

# Chapter 4

## Transparency and scrutiny of foreign investment

4.1 This chapter examines the scrutiny of foreign investment by the Foreign Investment Review Board (FIRB). It focuses on the FIRB review process, the application of the national interest test, mechanisms of compliance with FIRB decisions and the role of other government agencies.

4.2 The chapter discusses the broad evidence base that the committee has received through hearings and submissions in order to demonstrate the significant concerns that were identified in the FIRB review process. The chapter then details two case studies that were particularly important to this inquiry. The first is the acquisition strategy of Hassad Australia, the wholly owned subsidiary of a foreign government entity based in Qatar. The second case study is the sale of Cubbie Station to a consortium of the Australian based Lempriere Pty Ltd and the private company Shandong RuYi, based in China.

### The FIRB review process

#### Overview of FIRB national interest test

4.3 The FIRB review process takes place when FIRB is notified of foreign investment proposals that are above relevant thresholds. For agricultural land and assets, there are two key thresholds: \$248 million for private foreign investment and \$0 for investment by foreign government entities.<sup>1</sup>

4.4 As discussed in chapter two, the legislative scope for the Treasurer to interpret the national interest is broad. In practice, the review process is generally conducted by FIRB case managers based in the Treasury. For major cases however, recommendations are put to the Treasurer by the FIRB board. The board consists of the Chair, three additional part-time members, and one treasury official who is the executive member and general manager of FIRB. The application of the national interest is determined mostly by government policy rather than legislation or regulation.

4.5 The relationship between FIRB and the Treasury was described by the then general manager of FIRB, Mr Frank Di Giorgio, as follows:

Treasury provides secretariat services to FIRB and is responsible for the initial examination of foreign investment proposals received and for preparing recommendations for the Treasurer. FIRB's role, on the other hand, is to advise on the more significant proposals received by Treasury. FIRB is a non-statutory advisory body. It is not a decision-making body and

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1 The threshold issue is discussed in chapter five. As noted in chapter two, the thresholds for private foreign investment are covered by the relevant sections of the *Foreign Acquisitions and Takeovers Act 1975* (FATA) and the *Foreign Acquisitions and Takeovers Regulation 1989* (FATR). The zero dollar threshold for 'direct investment' from foreign government entities is largely covered by relevant sections of *Australia's Foreign Investment Policy* (AFIP).

has no decision-making powers under either the Foreign Acquisitions and Takeovers Act or foreign investment policy.<sup>2</sup>

4.6 Treasury officials explained that the national interest test is a 'negative' test and the application of the national interest stems from the broad principle that 'Australian governments have consistently welcomed foreign investment that are not contrary to Australia's national interest.'<sup>3</sup> In interpreting the national interest, officials stated that the following matters are taken into consideration:

The government looks at a range of factors in assessing the national interest. These include national security, competition, wider government policies—such as taxation—an investor's impact on the economy and the community, and the character of the investor involved. Where a proposal involves a foreign government or related entity, the government also considers whether the investment is commercial in nature or whether the investor may be pursuing broader political or strategic objectives that may be contrary to Australia's national interest, and all direct investment proposals from government related entities are reviewed by the government. The relative importance of factors can vary, depending on the nature of the target enterprise.<sup>4</sup>

4.7 FIRB officials also described the screening process as 'rigorous', 'thorough', and 'relatively broad and consultative'.<sup>5</sup> The committee also heard throughout its inquiries that FIRB often seeks comment from other relevant government agencies, such as the Australian Competition and Consumer Commission (ACCC) regarding competition matters, the Australian Taxation Office (ATO) on tax matters, and the Department of Agriculture, Fisheries and Forestry (DAFF) in agriculturally sensitive cases.<sup>6</sup>

4.8 When consulted, these agencies summarised their role as follows. The ACCC stated that:

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2 Mr Frank Di Giorgio, General Manager, Foreign Investment and Trade Policy Division, Treasury and Executive Member, Foreign Investment Review Board, *Committee Hansard*, 16 November 2011, p. 1.

3 Mr Frank Di Giorgio, General Manager, Foreign Investment and Trade Policy Division, Treasury and Executive Member, Foreign Investment Review Board, *Committee Hansard*, 16 November 2011, p. 1.

4 Mr Frank Di Giorgio, General Manager, Foreign Investment and Trade Policy Division, Treasury and Executive Member, Foreign Investment Review Board, *Committee Hansard*, 16 November 2011, pp 1–2.

5 Mr Frank Di Giorgio, General Manager, Foreign Investment and Trade Policy Division, Treasury and Executive Member, Foreign Investment Review Board, *Committee Hansard*, 16 November 2011, p. 2.

6 Ms Rose Webb, Executive General Manager, Mergers and Adjudication Group, Australian Competition and Consumer Commission, *Committee Hansard*, 17 February 2012, p. 47; Mr Michael O'Neill, Assistant Deputy Commissioner, International Branch, Australian Taxation Office, *Committee Hansard*, 17 February 2012, p. 52; and Mr Frank Di Giorgio, General Manager, Foreign Investment and Trade Policy Division, Treasury and Executive Member, Foreign Investment Review Board, *Committee Hansard*, 16 November 2011, p. 3.

The ACCC does not have any formal role under the Foreign Acquisitions and Takeovers Act. However, it is routinely consulted by the Foreign Investment Review Board on transactions which FIRB considers may potentially raise competition issues for consideration. In responding to these consultations, the ACCC advises FIRB whether or not it considers the proposed transaction is likely to raise competition concerns in breach of section 50 of the *Competition and Consumer Act 2010*. It is understood that FIRB then takes the ACCC's section 50 competition assessment into account as well as other factors as part of its assessment of the national interest test...

