

The Senate

Rural and Regional Affairs
and Transport
References Committee

Foreign Investment and the National Interest

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Table of Contents

Membership of the committee	iii
Abbreviations	ix
List of Recommendations	xi
Recommendations of the Committee's Interim report: Tax arrangements for foreign investment in agriculture and the limitations of the <i>Foreign Acquisitions and Takeovers Act 1975</i>	xix
Executive Summary	xxi
Key Findings	xxii
Chapter 1.....	1
Introduction	1
Conduct of inquiry.....	2
Acknowledgements	4
Note on references	4
Previous Senate inquiries	4
Structure of the report.....	5
Chapter 2.....	7
Background—the global food task, comparative regulatory contexts and Australia's regulatory framework	7
The benefits of foreign investment.....	7
The global food task	9
Comparative regulatory contexts.....	13
Implications of free trade agreements for Australia's foreign investment regulations	20
Australia's foreign investment framework.....	21

Chapter 3.....	27
Foreign investment—information gaps.....	27
Concerns about lack of information	27
ABS agriculture survey	29
ABARES' study.....	39
The national register of foreign ownership of agricultural land.....	41
Chapter 4.....	47
Transparency and scrutiny of foreign investment	47
The FIRB review process	47
Overview of FIRB national interest test.....	47
General views of the FIRB review process	49
Compliance.....	52
Case studies	55
Hassad Australia case study	55
Cubbie Station case study.....	59
Chapter 5.....	67
Investment threshold and related issues	67
FIRB foreign investment review threshold	67
Cumulative purchases.....	70
Local economy impacts	71
Definition of "rural land".....	76
Definition of "direct investment"	80
Chapter 6.....	85
Foreign investment and agricultural development: the Ord irrigation area case study	85
The Ord irrigation area	86
Key issues.....	87
Capital investment.....	87

Water entitlements and access to domestic capital	91
Land tenure	94
Community sentiment towards foreign investment.....	96
Dissenting report by Government Senators	99
Minority report from the Australian Greens	107
Additional Comments by Senator Nick Xenophon.....	111
Appendix 1	121
Terms of Reference.....	121
Appendix 2	123
Submissions Received.....	123
Appendix 3	127
Public Hearings and Witnesses	127
Appendix 4	135
Information about the Significant Investor Visa	135
Appendix 5	139
AACo's Proposed Terms of Reference for an Independent Commission of Audit into Agribusiness.....	139
Appendix 6	149
Map of the Ord Irrigation Expansion Project, including current and future developments.....	149

Abbreviations

AACo	Australian Agricultural Company
ABARES	Australian Bureau of Agricultural and Resource Economics and Sciences
ABS	Australian Bureau of Statistics
ACA	Agribusiness Council of Australia
ACCC	Australian Competition and Consumer Commission
AFIP	Australia's Foreign Investment Policy
ANZSIC	Australian and New Zealand Standard Industrial Classification
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
DAFF	Department of Agriculture, Fisheries and Forestry
FATA	<i>Foreign Acquisitions and Takeovers Act 1975</i>
FATR	Foreign Acquisitions and Takeovers Regulation 1989
FIRB	Foreign Investment Review Board
NFF	National Farmers Federation
NSW Farmers	NSW Farmers Association
OECD	Organisation for Economic Co-operation and Development
RCEP	Regional Comprehensive Economic Partnership
RIRDC	Rural Industries Research and Development Corporation
SAFF	South Australian Farmers Federation
TPP	Trans-Pacific Partnership Agreement
WAFF	Western Australian Farmers Federation

List of Recommendations

Recommendation 1

1.16 The committee recommends that the government further strengthen Australia's tax regulations in order to protect against the erosion of Australia's tax revenue. In particular, the government should develop more rigorous approaches to prevent tax revenue leakage that may occur due to the business structures and practices used by foreign investors in relation to:

- **transfer pricing;**
- **capital gains;**
- **passive income;**
- **thin capitalisation; and**
- **any other relevant tax mechanisms.**

Recommendation 2

1.17 The committee also recommends that the government continue to work towards international reforms to address tax revenue leakage, including issues relating to transfer pricing. The committee notes the current progress by the government, the OECD and the G20 in this area and urges the government to continue pursuing international taxation reforms through these organisations.

