for foreign investors flowing from this focus:

Foreign investors will also benefit from better service delivery. In addition to the funding that has been provided to the Australian Taxation Office to increase compliance and enforcement activities, additional funding has also been provide to Treasury so that the Foreign Investment Review Board can

51 House of Representatives Standing Committee on Economics, *Report on Foreign Investment in Residential Real Estate*, November 2014, p. 39.

52 The Hon. Tony Abbott, MP, Prime Minister of Australia, and the Hon. Joe Hockey, MP, Treasurer, 'Government strengthens the foreign investment framework', Media release, 2 May 2015.

53 Department of the Treasury, *Australian Government response to the House of Representatives Standing Committee on Economics report: Foreign Investment in Residential Real Estate*, August 2015, pp. 2–3.

54 The Hon. Tony Abbott, MP, Prime Minister of Australia, and the Hon. Joe Hockey, MP, Treasurer, 'Government strengthens the foreign investment framework', Media release, 2 May 2015.

increase engagement with clients and intermediaries and improve service levels.⁵⁵

2.57 Hickey Lawyers supported the transfer of powers and functions to the ATO:

Generally, we support greater compliance and enforcement measures within the foreign investment review framework...we support the creation of a new compliance and enforcement area in the Australian Taxation Office to address compliance matters.⁵⁶

2.58 On the other hand, the ECG submitted that it 'has not seen any evidence or statement from government in the last 12 months or so that justifies such an expensive compliance regime'.⁵⁷

Committee view

2.59 The committee considers that the delegation of functions to the ATO and increased funding to both the ATO and Treasury will deter non-compliance and, as a result, improve the community's perception of compliance with the foreign investment framework.

The importance of the register of foreign investment in agriculture land

2.60 In its report on foreign investment in residential real estate, the House of Representatives Standing Committee received evidence that current data limitations lead to poor decision-making by governments and speculative debate over the level of foreign investment in Australia:

The quality of the currently available data on foreign investment in residential property was a regular topic of discussion in the written submissions to this inquiry and in the evidence given to the committee at public hearings. A consistent theme emerges from this evidence, which is that data needs to be improved to enable better informed decision-making.⁵⁸

2.61 The Standing Committee recommended that the government, in conjunction with the states and territories, establish a national register of land title transfers that records the citizenship and residency status of all purchasers of Australian real estate.⁵⁹

2.62 In the explanatory material accompanying the package of bills, the government acknowledged that the current data collection for foreign investment for real estate was insufficient:

55 *Submission 5*, p. 2.

56 *Submission 1*, attachment 1, p. 5.

57 *Submission 12*, p. 3.

58 House of Representatives Standing Committee on Economics, *Report on Foreign Investment in Residential Real Estate*, November 2014, p. 55.

59 House of Representatives Standing Committee on Economics, *Report on Foreign Investment in Residential Real Estate*, Recommendation 8, November 2014, p. 75.

There is no definitive data source showing how much Australian land is owned by foreigners. Treasury only collects data on approvals of applications submitted to it, which are published in the FIRB [Foreign Investment Review Board] Annual Report. It does not track whether an approval translated into an acquisition or a subsequent disposal of a property.⁶⁰

2.63 In light of the current data limitations, stakeholders welcomed the establishment of the register of foreign persons with interests in Australian agricultural land. The Cattle Council of Australia submitted that the 'maintenance of a foreign investment register is a useful tool to the inform Australian Government decisions on investment'.⁶¹ Finsia also considered that the register could provide valuable information to all Australians in policy discussions about foreign investment:

Finsia believes that a national register of foreign ownership of agriculture land is an initiative that could serve to dispel common misconceptions about foreign direct investment.

...