Section 50 of the Competition and Consumer Act prohibits mergers or acquisitions that would have the effect or would be likely to have the effect of substantially lessening competition in any market in Australia. In making its assessment, the ACCC is confined to considering the effect on competition in a relevant market in Australia in accordance with the tests provided in the act.<sup>7</sup>

#### 4.9 The ATO outlined its involvement as:

...Of the numerous requests FIRB gets, the business investment proposals, the ones greater than the [\$248] million threshold are the ones that we consider mostly. There is some vetting by FIRB in the first instance. We do not receive all the applications that they receive. If they consider there is a tax implication, they will flick it to us for our consideration. Historically, we have received through this process about 200 to 300 proposals annually for consideration... We do some analysis to determine whether there are tax implications in those investment proposals.

We also have a separate process in relation to real estate transactions of a more general nature. There is some data matching protocols between the agencies in relation to that for our general intelligence purposes. Some of the tax aspects that we would look at would be the attributes of the acquirer, the target, the vendor and the structure proposed.<sup>8</sup>

### **General views of the FIRB review process**

4.10 The committee heard a range of views regarding the effectiveness and desirability of the current FIRB review process. There was some evidence that the flexibility of the current arrangements regarding the FIRB review process were effective and helped facilitate foreign investment. In particular, this evidence drew contrasts with the New Zealand model of the national interest test (discussed in chapter two). For these submitters, the New Zealand model was too restrictive and discouraged foreign investment in general. For example, according to Cargill:

A key feature of Australia's foreign investment laws is that they apply a negative test – an investment proposal can only be rejected if it is found to

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7 Ms Rose Webb, Executive General Manager, Mergers and Adjudication Group, Australian Competition and Consumer Commission, *Committee Hansard*, 17 February 2012, p. 47.

8 Mr Michael O'Neill, Assistant Deputy Commissioner, International Branch, Australian Taxation Office, *Committee Hansard*, 17 February 2012, p. 52.

be contrary to the national interest. This compares with New Zealand's foreign investment laws which require a foreign investor to establish a benefit to New Zealand (and, in some cases, a substantial and identifiable benefit).

Australia's negative test demonstrates that Australia welcomes foreign investment with foreign investors treated equally with domestic investors. A positive test suggests that foreign investment is not as welcome, that domestic investors are preferred.<sup>9</sup>

4.11 This view was similarly supported by TFS Corporation:

Whilst the transactions undertaken by TFS would comfortably meet the provisions in NZ, TFS believes that the [New Zealand] system is too prescribed and cumbersome. This in turn would not create an attractive environment for foreign investment.<sup>10</sup>

4.12 Some submitters were concerned about possible negative impacts from changing the current system.<sup>11</sup> For example, the independent livestock agency, Vicstock, stated in its submission:

Our laws are rock solid, and the FIRB review process, as liberal as they seem to the uninformed, is actually doing its job while not restricting the flow of new capital into our ailing rural sector.

...

I would counsel any government against making any decision that would impede foreign capital from flowing into our Agricultural sector at this time because our rural and regional communities desperately need it.<sup>12</sup>

4.13 In its submission to the inquiry, TFS Corporation—a publicly listed company and grower of plantation sandalwood—told the committee that the company had recently received foreign investment of over \$65 million from a Middle Eastern sovereign fund and an AAA rated US-based institution. The TFS Corporation also argued for the importance of a balance between confidentiality and transparency in relation to FIRB decisions:

Whilst TFS would not support publication of applications for approval of foreign investment, it has no objection to a public register of land (particularly agricultural land) which is the subject of foreign investment.<sup>13</sup>

Publicising an application for approval of foreign investment would deter investors and could have detrimental commercial consequences. The situation is quite different however once approval has been granted.

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9 Cargill, *Submission 9*, p. 9.

10 TFS Corporation, *Submission 14*, p. 6.

11 For example, AGEA, *Submission 18*, p. 2; and Vicstock International Limited and Vicstock (Aust.) Pty Ltd, *Submission 22*, p. 2.

12 Vicstock International Limited and Vicstock (Aust.) Pty Ltd, *Submission 22*, p. 2.

13 TFS Corporation, *Submission 14*, p. 6.

4.14 One of the most common criticisms of the current situation related to the lack of information available about FIRB decisions. This concern was expressed from a wide variety of stakeholders from companies that were otherwise generally supportive of FIRB arrangements, to agricultural industry bodies (discussed below) and individuals interested in the process.<sup>14</sup>

4.15 For example, in its submission, the United States based agribusiness Cargill, noted that its experience of the FIRB approval process was somewhat difficult to discern.<sup>15</sup> Cargill noted that the type of information provided by FIRB was usually limited to *ad hoc* sources such as speeches and press releases about difficult cases. The company also expressed concerns about the clearance process, arguing that it was too lengthy and, in some cases, re-examined issues previously considered by the ACCC. Whilst in its submission Cargill did not advocate for the legislative prescription of the national interest test, it does argue that there is a need for greater clarity in the process.<sup>16</sup>

4.16 To counter the issue of a lack of transparency the South Australian Farmers Federation (SAFF) called for a codification of the national interest test:

While we [SAFF] believe it is important for the Treasurer to have flexibility to determine at a particular point in time what might the national interest be, we also feel that there needs to be some agreed standard measure of quantification that will enable clearer and consistent boundaries for the interpretation.<sup>17</sup>

4.17 Some submitters also considered that the current assessment process did not consider issues that were important to the agriculture sector and rural communities. For example the Western Australia Farmers Federation (WAFF) stated that:

...we seek a change in the current assessment criteria, which would result in the Foreign Investment Review Board being able to consider a greater number of applications by foreign investors into Australian agriculture. This change would allow the National Interests Test to be more broadly applied, and to identify the applicant's likely impact on rural communities, Australia's long term food security and capacity to develop and maintain export markets for agricultural products.<sup>18</sup>

4.18 In response to questioning about this matter, FIRB stated that the impact on local communities was a factor considered alongside other national interest

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14 For an individual perspective see for example, Wayne Van Balen, *Submission 21*.