Recommendation 3

2.25 The committee recommends that the government establish an Independent Commission of Audit into Agribusiness, or similar body, to develop a comprehensive policy approach to Australian agriculture. Furthermore, the government should use this inquiry's interim report and final report, and the submission from Mr Farley (referred to above) as the basis for consultations with industry stakeholders aimed at establishing the terms of reference and general structure of the commission (including relevant commissioners and powers for information gathering).

Recommendation 4

2.47 The committee recommends that, given the future challenges arising from the global food task and the changing approaches to the regulation of foreign investment that have occurred in countries comparable to Australia, the government should commission an independent and wide-ranging review of Australia's foreign investment regulatory framework. In particular, the review

should examine the ways that the government can ensure that foreign investments in Australian agriculture:

- are made on a genuinely commercial basis;
- *do not* distort the capital market;
- *do not* distort the trade in agricultural products; and
- compete fairly with domestic Australian farmers and agribusinesses.

2.48 The review should take into account the issues raised, and the recommendations made, in this report and the committee's interim report of November 2012.

2.49 The review should be used as a reference point for the government's strengthening of the national interest test, improvement of relevant compliance regimes, and the other policy and legislative changes recommended in this report.

Recommendation 5

3.44 The committee recommends that the ABS does *not* conduct future ABS agricultural surveys on foreign investment. The committee considers that the national register for foreign ownership of agricultural land should be the primary mechanism for collecting and publishing information about foreign investment in Australian agriculture (as per the recommendations below).

Recommendation 6

3.60 The committee recommends that when establishing the agricultural land register, the government conduct an initial stocktake of foreign ownership of agricultural land, agribusiness and water entitlements. In addition to numbers of businesses, land size and volume of water entitlements, the value of foreign investment acquisitions should be captured. The initial stocktake should be comprehensive, as far as possible consistent across states, and take into account complex company structures including foreign trusts, "shell companies", ownership of agricultural assets by foreign mining companies, and debt structuring and ultimate liability.

3.61 Furthermore, on the basis of this initial stocktake, the government should commission independent modelling of the level of foreign investment in Australian agriculture in 20 years' time if current trends and regulatory arrangements are assumed to remain. The modelling should also include estimated costs to the industry over the same period based on current constraints to domestic capital investment in Australian agriculture. Finally, the modelling should have regard to the future opportunities provided by the growing global food task over this period.

Recommendation 7

3.62 The committee recommends that the ongoing information collected in the register include the information that the committee recommended be included as part of the stocktake of foreign ownership (as per recommendation 6).

Recommendation 8

3.63 The committee recommends that the register include divestments as well as investments. This will ensure that the information from the register remains current and can reflect changes over time.

Recommendation 9

3.64 The committee recommends that participation in the register be a legal requirement for foreign investors and that appropriate mechanisms for compliance apply in cases where such participation is avoided.

Recommendation 10

3.65 The committee recommends that the register *not* use the current definition of 'rural land' in the FATA. Instead the definition adopted should be that which results from the update of 'rural land' as per recommendation 25. This would maintain consistency with the regulatory framework for foreign investment in Australian agriculture.

Recommendation 11

3.66 The committee recommends that there be no minimum threshold for reporting and that all foreign investment should be captured in the agricultural land register. However, this data should be collected in a manner that can clearly delineate foreign investments in terms of value and business size.

Recommendation 12

3.68 The committee recommends that the register's data be held in a manner that is centralised and can provide comprehensive information about all foreign ownership that is recorded.

Recommendation 13

3.69 The committee recommends that levels and trends of foreign ownership of land, agribusiness and water entitlements should be published annually by the national register for foreign ownership of agricultural land. Aggregate level data about the respective value and level of interest of foreign government investors and private foreign companies should be included. The data should also be made available in categories such as state, sub-industry (ANZSIC levels), water catchment areas, and local shires.