Finsia submits that regular reporting of this data could be used to encourage genuine debate about how foreign investment can benefit Australia in the coming decades.⁶²

2.64 The Law Society of New South Wales expressed reservations about the timing provided for foreign persons to notify the ATO of interests in agricultural land and the compliance burden of the obligations. The Law Society of New South Wales contended that:

- foreign persons must give notice to the ATO in the approved form within 30 days of the event occurring (or within 30 days of the Register Bill commencing, for events which occur before the commencement of the Register Bill), which may be an insufficient period of time for foreign persons with large land holdings;
- other parties, such as the executor or administrator of a person's estate and the liquidator of a corporation, may be required to give notice the ATO in the approved form within 30 days of a foreign persons' event occurring, which may be an insufficient period of time depending on the circumstances; and
- the ATO's approved form must be completed on a 'per lot' basis, which is a time-consuming process for foreign persons who have an interest in multiple lots or whose rural property consists of a number of lots.⁶³

60 Department of the Treasury, *Regulation Impact Statement: Foreign investment proposals*, 14 September 2015, paragraph 1.101, <http://ris.dpmc.gov.au/2015/09/14/strengthening-australias-foreign-investment-framework/> (accessed 15 September 2015).

61 *Submission 2*, p. 3.

62 *Submission 10*, p. 3.

63 *Submission 6*, pp. 2–5.

2.65 As the Register Bill is a taxation law, the Commissioner of Taxation has powers under the Taxation Administration Act to:

- provide further time for foreign investors to notify the ATO; and
- determine the content of an approved form and the manner in which it is given to the Commissioner of Taxation, including by electronic means.⁶⁴

Expansion of the register to include all types of land

2.66 The government has indicated that the register will be expanded at a later date to include data on foreign investment in all types of land, not just agricultural land.

When fully operational, the register will capture all land transfers to and from foreign persons, regardless of whether the land is agricultural, commercial or residential.

...

The Government is currently negotiating with States and Territories to leverage from their existing State and Territory land title collects to establish the all land register.

...

From 1 July 2016 it is expected that the register would include information on all land types with data to be supplied from the States and Territories. There is no proposal to conduct a stocktake of existing foreign ownership of other types of land.⁶⁵

Committee view

2.67 The committee considers that the establishment of a national register of foreign investment in land title transfers will aid both compliance and public discussion about foreign investment trends. Further, leveraging off state and territory data collections will avoid duplication and unnecessary red tape for foreign investors.

2.68 Even so, the committee notes the concerns raised about the compliance burden posed by the ATO's approved form, particularly for foreign persons who own multiple lots of agricultural land. The committee recognises that the content and format of the approved form should be as simple and straightforward as possible to minimise the compliance burden on foreign persons with an interest in Australian agricultural land. The ATO website currently advises foreign persons who need to register their interest in more than one property to either complete multiple forms or contact the ATO via email.⁶⁶ In the committee's view, the Commissioner of Taxation

64 Taxation Administration Act, sections 388-50 and 388-55 of Schedule 1.

65 Department of the Treasury, *Regulation Impact Statement: Foreign investment proposals*, 14 September 2015, paragraphs 1.102, 1.104 and 1.107, <http://ris.dpmc.gov.au/2015/09/14/strengthening-australias-foreign-investment-framework/> (accessed 15 September 2015).

66 ATO, 'Agricultural land registration form and instructions – individuals and partnerships', <https://www.ato.gov.au/Forms/Agricultural-land-registration-form-and-instructions---individuals-and-partnerships/> (accessed 26 September 2015).

should consider ways to simplify the notification process for foreign persons who hold or acquire interests in multiple lots of agricultural land.

Issues raised in relation to the Foreign Acquisitions and Takeovers Regulations 2015

2.69 As part of this inquiry, the committee only considered matters raised in regards to the package of bills. However, submitters often referred to matters in the Foreign Acquisitions and Takeovers Regulations 2015 (the associated regulations) as an exposure draft of the associated regulations was released as part of the Treasury consultation process. The associated regulations are intended to replace the Foreign Acquisitions Regulations.

2.70 The government has indicated that it intends to undertake further consultation in relation to the associated regulations before they are made.⁶⁷ As such, the committee notes the following matters for consideration as part of that consultation process.

Definition of agribusiness

2.71 The associated regulations define agribusinesses based on classes of the Australian and New Zealand Standard Industry Classification (ANZSIC) codes; an agribusiness is defined to include classes in Division A as well as any classes in Subdivision C (food product manufacturing), with some exemptions.