15 Note: the term "FIRB approval" is used in this report to indicate that a foreign investment proposal has been reviewed by FIRB, recommended to and accepted by the Treasurer. It should not be read as FIRB having the ultimate decision-making power which rests with the Treasurer.

16 Cargill, *Submission 9*, pp 4–6.

17 SAFF, *Submission 11*, p. 7.

18 Western Australia Farmers Federation, *Submission 7*, p. 2.

considerations.<sup>19</sup> This issue is discussed further in chapter five regarding investment thresholds and the impact of purchases below \$248 million on local economies.

## Compliance

4.19 In addition to the review process, the committee heard evidence about the mechanisms of compliance that are available to FIRB and the government should foreign investors renege or deviate from their undertakings. In general terms, FIRB explained its compliance depending on three key terms: intentions, undertakings and conditions. The former FIRB Chair explained this and the relevant compliance mechanisms available:

**Mr Phillips:** ...A statement of intentions is where the company merely tells us what they intend to do and then we take that into consideration and we check it out as much as we can. It is a voluntary statement, if you like, given by—

**CHAIR:** Which they don't have to comply with?

**Mr Phillips:** Yes. Undertakings are usually undertakings which are given to us in the course of the application or the inquiry which are then built into the Treasurer's letter of approval so that they become, if not formal conditions, at least part of the basis on which the approval is being given and therefore can be acted on if the undertakings are not followed. Conditions are formal conditions which are laid down and which would give immediate rights to divestiture if they were not [met]...<sup>20</sup>

4.20 However, the committee also heard of the limited compliance mechanisms available to FIRB—formally the only form of penalty available to FIRB is forced divestiture of foreign acquisitions. For example, the FIRB Chair, Mr Brian Wilson, was asked to comment on the compliance mechanisms for the conditions placed on the sale of Cubbie Station. Mr Wilson responded:

In this case, there certainly would be because the acquisition was not under the policy but under the act, and under the act there is divestment capability. Obviously, that is a pretty blunt instrument and it has never been used.<sup>21</sup>

4.21 At a hearing on 21 March 2103, Mr Wilson reiterated the limitations of divestment as a compliance mechanism when asked about the penalty for not reporting foreign acquisitions to FIRB. As the following exchange shows:

**CHAIR:** I made a point earlier from the evidence received from your predecessor that if by design they avoid reporting, is there a penalty?

**Mr Wilson:** The answer to that is there can be a penalty under the act.

**Senator NASH:** What is it?

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19 Mr Brian Wilson, Chair, FIRB, *Committee Hansard*, 11 October 2012, p. 12.

20 Mr John Phillips, Chair (former), FIRB, *Committee Hansard*, 9 February 2012, p. 21.

21 Mr Brian Wilson, Chair, FIRB, *Committee Hansard*, 11 October 2012, p. 2.

**Mr Wilson:** Divestment.

**CHAIR:** Has it ever been used?

**Mr Wilson:** Not to my knowledge, but we can only deal with the act as it is. It is up to the legislature to determine what the act should be.

**CHAIR:** I understand that. We look forward to making some recommendations on updating it.

**Mr Wilson:** In other areas in which I have been involved, we have looked hard at proportionality of penalties—so, waterfall penalties according to the frequency and severity of the poor behaviour. The problem with a single, nuclear option is that the button is not often pushed.<sup>22</sup>

4.22 The evidence received by the committee indicates that ensuring compliance with undertakings and conditions after foreign acquisitions had been made could also be problematic:

**Senator XENOPHON:** ...are there requirements in the way you attach the various conditions to it [a foreign acquisition]—say, if five years down the track they say, 'Sorry; we can't do it'? ...

**Mr Phillips:** There was one [case] in particular. I will not mention what it was, but it was a very long time ago. There were a couple of others who worked very hard to try not to do it. I have to say that in recent years we have managed to deal with all those companies that have not toed the line. They give an undertaking that there will always be a majority of Australian independent directors, and you suddenly find that the list of directors does not look that way. So you have to go to them. So far they have always toed the line and changed the system. Where they have undertaken to maintain their head office and the bulk of their business, that is happening.

I agree with you that relying on the act [FATA] after a passage of time is very difficult, because it is very hard to unpick the thing after it has all been put together, and it is very difficult for the Treasurer to order divestment. It is not difficult in real estate, but it is very difficult in the case of multiple businesses.<sup>23</sup>

4.23 Although the FATA has certain penalties that can be imposed, FIRB is more constrained in relation to ensuring compliance with government policy under the AFIP. The difference between the FATA and the AFIP was explained in reference to the Cubbie Station case by the FIRB Chair, Mr Brian Wilson:

Can we just be clear: there are two aspects here. If we are talking about Cubbie, that is not sovereign. It is under the act and there are specific penalties. If we are talking about the policy, which obviously does not have a legislative basis, I think it is true that there is no explicit legislative penalty.<sup>24</sup>

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22 Mr Brian Wilson, Chair, FIRB, *Committee Hansard*, 21 March 2013, p. 12.