Recommendation 14

3.70 The committee recommends that country of origin of all foreign government investors and specific foreign government investments should be published annually by the national register for foreign ownership of agricultural land.

Recommendation 15

3.71 The committee recommends that, in order to prevent possible disincentives for foreign investment, the country of origin details for private foreign companies should be published by the national register for foreign ownership of agricultural land at aggregate levels only. However, country of origin details for specific private foreign investments should be made available to parliamentarians, parliamentary committees, and any relevant government agency upon request.

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.

Recommendation 20

5.31 The committee recommends that the threshold for private foreign investment in agricultural land be lowered to \$15 million.

Recommendation 21

5.32 The committee also recommends that once cumulative purchases of \$15 million of private investment in agricultural land has been reached by a private business or associated entities, any further investment by that business or entity be required to receive FIRB approval regardless of value.

Recommendation 22

5.33 The committee recommends that FIRB reviews any proposed foreign acquisition of an agribusiness where investment exceeds 15 per cent or more in an agribusiness valued at \$248 million (indexed annually) or exceeds \$54 million.

Recommendation 23

5.34 The committee recommends that the zero trigger required for approval by FIRB for any purchase of agricultural land or an agribusiness by a state owned enterprise will continue to apply.

Recommendation 24

5.35 The committee recommends that Australia's Foreign Investment Policy (AFIP) be amended to clearly define the "interests of local economies" and the "interests of local communities". Furthermore, there should be a greater requirement for FIRB to take into account these local interests in the assessment of foreign purchases of agricultural assets.

Recommendation 25

5.51 The committee recommends that the government update the definitions of 'Australian rural land' and 'Australian urban land' in the FATA with the aim of more accurately reflecting the common understandings of these terms.

Recommendation 26

6.14 The committee recommends that the Australian government commission an extensive and independent review of possible incentives and barriers for long-term capital investment in major Australian agricultural developments by Australian investors, including superannuation funds and other domestic investors with long-term horizons. The review should make a comparative analysis with the incentives for foreign investors to invest in major Australian agricultural developments.

6.15 Based on the findings of the review, the Australian government should develop, publish and implement policies to encourage long-term domestic capital

investment in Australian agriculture. The policies should specifically identify opportunities for Australian superannuation funds and other domestic investors with long-term horizons and where appropriate, the policies should be coordinated with relevant state governments and agencies.

Recommendation 27

6.18 The committee recommends that, as part of the review and policies established under recommendation 26, and with appropriate consultation with the banking industry, the agricultural sector and other interest parties, the government should consider appropriate avenues for improving access for Australian agricultural businesses to domestic finance from Australian banks.

Recommendation 28

6.25 The committee recommends that the Australian government encourage the Western Australian and Northern Territory governments to consider possibilities for establishing a water market (including tradable water entitlements) for irrigation developments, including the Ord, in Australia's north. The information about foreign ownership of any water entitlements established under this regime should be included in the national foreign ownership register for agricultural land.

Recommendation 29

6.34 The committee recommends that the commonwealth, state and territory governments work together to consider appropriate policy options for consulting with FIRB in cases of proposals for significant foreign acquisitions from respective governments bodies.

Recommendations of the Committee's Interim report: Tax arrangements for foreign investment in agriculture and the limitations of the *Foreign Acquisitions and Takeovers Act 1975*

Recommendation 1

The committee recommends that in order to prevent tax revenue leakage and market distortions, the government undertake an extensive review of the tax arrangements applying to foreign investments and acquisitions in the agricultural sector.

Recommendation 2

The committee recommends that as part of the broader review outlined in Recommendation 1, the government should review Australia's tax laws that apply to tax exemptions for not-for-profit activities for foreign entities. The review should examine ways to prevent tax revenue leakage when foreign government entities undertake agricultural production in Australia for humanitarian purposes or for food security.