2.72 The National Farmers' Federation and the Australian Food and Grocery Council both submitted that certain supply chain business types should not be captured by the definition of agribusiness as this could deter foreign investment in the food supply chain.⁶⁸ The Australian Food and Grocery Council proposed that the definition of agribusiness should apply to activities covered by Division A of the ANZSIC codes only.⁶⁹ In contrast, the Cattle Council of Australia did not have a preference as to whether the definition of agribusiness should be extended to meat processing or other aspects of the supply chain.⁷⁰

2.73 The National Farmers' Federation and the Australian Food and Grocery Council also raised concerns about the percentage of the value of the assets of a business that needs to be classified as an agribusiness for the purposes of the Foreign Acquisitions Bill. The associated regulations state that an Australian business is an agribusiness if the value of assets of the business in the relevant ANZSIC codes is at least 25 per cent of the total asset value of the business.⁷¹ The National Farmers' Federation and the Australian Food and Grocery Council both submitted that 25 per

67 Department of the Treasury, *Regulation Impact Statement: Foreign Investment Proposals*, 14 September 2015, p. 39, <https://ris.govspace.gov.au/files/2015/09/Foreign-investment-reforms-RIS-web-accessible.pdf> (accessed 15 September 2015).

68 Australian Food and Grocery Council, *Submission 8*, p. 6; *Submission 11*, p. 11.

69 *Submission 8*, p. 3.

70 *Submission 2*, p. 3.

71 *Submission 11*, p. 12.

cent is too low and may capture businesses that are largely not an agribusiness; instead, they submitted the percentage of the value of the assets should be raised to at least 50 per cent.⁷²

Definition of direct interest in a business

2.74 Generally, the associated regulations define an investor taking a 'direct interest' in a company if a 10 per cent or greater share of the company is acquired.⁷³ However, there is also a provision in the associated regulations which states that if a foreign investor has a 5 per cent stake in a company and adds a new interest of at least 1 per cent, this new interest will require foreign investment approval. The National Farmers' Federation and the Australian Food and Grocery Council both considered that this provision is too onerous for the size of the investment and recommended that a foreign investor should have a stake of at least 10 per cent (instead of 5 per cent) before the obligations for a new interest applies.⁷⁴

Threshold tests for purchases of agricultural land and agribusinesses

2.75 From 1 March 2015, the government reduced the threshold test for purchases of agricultural land (previously known as 'Australian rural land') from \$252 million to \$15 million for investors from most countries. This \$15 million threshold is cumulative, capturing combined purchase values. This change was implemented through Australia's Foreign Investment Policy, which is a Ministerial statement, and will also be made through the associated regulations. Schedule 3 of the Foreign Acquisitions Bill contains transitional provisions relevant to actions relating to agricultural land during this period.

2.76 The Cattle Council of Australia considered that this \$15 million threshold test may be too low and may potentially deter investment.⁷⁵ However, given the threshold was already in place, the Cattle Council of Australia proposed that the focus should now be on streamlining administrative process for processing applications so that the process did not prove to be a deterrent to foreign investment in agricultural land.⁷⁶ The National Farmers' Federation supported the \$15 million threshold, stating:

Though some NFF [National Farmers' Federation] members oppose the threshold being cumulative, the NFF believes it is in the best interests of the broader sector to support a cumulative threshold.⁷⁷

2.77 In addition, the changes to the foreign investment framework introduced a \$55 million threshold (based on the value of investment) for direct investments in agribusinesses to capture downstream or supply chain activities with links to primary

72 *Submission 11*, p. 12; *Submission 8*, p. 7.

73 *Submission 11*, p. 12.

74 *Submission 11*, p. 12; *Submission 8*, p. 8.

75 *Submission 2*, p. 3.

76 *Submission 2*, p. 3.

77 *Submission 11*, p. 9.

production. Similar to the threshold value for agricultural land, the \$55 million threshold value for direct investments in agribusinesses will be implemented through the associated regulations. The National Farmers' Federation supported the \$55 million threshold for agribusinesses.⁷⁸

Other issues

2.78 Herbert Smith Freehills made a number of proposals, including widening the underwriter exemption to include foreign government investors.⁷⁹ Herbert Smith Freehills also suggested amending the definition of 'agreement country investor' to include entities who invest through any jurisdiction with which Australia maintains diplomatic relations and incorporating an exemption for acquisitions of land that are 'wholly incidental' to the investor's business activities.⁸⁰

Conclusion

2.79 The committee recognises that foreign investment plays an important role in the Australian economy. Australia's foreign investment framework, with its case-by-case assessment of applications to ensure they are not contrary to the national interest, has played a major role in ensuring foreign investment supports economic activity and should be retained.