23 Mr John Phillips, Chair (former), FIRB, *Committee Hansard*, 9 February 2012, pp 25–26.

24 Mr Brian Wilson, Chair, FIRB, *Committee Hansard*, 11 October 2012, p. 4.

4.24 For those foreign investors that failed to appropriately notify FIRB prior to their investment, FIRB explained the compliance regime in terms of an education program:

**CHAIR:** ... Does FIRB have a formal program to identify foreign investors who have not submitted applications when required to do so? Do you have some sort of scheme, audit system, trigger point?

**Mr Di Giorgio:** We have a compliance regime.

**CHAIR:** Could you describe it to us?

**Mr Di Giorgio:** The compliance regime is one of educating the community, the people who need to know, about the rules and regulations. For example, we have spoken with lawyers in Sydney and will do so in Melbourne. We have got information on the website. That is the first part of compliance: to let people know.

**CHAIR:** It is a volunteer arrangement.

**Mr Di Giorgio:** That is a typical part of compliance. We also have a phone line. People phone in with cases they believe do not meet the criteria and we follow those up. We also monitor newspapers and if it appears that a foreign company has not abided by the act [the FATA], we make inquiries about it. So we work within those general parameters.<sup>25</sup>

4.25 In terms of foreign government entities complying with foreign investment undertakings, FIRB sought to reassure the committee that such undertakings could be upheld through 'soft power' and 'international pressure'. As the FIRB representatives explained:

**Ms Reinhardt:** There are significant international pressures that can be brought to bear from government to government if we do not get compliance with those. We also have the ability to consider further applications in the future from those countries or companies.

**Mr Wilson:** I think the saying that has been used in the past is, beware the soft power of a sovereign government. Generally, foreign governments and foreign entities, no matter how large and powerful they are, tend not to want to come to other countries and act in an unacceptable way. In the end, the Australian government does have capacity to change laws and make life difficult. Under the policy I do not think there is a legislative redress. Under the act [the FATA] there is. But I must say, I have not seen situations where I believe a foreign party, including a foreign government, has deliberately gone out to tell lies or circumvent the things. Obviously, with the help of lawyers and so on, foreign governments as well as commercial enterprises,

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25 Mr Frank Di Giorgio, General Manager, Foreign Investment and Trade Policy Division, Treasury and Executive Member, Foreign Investment Review Board, *Committee Hansard*, 9 February 2012, p. 20.



both Australian and foreign, do attempt to operate their affairs in the most effective and efficient manner.<sup>26</sup>

4.26 Ultimately, as mentioned above, FIRB stated that the Treasurer did have power to order divestiture if undertakings were not met. This has occurred for real estate investments of a number of occasions.<sup>27</sup> However, divestiture and prosecutions were far from common as FIRB told the committee in a response to a question on notice:

For the 2010-11 financial year there were no prosecutions initiated for failing to obtain foreign investment approval or for failing to comply with approval conditions. There were also no divestment orders were issued.<sup>28</sup>

4.27 There were also no divestiture orders made at all by FIRB in 2011/12.<sup>29</sup>

## Case studies

### Hassad Australia case study

4.28 The committee heard evidence from Hassad Australia at its public hearings on 16 November 2011 and 9 April 2013. Hassad Australia is an Australian company with a single shareholder which is the Qatari government-owned Hassad Food based in Qatar. Hassad Australia was established in 2009 and has its headquarters in Sydney.<sup>30</sup>

4.29 As Hassad Australia is directly owned by a foreign government entity, its appearance before the committee provided a case study of FIRB's review process for foreign government entities investing in Australian agriculture. Furthermore, because Hassad Australia was open about its role in the Qatari government's strategy to improve Qatar's long term food security, it is a case that directly represents a number of the key terms of reference of the inquiry.

4.30 Hassad Australia described the role of food security for its business as follows:

...the initial plan that the Qatari government put in place under the banner of the Hassad Food company, their initial investment was driven by food security and, obviously, the mid-2000 issues of food shortages in those areas. But when they put the plan together—and I have to advise that most of the key advisers within their company are actually Australian—they realised that it would not be successful if it did not have a commercial

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26 Mr Brian Wilson, Chair, and Ms Sam Reinhardt, General Manager, Foreign Investment and Trade Policy Division, Treasury and Executive Member, Foreign Investment Review Board *Committee Hansard*, 16 August 2012, p 15.

27 Mr Brian Wilson, Chair, Foreign Investment Review Board, *Committee Hansard*, 11 October 2012, p. 3.

28 FIRB, answer to question on notice, 9 February 2012, (answered 16 August 2012).

29 FIRB, *Foreign Investment Review Board Annual Report 2011-12*, p. 10

30 Mr Tom McKeon, Chief Executive Officer, Hassad Australia Pty Ltd, *Committee Hansard*, 16 November 2011, p. 38.

outcome. To invest just for the purposes of producing food is not sustainable in the long term.<sup>31</sup>

4.31 Furthermore, Mr McKeon noted that 'Qatar have identified that they wish to secure 30 or 35 per cent of Qatar's food supply, principally grains and livestock, from Australia.'<sup>32</sup>

4.32 Because of Hassad Australia's relationship with the Qatari government, the company's investments in Australia are subject to a zero dollar threshold for FIRB review.<sup>33</sup> In terms of its relationship with FIRB, Mr Tom McKeon, Chief Executive Officer of Hassad Australia noted:

Currently all investments that Hassad Australia makes, regardless of value, are subject to approval by the Foreign Investment Review Board, even if it is one dollar. There is no threshold and every transaction and acquisition must be approved by them. This is a process which Hassad Australia fully supports. We continue to cooperate with FIRB in that regard and our plan is very transparent to them.<sup>34</sup>