Recommendation 3

The committee recommends that the government require that any non-commercial production from agricultural land and businesses by foreign government entities (including for the purposes of food security) is undertaken within relevant Australian Government foreign aid programs.

Recommendation 4

The committee recommends that as part of the broader review outlined in Recommendation 1, the government should investigate ways of developing more rigorous tax liability arrangements for both government-owned and private foreign entities, particularly in relation to capital gains and passive income. In this regard, further efforts should be considered to limit the scope for foreign investors to use business structures, and other possible loopholes, not available to domestic competitors in order to reduce their tax burden.

Recommendation 5

The committee recommends that as part of the broader review outlined in Recommendation 1, the Government review the tax barriers for Australian organisations that limit Australian investment in long-term development projects in Australian agriculture. The review should explicitly compare tax arrangements for domestic entities to those faced by potential foreign investors in

Australian agriculture. The review should also consider possible reforms of tax regulation to improve incentives for Australian capital investment in agriculture.

Recommendation 6

The committee recommends that the government undertake a review of the *Foreign Acquisitions and Takeovers Act 1975* with the aim of developing proposed amendments that address contemporary issues of foreign investment, particularly in agriculture.

The review should specifically consider:

- **the definition of 'rural land' and 'urban land';**
- **drawing a distinction between the treatment of rural land and agricultural business; and**
- **any limitations that the *Foreign Acquisitions and Takeovers Act 1975* may place, either explicitly or implicitly, on the Foreign Investment Review Board's ability to effectively review the level and nature of foreign investment activities in Australia.**

Executive Summary

Foreign investment has long been an important feature of Australian agriculture. It has provided a key source of capital for Australian farmers and has promoted the growth of the Australian agricultural sector. Foreign investment has improved agricultural productivity, has generated many opportunities for Australian agricultural businesses, and assisted job creation and economic sustainability for many rural communities.

Foreign investment will also be essential to further development of Australian agriculture and will greatly assist Australian businesses to make the most of opportunities in the Asia Pacific region in the coming century.

However, future foreign investment in Australia also presents challenges for the agricultural industry and Australia's national interest. While genuinely commercial foreign investment should always be welcomed, the growing global food task appears to be leading to an increasing trend of foreign governments and associated entities considering investment in Australia for food security purposes. The committee notes that non-commercial foreign investments, motivated by factors such as food security rather than commercial returns, have a great potential to distort the capital market and the trade in agricultural products to the detriment of Australian farmers and Australia's economy. In addition, as noted in the committee's interim report, foreign government-owned companies and foreign multinational businesses can use complex corporate structures and mechanisms such as transfer pricing to minimise their tax liabilities in Australia and, as a consequence, erode Australia's revenue base. The committee is acutely aware that the future global food task, driven by world-wide population growth and combined with shrinking areas of prime agricultural land, will require dramatic increases in agricultural productivity in the next few decades.

Fortunately, as a net exporter of food, the future global food task also provides significant opportunities for Australia. The committee believes that with the right agricultural policy settings—including appropriate and clear foreign investment policies—the agricultural sector and the whole Australian economy can benefit greatly.

Australia is not alone as a country that has had to manage significant foreign investment in agricultural land and businesses. Nor is Australia the only country facing challenges from the global food task. The committee believes that Australia needs to be mindful of international trends and as such the committee considered the regulatory framework in countries facing similar issues to Australia. To this end this report outlines (in chapter two) the regulation of foreign investment in agriculture in countries including the United States, New Zealand, Brazil, Argentina, China and India. It also notes possible impacts of international free trade agreements on Australia's foreign investment regulations.

Being mindful of international developments and the context of the growing global food task, the committee was able to more fully examine Australia's current regulatory framework. In short, the committee found that Australia's current framework for

foreign investment (as per the *Foreign Acquisitions and Takeovers Act 1975* (FATA) and related regulations and policy)¹ was significantly deficient in effectively managing a number of key challenges facing Australian agriculture. Therefore, the committee recommends that the government make a comprehensive update of the FATA and related policies to address the key findings of this report.