2.80 That said, the committee notes that Australia's foreign investment legislation has not been updated in almost 40 years despite the significant changes in foreign investment trends and approaches to regulation that have occurred during that time. It is also apparent that reforms are needed to improve community confidence in Australia's foreign investment framework, particularly with regards to the penalty regime and the level of compliance and enforcement of the rules. These issues were among those raised during the government's extensive consultation on the package of bills with industry stakeholders and state and territory governments.

2.81 The committee has considered the evidence and formed the view that the package of bills, through tougher penalties and increased compliance and enforcement capabilities, will help deter non-compliance. In addition, the improved data collection and transparency of collected information will provide valuable information to both the government and the community about foreign investment trends and levels of non-compliance.

Recommendation 1

2.82 The committee recommends the bills be passed.

Senator Sean Edwards
Chair

78 *Submission 11*, p. 6.

79 Herbert Smith Freehills, *Submission 4*, p. 2.

80 *Submission 4*, pp. 4–5.

Dissenting Report by Labor Senators

1.1 Labor Senators support some measures contained in the package of bills subject to this inquiry: the Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015, the Foreign Acquisitions and Takeovers Fees Imposition Bill 2015, and the Register of Foreign Ownership of Agricultural Land Bill 2015.

1.2 These measures include changes to the rules relating to residential property and the register of agricultural land.

1.3 However, Labor Senators have deep concerns about other measures, as outlined in this dissenting report.

1.4 For this reason, Labor Senators recommend the Government not proceed with the bills in their current form.

Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015 (Foreign Acquisitions Bill)

1.5 The Foreign Acquisitions Bill makes substantial changes to the *Foreign Acquisitions and Takeovers Act 1975* (Foreign Acquisitions Act), changing foreign investment rules and strengthening the enforcement measures.

1.6 The Foreign Acquisitions Bill introduces civil penalties and stricter criminal penalties against foreign investors and their intermediaries breaking the rules.

1.7 The Foreign Acquisitions Bill enables the transfer of responsibility for regulating foreign investment in residential real estate to the Australian Taxation Office (ATO), which will further strengthen enforcement and compliance with the existing rules.

Foreign Acquisitions and Takeovers Fees Imposition Bill 2015 (Fees Imposition Bill)

1.8 The Fees Imposition Bill introduces fees on all foreign investment applications, intended to ensure Australian taxpayers are no longer funding the administration of the system, while providing additional resourcing to the Treasury and the ATO to improve service delivery for investors.

Register of Foreign Ownership of Agricultural Land Bill 2015 (Register Bill)

1.9 The Register Bill establishes a register of foreign ownership of agricultural land that will be operated by the ATO. Foreign persons will be required to register information about their existing holdings and subsequent acquisitions and disposals of Australian agricultural land, providing greater transparency around the levels of foreign ownership of agricultural land.

Higher fees

1.10 While Labor Senators are not opposed to the introduction of full cost-recovery arrangements, we recommend the Government consider a simpler, more streamlined approach to the one proposed.

1.11 We note that the Office of Best Practice Regulation asserts the new red tape burden is being imposed by the Government without proper assessment of the increased regulatory burden.

1.12 We also note that the Property Council of Australia has expressed concerns that the new fees could undermine, rather than promote, housing affordability. These concerns should be closely monitored.

1.13 Under the Government's proposals, Australia will have 22 different screening thresholds and categories, which vary depending on the value and type of investment and the nationality of the investor; and 33 different levels and categories of application fees, ranging from \$5,000 to \$100,000.

1.14 The increase in fees is significant. The complexity imposed by the new fee structure will make Australia a less attractive investment destination. It is hard to see how such a complex and burdensome system can do otherwise.