4.33 Hassad Australia also provided evidence to the committee about how the process of its purchases of agricultural land took place and the role of FIRB in this regard. As Hassad Australia's representatives told the committee:

**Mr Corbett:** The process is highly driven around governance as much as the [FIRB] requirements. We identify a property and we negotiate with the landowners on a purchase price. As part of doing our desktop due diligence, if you like, we enter into a term sheet with the vendors and then proceed from the term sheet into a contract. The contracts are signed subject to FIRB. At the same point in time as we go to contract we also complete our FIRB application. So that details the acquisition—the style of properties that we are buying, how we intend to use them, how we intend to staff them and how we intend to operate them. That then goes into FIRB as part of the process. Meanwhile, we continue to finish our due diligence around valuations, agronomy, assessments and the like. That FIRB process takes somewhere between 50 and 60 days. If there is anything in the application that FIRB have questions about, they come back to us. We found it has been a fairly smooth process. We have been very transparent with them all the way along, and that has assisted in the dialogue lines between us and FIRB.

**Mr McKeon:** To add to that, in the initial stages of the first couple of property aggregations or properties that we purchased it was a very

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31 Mr Tom McKeon, Chief Executive Officer, Hassad Australia Pty Ltd, *Committee Hansard*, 16 November 2011, p. 40.

32 Mr Tom McKeon, Chief Executive Officer, Hassad Australia Pty Ltd, *Committee Hansard*, 16 November 2011, p. 39.

33 For information about the review of foreign government entity investment see FIRB, *Australia's Foreign Investment Policy*, 2013, pp 2 and 14–15.

34 Mr Tom McKeon, Chief Executive Officer, Hassad Australia Pty Ltd, *Committee Hansard*, 16 November 2011, p. 38.

protracted process with FIRB because we did not know what they wanted in the application. They kept on coming back with questions, so the process was protracted. Probably six months ago we learnt our lesson. We went and put our whole plan in front of FIRB and said, 'Here's the plan.' We gave them the details and they understand it now. If we put an application in, they measure it against the plan and it is a pretty seamless process. Prior to that there were a lot of questions. If I could make one comment there, a lot of the questions coming back were not structured questions; they were questions relating to public perceptions coming back through the ministers to FIRB.<sup>35</sup>

4.34 However, Hassad Australia indicated that there was little discussion about compliance mechanisms if it was to significantly change its business practices as reviewed by FIRB:

**Senator NASH:** Were you required to give an undertaking that you would maintain the practices as you had set out in your submission?

**Mr Corbett:** There is no formal undertaking in that regard, but one of the things from our perspective is that we have no problems in coming back and letting them know that we are doing that...

...

**Senator EDWARDS:** ...Suppose that in five years time they come back to you and say, 'We want to do an audit,' and you have not done what you [said you would] have done—in fact your shareholding has changed or whatever and you are no longer growing sheep, fat lambs and all those things; you are actually just land-banking and not employing anybody anymore. Just say hypothetically. Did they say at any stage during that whole process that they would do that and that they reserved the right to unwind your business practices?

**Mr Corbett:** Not at any stage.<sup>36</sup>

4.35 At the committee's hearing on 9 April 2013 it received an update from Hassad Australia about its operations. Since the first appearance in November 2011, Hassad Australia had purchased an additional 80 000 hectares of farmland (including 40 000 hectares in western Victoria and 'partly' South Australia, and 30 000 hectares in Western Australia) to give it total holdings of about 250 000 hectares. Hassad Australia stated all its purchases were reviewed by FIRB.<sup>37</sup>

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35 Mr Tom McKeon, Chief Executive Officer, and Mr John Corbett, Director, Hassad Australia Pty Ltd, *Committee Hansard*, 16 November 2011, pp 46–47.

36 Mr John Corbett, Director, Hassad Australia Pty Ltd, *Committee Hansard*, 16 November 2011, p. 42.

37 Mr Tom McKeon, Chief Executive Officer, Hassad Australia Pty Ltd, *Committee Hansard*, 9 April 2013, p. 44.

4.36 In light of a recent media report,<sup>38</sup> Hassad Australia was asked whether it was willing to pay above market prices when purchasing agricultural properties and if it used confidentiality agreements with potential vendors. Hassad Australia stated that did not pay above market prices for its agricultural land purchases and specifically denied paying above market rates in the reported case of acquisition of land in the Eyre Peninsula—as the following exchange shows:

**CHAIR:** ...There are reports from Cameron England in the *Adelaide Advertiser* that maybe you are paying up to 40 per cent above the going rate for Eyre Peninsula land—in some cases, \$5,000 a hectare...

**Mr McKeon:** Sorry, could I interrupt in relation to the Eyre Peninsula. I can make quite an emphatic statement there. We did go back and check out the real estate values there. Most of the real estate value over there is selling for more than \$5,000 a hectare. The other thing is that we do not pay above market values; we cannot. We cannot do it within our system. Every property we purchase must undergo a totally independent valuation, and that independent valuation must stack up to local valuations. There are many instances where we have walked away from real estate deals because we could not achieve that.<sup>39</sup>

4.37 It was in line with its general approach to paying market value for properties that Hassad Australia justified using confidentiality agreements with potential vendors. As Mr Tom McKeon, Hassad Australia's CEO put it:

The fact that we do not want to encourage inflated property prices is precisely why we employ the standard best practice approach of using confidentiality agreements with potential vendors. Widespread knowledge, as you know, of a buyer in the market inevitably pushes up market values. There have been a number of instances where we have actually pulled out of the market because of that issue.<sup>40</sup>

4.38 In addition, Hassad Australia noted that, with the possible exception of malicious breaches, the confidentiality agreements may not be enforced. As Mr McKeon explained in the following exchange:

**CHAIR:** ...[If] I have signed the confidentiality agreement, and I go down to the Illabo pub, get pissed and let it be known to someone that I have signed up, and someone says, 'I'll give you \$500 an acre more,' what is the penalty for breaching the confidentiality clause?