Key Findings

Information Gaps

The first key finding of the committee's inquiry is that there is a significant lack of detailed and accurate information regarding foreign investment in the Australian agricultural sector (discussed in chapter three). This issue was widely identified by submitters and witnesses and acknowledged by the government as it took actions to address these gaps. The committee examined these steps by the government (notably the ABS agriculture survey and the subsequent ABARES report about foreign investment in Australian agriculture) and found they did little to genuinely improve knowledge of the issue. However, the committee also noted the government's progress to date towards a register for foreign investment in agricultural land. The committee strongly supports the register and urges that the government adopt the committee's recommendations in this regard. The committee believes that the register must provide consistent and transparent information about the current and future trends of foreign ownership of Australian agricultural assets. The committee also hopes that the publication of the register will provide a more informed debate, and that this will dispel some of the myths that currently surround this subject.

The transparency and scrutiny of the national interest test

The second key finding (discussed in chapter four) is that while some submitters and witnesses supported the current FIRB arrangements, there were significant shortcomings in the transparency of the FIRB process and in the scrutiny of the national interest test. In addition, the committee found that the compliance mechanisms for appropriately dealing with any conditions placed on foreign acquisitions need strengthening. The committee also examined these issues through two short case studies—the recent acquisitions by Hassad Australia and the sale of Cubbie Station. In these cases, the committee found that it was the actions and initiatives of the companies themselves, rather than the FIRB oversight process, that helped determine how rigorously the national interest test was applied to proposed foreign investments.

The FIRB review investment threshold

The third key finding (discussed in chapter five) is that the current investment threshold that triggers a FIRB review of proposed private foreign investments in the agriculture industry is far too high. The current threshold rate of \$248 million only covers a very small number of agricultural acquisitions. This was exacerbated by the limitations of FIRB to monitor cumulative purchasing strategies which may result in

1 The regulations and policy are Foreign Acquisitions and Takeovers Regulation 1989 and Australia's Foreign Investment Policy (AFIP), respectively.

large aggregate holdings of agricultural land. Furthermore, committee found that the high threshold level means that potentially large impacts on local economies may often also fall outside of the FIRB review process.

Definitional issues – rural land, urban land, and direct investment

The fourth key finding (also discussed in chapter five) is that the definitions of key terms in the FATA and the AFIP were inappropriate or inadequate for managing current foreign investment challenges in agriculture. In particular, the committee considered that the definitions of 'rural land' and 'urban land' in the FATA do not match with commonly understood meanings of the terms and that this has led to the inappropriate classification of land that may be considered for FIRB review. The committee considers that this potentially undermines confidence in the current regulatory framework. Furthermore, the committee found that the term 'direct investment' as defined in the AFIP did not appropriately cover certain cases of foreign government investors. The committee is pleased that the government has amended the AFIP in March 2013 to address this issue.

Foreign Investment and future agricultural developments

Finally, the committee examined the role of foreign investment in major agricultural developments in Australia's northern regions through the case study of the Ord irrigation development (see chapter six). The committee considers that foreign investment can make a major contribution to future agricultural developments in Australia, including the Ord irrigation area. This in turn can lead to significant benefits for Australia's economy and future food security. However, the committee also considers that to maximise the benefits of such developments there are challenges to be overcome such as: limited access to long-term capital investment; restrictions from land tenure arrangements; and the trade and transparency of water entitlements. These issues need to be addressed by encouraging and properly regulating both domestic and foreign investment in the national interest.

Chapter 1

Introduction

1.1 The Rural and Regional Affairs and Transport References Committee's inquiry into the Foreign Investment Review Board (FIRB) national interest test contended with a major contemporary challenge facing Australia's agricultural industry: that is, how to encourage foreign investment in Australian agriculture while managing it in the best interests of the industry and the nation. The committee welcomes the significant wealth and job creating benefits that foreign investments can bring to the Australian economy as well as to the continued development of the agriculture sector. The committee unequivocally supports foreign investment in Australia that is commercial in nature, improves local and national agricultural markets, and competes fairly with domestic businesses.