New housing measures

1.15 Labor Senators are prepared to support the measures in this legislation relating to residential property investment, such as the transfer of responsibility for regulating foreign investment in real estate to the ATO to ensure stronger enforcement and better compliance with existing rules.

1.16 But Labor Senators do not consider that these measures are a sufficient response to the housing affordability crisis, and these bills are a very poor substitute for a comprehensive affordable housing plan.

1.17 Recent measures that this Government has introduced have had a negative impact on housing affordability, including abolishing the National Housing Supply Council and the National Rental Affordability Scheme.

1.18 Whilst there are benefits in imposing—and enforcing—restrictions on foreign investment in real estate that does not increase housing stocks, the Government should be cautious to ensure that the value and impact of these actions is not overstated.

New agricultural land and agribusiness investment screening thresholds

1.19 Labor Senators recognise that trade and investment are two sides of the same coin. To take advantage of new markets abroad, Australia needs to continue encouraging investment—including foreign investment—to support production at home.

1.20 Foreign investment has been critical to Australia's economic development, and will remain critical to our future prosperity. The National Farmers' Federation has estimated that Australian agriculture will require investment of between \$1.2 and \$1.5 trillion over the next 35 years to increase the capacity needed to meet rising demands.

1.21 Labor Senators support meeting this demand by encouraging foreign investment in an open and transparent manner, while ensuring that substantial investments remain in our national interest. Labor Senators support policy that encourages foreign investment growth while ensuring that safeguards remain in place.

1.22 On 2 May 2015, the former Treasurer, the Hon Joe Hockey MP, announced a number of changes to the rules relating to foreign investment, including the thresholds relating to agricultural land that trigger a notifiable action to the Foreign Investment Review Board. The Government reduced the threshold test for purchases of agricultural land (previously known as Australian rural land) from \$252 million to \$15 million for investors from most countries.

1.23 The Government is now proposing to further supplement to this complex regime of differential and discriminatory thresholds for Foreign Investment Review Board screening of proposed investments—with no economic or foreign policy rationale. The new barriers to foreign investment in Australian agriculture and agribusiness are retrograde and are not in the national interest.

1.24 There is no strong policy reason to reduce the investment screening threshold for agricultural land to \$15 million for investors from China, Korea and Japan – but not for investors from Singapore and Thailand who enjoy a \$50 million threshold – or investors from the United States of America, New Zealand and Chile who enjoy a \$1.094 billion threshold.

1.25 Furthermore, the new \$15 million threshold on investment in agricultural land will apply even where an investor is seeking to make improvements to their existing property. Buying a small adjoining parcel of land, perhaps to facilitate significant investment in improved farm infrastructure, triggers a Foreign Investment Review Board review if it takes the cumulative value of the investment above \$15 million.

1.26 In this package of bills, the Government is also proposing to reduce the screening threshold for some agribusiness investments, while redefining agribusiness so broadly that it would include half of Australia's food manufacturing industry.

1.27 Labor Senators are particularly concerned that new and seemingly arbitrary rules discriminate against investors based on their country of origin. Investors from China, Korea and Japan are subject to the new \$55 million screening threshold. Investors from the United States, New Zealand and Chile are not subject to the new rules, and will continue enjoying a \$1.094 billion threshold.

1.28 Concerns about the impact of these measures relating to agribusiness have been highlighted by a range of stakeholders including the Australian Food and Grocery Council and the Business Council of Australia.

1.29 In its submission to this inquiry, the Australian Food and Grocery Council stated:

In the absence of a clearly articulated public policy objective the additional regulatory burden on food processing has not been justified. Furthermore, if the proposed changes are about transparency in relation to sensitive sectors then alternative approaches should first be considered rather than the blunt instrument of applying these legislated changes to more than half of Australia's food manufacturing sector.¹

1 Australian Food and Grocery Council, *Submission 8*, p. 4.

1.30 The Australian Food and Grocery Council opposes the proposed foreign investment legislation and regulations on the basis that the changes:

- will discourage investment in Australia's food manufacturing sector by affecting more than half of the \$97 billion sector, especially medium sized enterprises who rely on foreign capital to expand and grow;
- are not based on a clear public policy objective;
- are not an appropriate response to competition concerns—concerns about competition have not yet been fully considered and, even if found to be justified, are being addressed through additional resourcing of the Australian Competition and Consumer Commission;
- are inconsistent with the Government's efforts to attract foreign investment; and
- undermine the efforts to build stronger economic relationships through trade agreements.²

1.31 These concerns were echoed in the submission of the Business Council of Australia to the exposure draft consultation process conducted by the Treasury, in which it stated:

Investment in the Australian agrifood sector is required to ensure that it has the resources and capabilities necessary to innovate, compete and to grow. Investment is needed to ensure that the value chain is well capitalised.