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38 See Cameron England, 'Foreign Land Grab: Middle East secretly targets our farms', *Adelaide Advertiser*, 23 February 2013. The article discusses the agricultural land purchases of Hassad Australia and specifically alleges that Hassad Australia is paying above market prices for agricultural land in Eyre Peninsula and 'demanding' that farmers sign confidentiality agreements regarding the acquisitions.

39 Mr Tom McKeon, Chief Executive Officer, Hassad Australia Pty Ltd, *Committee Hansard*, 9 April 2013, p. 45.

40 Mr Tom McKeon, Chief Executive Officer, Hassad Australia Pty Ltd, *Committee Hansard*, 9 April 2013, p. 44.

**Mr McKeon:** Basically none at all, because the heads of agreement is a non-binding agreement. It is actually stated on it that it is a non-binding agreement. But in all our dealings Australia wide we have only ever had that happen once.

**CHAIR:** But are you prepared to put it on the record that, sure, you sign them up to a confidentiality agreement, but if they want to breach the confidentiality agreement there is no penalty? You do not say, 'Well, we're not going to buy the property from you'? Or, if someone else comes along and offers them \$500 an acre more, they are free to sell?

**Mr McKeon:** Again, I would have to take that one on notice, but the basic principle is that, if there is no maliciousness in the intent of the person in breaking that confidentiality agreement, there is really no recourse for the person—

**CHAIR:** That is fair enough.

**Mr McKeon:** they had the agreement with to seek a penalty for it. But, if there is maliciousness and it does cause damage, obviously there may be some recourse.<sup>41</sup>

4.39 Hassad Australia further clarified its approach regarding enforcement of confidentiality agreements in an answer to question on notice, stating that:

...if the confidentiality clause was breached, HA [Hassad Australia] would weigh the quantum of the loss suffered by HA as a result of the breach of confidentiality and make a commercial decision as to whether there would be any merit in enforcing its contractual rights against the vendor.<sup>42</sup>

### **Cubbie Station case study**

4.40 Lempriere Pty Ltd appeared before the committee on 24 October 2012 to discuss its involvement in the purchase of Cubbie Station. Lempriere Pty Ltd is a wool trading company established in Australia in 1857. It also has a 'variety of different agricultural farming interests' in Australia and New Zealand.<sup>43</sup>

4.41 In mid-2012, Lempriere Pty Ltd joined with a private Chinese company, Shandong RuYi, to form a private Australian company to purchase the large Queensland cotton producing farm, Cubbie Station. At the point of purchase, Lempriere Pty Ltd held a 20 per cent stake in the company and Shandong RuYi held the remaining 80 per cent.<sup>44</sup>

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41 Mr Tom McKeon, Chief Executive Officer, Hassad Australia Pty Ltd, *Committee Hansard*, 9 April 2013, pp 46–47.

42 Hassad Australia, answer to question on notice, 9 April 2013, (received 9 May 2013).

43 Mr William Lempriere, Managing Director, Lempriere Pty Ltd, *Committee Hansard*, 24 October 2012, p. 1.

44 Mr William Lempriere, Managing Director, Lempriere Pty Ltd, *Committee Hansard*, 24 October 2012, pp 1–2. Note: the Japanese company Itochu has a 30 per cent shareholding in Shandong RuYi.

4.42 As Cubbie Station is one of Australia's largest agricultural properties, with vast water resources and had been subject to external administration, its potential purchase from foreign interests was controversial. The bid went before FIRB which approved the investment in August 2012. FIRB sought a number of undertakings from Lempriere and Shandong RuYi as part of the approval process. Some of the details of the undertakings were made publicly available by the Treasurer in a media release announcing FIRB approval.<sup>45</sup>

4.43 There were several issues of concern to the committee and the wider public about the nature of the foreign investment by Shandong RuYi in Cubbie Station. A number of these concerns were allayed by the evidence provided by Mr William Lempriere, Manager Director, Lempriere Pty Ltd. The key issues will be discussed in turn.

4.44 First, the committee noted that Shandong RuYi had committed to reduce its 80 per cent stake in Cubbie Station to 51 per cent in three years from the completion of the acquisition—which reportedly took place on 15 January 2013. The committee heard that this undertaking was a proposal made by Shandong RuYi rather than a condition put forward by FIRB.<sup>46</sup>

4.45 The committee questioned both FIRB and Lempriere Pty Ltd about the undertaking to sell down to 51 per cent within three years and what mechanisms were in place to ensure that this occurred. The FIRB Chair, Mr Brian Wilson, noted that although in some circumstances – such as a market 'crash' – an extension to the sell down period may be granted, he stated that:

It would not be a case of: 'We can't get the right price; we don't want to sell.' It is not an undertaking to sell at a particular price or at the price they have bought or for a gain; it is an undertaking to sell.<sup>47</sup>

4.46 Furthermore, FIRB noted that there were powers under the FATA to force divestiture. In this regard Mr Wilson noted:

Ultimately the decision to force divestment is with the minister, not with the board. But I would have thought, if it was the selldown obligation, it may well be that the minister would insist that divestment occur. It has occurred in the past in some cases. It has certainly occurred in real estate

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45 The Hon Wayne Swan MP, Deputy Prime Minister and Treasurer, media release No. 079, 31 August 2012, [www.treasurer.gov.au/wmsDisplayDocs.aspx?doc=pressreleases/2012/079.htm&PageID=003&min=wms&Year=&DocType=0](http://www.treasurer.gov.au/wmsDisplayDocs.aspx?doc=pressreleases/2012/079.htm&PageID=003&min=wms&Year=&DocType=0) (accessed 12 November 2012).