In addition to domestic sources, foreign investment has been, and will need to continue to be, an important source of funds for the Australian agrifood sector.

Rather than putting up barriers to foreign investment, the government needs to make clear that Australia is open to investment, and put in place policies and actions that support this.³

1.32 The Government's arbitrary thresholds will make Australia a less attractive investment destination. Labor Senators are concerned that these foreign investment changes will make it harder for the agriculture and agribusiness sector to raise capital, and risk putting downward pressure on the values of farm assets.

1.33 Labor Senators support a foreign investment framework that encourages much-needed investment in our country while providing safeguards to ensure all foreign investment is in this country's best interest. Labor Senators do not consider that the Government's proposed discriminatory-screening thresholds and new red-tape barriers will support that objective and call for clear, non-discriminatory rules.

2 Australian Food and Grocery Council, *Submission 8*, p. 5.

3 Business Council of Australia, *Submission to Exposure Draft on Implementing Foreign Investment Reforms*, July 2015, p. 2.
<http://www.treasury.gov.au/~media/Treasury/Consultations%20and%20Reviews/Consultations/2015/Implementing%20Foreign%20Investment%20Reforms/Submissions/PDF/BCA.ashx>
(accessed on 14 October 2015)

1.34 Further, at the same time as it released an exposure draft of the legislation being considered, the Government released an exposure draft of the Foreign Acquisitions and Takeovers Legislation Regulation. It is unclear exactly which measures stem from the bills and which measures will be retained in regulation. This is something the Government must clarify.

Agricultural land register

Labor Senators support the measures in the Register Bill.

Recommendation 1

That the Government separate the three bills, the Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015, the Foreign Acquisitions and Takeovers Fees Imposition Bill 2015 and the Register of Foreign Ownership of Agricultural Land Bill 2015.

Recommendation 2

That the Senate pass the Register of Foreign Ownership of Agricultural Land Bill 2015 without amendment.

Recommendation 3

That the Government amend the Foreign Acquisitions and Takeovers Fees Imposition Bill 2015 to establish a more consistent, simpler and streamlined approach to fees.

Recommendation 4

That the Government make clear in the explanatory memorandum to the Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015 the interaction between the bill, the current regulatory regime and the proposed Foreign Acquisitions and Takeovers Legislation Regulation, particularly as they relate to screening thresholds for agricultural land.

Recommendation 5

That the Government aim to streamline screening thresholds for agricultural land and agribusiness and eliminate inconsistent, discriminatory and arbitrary thresholds—that is, reduce red tape, not create it.

Recommendation 6

That the Government should further consult with industry, and commission a broader evaluation of the proposed changes, before seeking further passage of the Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015 and the Foreign Acquisitions and Takeovers Fees Imposition Bill 2015.

**Senator Sam Dastyari
Deputy Chair**

Additional Comments by Senator Nick Xenophon

1.1 There is no question that foreign investment brings considerable economic benefits to Australia. I have previously acknowledged the range of potential benefits that foreign investment could provide to the Australian economy, particularly in Australian agricultural land and the potential to develop our agricultural sector and create jobs.¹

1.2 However, I have also previously expressed concerns about the lack of scrutiny and the lack of available information about foreign investment and the capacity for such foreign investment to have long-term market and food security impacts.²

1.3 In 2010 I introduced the Foreign Acquisitions Amendment (Agricultural Land) Bill 2010 (together with then Senator Christine Milne) to Parliament for debate to address these concerns.