46 Mr Brian Wilson, Chair, Foreign Investment Review Board, *Committee Hansard*, 11 October 2012, p. 3. The Hon Wayne Swan MP, Deputy Prime Minister and Treasurer, Media Release no. 79, *Foreign Investment Decision*, 31 August 2012. Matthew Cranston, 'Cubbie's new owners look at water sale', *The Land* (online), 15 March 2013, [www.theland.com.au/news/agriculture/agribusiness/general-news/cubbies-new-owners-look-at-water-sale/2650753.aspx](http://www.theland.com.au/news/agriculture/agribusiness/general-news/cubbies-new-owners-look-at-water-sale/2650753.aspx).

47 Mr Brian Wilson, Chair, Foreign Investment Review Board, *Committee Hansard*, 11 October 2012, p. 3.

cases where people have not honoured their obligations and forced divestment has been made.<sup>48</sup>

4.47 Evidence received from Lempriere Pty Ltd confirmed the undertaking for Shandong RuYi to sell down. However, it was also noted that FIRB had not placed restrictions on the vendor (i.e. Shandong RuYi) financing bids from third parties for the 29 per cent stake required to be sold.<sup>49</sup> Despite this, the committee was given evidence that the parties that already had shown interest in potentially purchasing some or all of the 29 per cent stake are, according to Mr Lempriere, 'independent, and certainly do not need any vendor finance.'<sup>50</sup>

4.48 A second area of concern for the committee was the extent to which Shandong RuYi and Lempriere Pty Ltd were to manage Cubbie Station on a commercial basis. The committee was re-assured by Mr Lempriere that this would be the case:

Under the structure that we have agreed with the Treasurer the independent manager has full responsibility and freedom and independence to manage the property as it sees fit and, in addition to that, to be responsible for the sale and potentially local processing of the product. So I think it is relevant to say that we have every incentive to maximise the profitability of this business within Australia and every intention—and we have, as I said, the independence to ensure that this occurs—of making sure, if it is a profitable enterprise, as we hope it will be, that it will be paying tax in Australia.<sup>51</sup>

4.49 The commercial nature of the transaction was reaffirmed in Mr Lempriere's response to a question about how Shandong RuYi would be able to obtain product from Cubbie Station:

We have an undertaking that, if they [Shandong RuYi] are willing to pay more than anyone else, we will sell it to them. But that has to be demonstrated. Certainly I personally have no interest in selling it to them for anything less than full price.<sup>52</sup>

4.50 Finally, the basis for the commercial management of Cubbie Station stemmed from an agreement of independent management between Lempriere Pty Ltd and Shandong RuYi. This agreement was still in draft form at the time of the public hearing on 24 October 2012. However, Mr Lempriere described it as a 'binding

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48 Mr Brian Wilson, Chair, Foreign Investment Review Board, *Committee Hansard*, 11 October 2012, p. 3.

49 Mr William Lempriere, Managing Director, Lempriere Pty Ltd, *Committee Hansard*, 24 October 2012, pp 2 and 12.

50 Mr William Lempriere, Managing Director, Lempriere Pty Ltd, *Committee Hansard*, 24 October 2012, p. 12.

51 Mr William Lempriere, Managing Director, Lempriere Pty Ltd, *Committee Hansard*, 24 October 2012, p. 2.

52 Mr William Lempriere, Managing Director, Lempriere Pty Ltd, *Committee Hansard*, 24 October 2012, p. 3.

contract that gives us the necessary independence to ensure that we operate that place in the way in which we best see fit.<sup>53</sup>

4.51 While the committee was reassured by Mr Lempriere's statement, the committee notes that the FIRB did not request to see this agreement of independence prior to granting approval for the transaction to go ahead. The committee did receive evidence that this would be made available to FIRB if requested and as a part of future reporting requirements regarding Lempriere's undertakings to FIRB.<sup>54</sup>

4.52 The committee also notes that subsequent to this October 2012 hearing there were media reports that Cubbie Station's new owners were reviewing and considering the potential sale of its water entitlements to the government under the Murray-Darling Basin water buyback scheme.<sup>55</sup>

### **Committee view**

4.53 The committee was often frustrated by the difficulty in uncovering information from the FIRB and the Treasury about how the FIRB process worked. Although the committee appreciates the extensive time that FIRB and Treasury officials, including the previous and current FIRB chairs, gave to the committee during their multiple appearances as witnesses, the committee was nevertheless often confronted with a dearth of information about the FIRB process.

4.54 The committee is deeply concerned about the lack of a systematic approach by FIRB to the conduct of the national interest test. Although it was encouraged by the input of numerous government departments in conducting the national interest test, the committee is of the view that the flexibility designed into the system is potentially detrimental to the interests of Australian agriculture. The committee is also concerned by the lack of information made publicly available by FIRB regarding the cases reviewed and decisions made about foreign investment in Australian agriculture.

4.55 In addition, the committee was left with little evidence to suggest that the current regulatory framework and the FIRB national interest test could effectively prevent foreign government-owned entities from acting in a manner that could distort Australia's agricultural capital and trading markets. In this respect, the committee was *not* reassured by the FIRB explanation that 'soft power' and 'international pressure' provided incentive for foreign government-owned entities to comply with conditions that may be placed on foreign acquisitions. The committee considers that such 'international pressure' will become increasingly difficult to apply in light of the strategic concerns that countries will face due to the growing global food task.

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53 Mr William Lempriere, Managing Director, Lempriere Pty Ltd, *Committee Hansard*, 24 October 2012, p. 7.

54 Mr William Lempriere, Managing Director, Lempriere Pty Ltd and Mr Anthony McKenna, Managing Director, Ceres Capital Management *Committee Hansard*, 24 October 2012, pp 6–7.

55 Mr Matthew Cranston, 'Cubbie's new owners look at water sale', *The Land* (online), 15 March 2013, [www.theland.com.au/news/agriculture/agribusiness/general-news/cubbies-new-owners-look-at-water-sale/2650753.aspx](http://www.theland.com.au/news/agriculture/agribusiness/general-news/cubbies-new-owners-look-at-water-sale/2650753.aspx).



4.56 Furthermore, the scope of FIRB's compliance powers appears to the committee to be out-dated given the evidence that food security is a strong motive for Hassad Australia's operations. Indeed, Hassad Australia's evidence indicated strongly that its goodwill was essential to it operating in a manner consistent with the undertakings it had made to FIRB. The committee, however, was not presented with any evidence that in the absence of such goodwill, the FIRB undertakings – and hence the national interest – would not be undermined.

4.57 Although the committee has some concerns about the role of food security in Hassad Australia's long-term strategy for investment in Australian agriculture, the committee acknowledges the evidence provided by Hassad Australia that it will operate on a commercial basis.

4.58 The Hassad Australia case demonstrates that FIRB makes initial questions and investigations about a proposal. The committee notes that FIRB's process does not follow a standard pattern. It appears that in Hassad Australia's case it was only because the proponent proactively pursued the matter that there was any ongoing certainty about the process.

4.59 Furthermore, the clear absence of effective compliance arrangements for the years following FIRB approval shows the potential for foreign investors to act in ways that are contrary to the national interest. The committee believes, therefore, that continued oversight of the operations of foreign investors after approval is necessary.

4.60 The committee is reassured by the openness of Hassad Australia both with FIRB and with the committee. However, in the way that Hassad Australia described the process, the committee reaffirmed its view that the FIRB review process relies as much on the goodwill of prospective foreign investors as it does on the scrutiny of FIRB.

4.61 Finally, the committee was reassured by Hassad Australia's clarification that it does not pay above market prices for its purchases of agricultural land. The committee is hopeful that this will remain Hassad Australia's practice into the future. In this respect, the committee's preference is for openness and transparency wherever possible.

4.62 The committee recognises that the sale of Cubbie Station to the joint bidders Shandong RuYi and Lempriere Pty Ltd, has caused a significant and somewhat justified angst in the community. The committee chooses not express a view about whether or not the particular case should have been approved by FIRB. Nevertheless, the committee is of the view that the Cubbie Station sale is an illustrative example of how the FIRB process often causes unnecessary public doubt about whether the national interest is being upheld.

4.63 In addition, the committee has expressed general concerns in its inquiry into the management of the Murray-Darling Basin about the value for money the buyback program has offered Australia's taxpayers.<sup>56</sup> The committee notes that Cubbie Station

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56 Senate Rural and Regional Affairs and Transport References Committee, *Management of the Murray-Darling Basin*, March 2013, pp 79–95.

has access to extensive water resources and that, in this case, the government buyback would be from a company that is majority owned by foreign investors. As such committee urges the government to be especially mindful in this case of ensuring that water buybacks represent value for money for Australian taxpayers.

### **Recommendation 16**

**4.64** The committee recommends that, in line with recommendation 4, the government develop a stronger, more rigorous and more transparent system for examining cases of foreign investment in Australia, including Australian agriculture. Particular focus should be made on forensically examining:

- company structures (including management relationships in joint Australian/foreign ventures);
- the relationship between a foreign government's acquisitions strategy (such as food security) and the commercial operation of their subsidiary businesses in Australia; and
- ways of setting clear and auditable ongoing undertakings that are in the 'national interest'.

### **Recommendation 17**

**4.65** The committee recommends that the government amend the FATA to create more effective compliance mechanisms for companies that do not rigorously and continually adhere to the undertakings and conditions of FIRB approval. In addition, the government should develop further mechanisms to improve compliance with FIRB policy and decisions. Any new compliance regime should provide the Treasurer and relevant officials with a wide variety of compliance tools, in addition to forced divestiture, so that compliance matters can be resolved more efficiently and in proportion to the severity of any breaches.

### **Recommendation 18**

**4.66** The committee recommends that the government increase the transparency and public awareness of the national interest test so that it has the following two clear aims:

- providing precise and unambiguous instructions to prospective foreign investors about their obligations to FIRB and the Treasurer, and how the national interest test is conducted; and
- building the confidence of the public, FIRB stakeholders and the Parliament that the national interest test is being rigorously and fairly applied and takes in to account all relevant factors including impacts on rural communities and the agriculture industry.

## **Recommendation 19**

**4.67** This recommendation relates to water entitlement buybacks conducted under the government's *Restoring the Balance Program* and the *Sustainable Rural Water Use and Infrastructure Program* as part of the water recovery process under the Murray-Darling Basin Plan. The committee recommends that any such water buybacks that are from companies that have had acquisitions subject to FIRB review (including Cubbie Station) should be forwarded to the Australian National Audit Office (ANAO) for review. The ANAO should publicly report on whether water buybacks in such cases represent value-for-money for Australian taxpayers. The committee accepts that any review by the ANAO would occur after a water buyback has occurred.