1.4 The Bill, which was modelled on New Zealand's Overseas Investment Act of 2005, required any interest in Australian agricultural land greater than 5 hectares to be subject to application to the Treasurer and required online publication of applications of interest in Australian agricultural land. Through the inquiry process it became apparent that this spatial figure was inappropriate in the Australian context and the Bill was amended to change the threshold from a spatial threshold of 5 hectares, as it is in New Zealand, to a monetary figure of \$5 million.

1.5 I welcome the proposed changes in the Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015 and related bills and its focus on ensuring foreign investment supports economic activity without jeopardising national interests.

1.6 Additionally, I welcome the government's announced changes to the screening threshold for agricultural land and the implementation of a foreign ownership register for agricultural land, established and maintained by the Australian Taxation Office (ATO).³

1.7 However, the government's reduced threshold test for purchases of agricultural land (previously known as 'Australian rural land') to \$15 million for investors from most countries doesn't go far enough to provide transparency of smaller scale agricultural land purchases.

1 Nick Xenophon, *Additional Comments to Examination of the Foreign Investment Review Board National Interest Test Interim report: Tax arrangements for foreign investment in agriculture and the limitations of the Foreign Acquisitions and Takeovers Act 1975*, 28 November 2012.

2 Nick Xenophon, *Additional Comments to Foreign Acquisitions Amendment (Agricultural Land) Bill 2010*, 16 June 2011.

3 The Hon. Tony Abbott, MP, Prime Minister of Australia, the Hon. Joe Hockey, MP, Treasurer, and the Hon. Barnaby Joyce, MP, Minister for Agriculture, 'Government tightens rules on foreign purchases of agricultural land', Media release, 11 February 2015.

1.8 The threshold tests for purchases of agricultural land and agribusinesses should be lowered to reflect the Foreign Acquisitions Amendment (Agricultural Land) Bill 2010 proposal of \$5 million.

1.9 This will strengthen the ability of the Government to make informed policy decisions with greater transparency and better information.

1.10 As food security concerns escalate around the world, Australian agriculture and its supply chain is increasingly seen as being a strong investment prospect for international investors and as foreign interest in Australian agricultural land increases, it is imperative we do not lose sight or control of our own domestic food security.

1.11 Furthermore, the current criteria for considering foreign investment proposals in prime agricultural are too vague and imprecise. They fail to set out key issues in the national interest such as the impact on local jobs and economic development. The criteria set out in sections 16 and 17 of New Zealand's Overseas Investment Act 2005 are set out below:

Section 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).

Section 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.

1.12 I believe that the New Zealand criteria, tried and tested across the Tasman, would be suitable for Australia and lead to much more transparent outcomes in the national interest.

1.13 Furthermore, the 'elephant in the room' that must be considered more broadly, is the difficulty Australian investors have in investing in agricultural land relative to foreign investors. It appears that foreign investors can have tax advantages through complex arrangements that puts local investors at a disadvantage.

1.14 As a matter of urgency the whole structure of current investment vehicles and tax incentives for agricultural investment must be considered. If other nations can see the benefit of investing in our prime agricultural land, it's about time we did too.

Recommendation 1

That Australia's Foreign Investment Policy and the associated regulations be amended to change the threshold test for purchases of agricultural land of \$15 million to \$5 million.

Recommendation 2

That the criteria used in New Zealand's Overseas Investment Act 2005 be broadly adopted to ensure greater levels of accountability and transparency.

Recommendation 3

That there be an urgent review by an independent body (such as the Productivity Commission) to examine the advantages foreign firms may have in investing in Australian agricultural land and any relative disadvantages local investors may have. Furthermore, the ability of superannuation funds to invest in agribusiness needs to be examined.

**Senator Nick Xenophon
Independent Senator for South Australia**

Appendix 1

Submissions received

Submission Number	Submitter
1	Hickey Lawyers <ul style="list-style-type: none">• Attachment 1
2	Cattle Council of Australia
3	Real Estate Institute of Australia (REIA)
4	Herbert Smith Freehills <ul style="list-style-type: none">• Attachment 1
5	Foreign Investment Review Board
6	The Law Society of New South Wales
7	Property Council of Australia
8	Australian Food and Grocery Council
9	Urban Development Institute of Australia
10	Finsia
11	National Farmers' Federation
12	Electronic Conveyancing Group