1.2 However, the committee also notes the concerns of many of Australia's rural and regional communities that certain recent trends in foreign investment in Australian agriculture that may not be consistent with Australia's national interest.

1.3 The evidence before the committee suggests that the current community concerns regarding foreign acquisitions of Australian agricultural assets stem from:

- the increasing pressure created by the growing global food task;
- a lack of transparency about the FIRB national interest test; and
- major information gaps about the levels and types of foreign investment in Australia.

1.4 The global food task appears to be leading to an increasing trend of foreign governments considering investment in Australia for food security purposes, while at the same time the lack information about foreign investment undermines public confidence in how this issue is governed. The inadequacies of the *Foreign Acquisitions and Takeovers Act 1975* (FATA) to deal with contemporary practices in foreign investment have exacerbated these problems.

1.5 Therefore, based on the evidence before the committee, this final report of the inquiry discusses the key issues of:

- the regulatory framework for foreign investment in Australia and the international trends in foreign investment regulation;
- the global context of food security and foreign investment;
- major information gaps regarding foreign investment in Australian agriculture;
- the scrutiny and transparency of FIRB's application of the national interest test;
- the foreign investment review threshold; and
- the role of foreign investment in future agricultural developments through the case study of the Ord irrigation area in northern Australia.

1.6 The issue of tax arrangements and foreign investment in agriculture was examined in detail in the committee's interim report which made five recommendations specifically about Australia's taxation framework.¹ Although the tax issue will not be discussed in depth in the body of this final report, because it is an ongoing interest for the committee, it is outlined further below.

1.7 In addition, the committee notes that the government introduced a new visa category called the 'significant investor visa' effective from 24 November 2012. The Department of Immigration and Citizenship notes that the:

...purpose of the visa is to provide a boost to the Australian economy and to compete effectively for high net worth individuals seeking investment migration. Migrant investors will be required to invest AUD 5 million into complying investments for a minimum of four years before being eligible to apply for a permanent visa.²

1.8 The committee has not had the opportunity to examine the implications of this visa, however the committee has concerns that it may have the potential to distort markets. Further information about the visa has been included in Appendix 4.

Conduct of inquiry

1.9 On 6 July 2011 the Senate referred the matter of the examination of the Foreign Investment Review Board national interest test to the Rural and Regional Affairs and Transport References Committee for inquiry and report. The terms of reference are available in Appendix 1.

1.10 The committee advertised the inquiry in the *Australian*, on the committee's website, and invited submissions from peak bodies, government departments and relevant agricultural companies.

1.11 The committee received 35 submissions which are published on the committee website (see Appendix 2). The committee held public hearings in Canberra, Perth, Kununurra, and Sydney (see Appendix 3) and conducted several site visits in northern Western Australia on 10 and 12 April 2013. Overall, the committee examined evidence from a wide variety of industry bodies, government departments, small and large agricultural businesses, and interested individuals.

1.12 The committee tabled a substantial interim report for the inquiry on 28 November 2012. The interim report focussed on the taxation arrangements of foreign investment in Australian agriculture and noted evidence received by that time regarding the global food task and the out-dated nature of the FATA. The interim report made six recommendations in total: relating to Australia's tax arrangements for foreign investment (including tax revenue leakage and transfer pricing, tax on capital

1 Senate Rural and Regional Affairs and Transport References Committee, *Examination of the Foreign Investment Review Board National Interest Test, Interim report: Tax arrangement for foreign investment in agriculture and the limitations of the Foreign Acquisitions and Takeovers Act 1975*, November 2012, pp 5–20.

2 Department of Immigration and Citizenship, 'Significant Investor Visa, frequently asked questions', www.immi.gov.au/skilled/business/pdf/significant-investor-faq.pdf, p. 2.

gains and passive income, and tax barriers to domestic capital investment in agriculture); and the need to update the FATA. These recommendations are reproduced at the beginning of the report.

1.13 While the issue of tax arrangements for foreign investment in agriculture is primarily considered in the interim report rather than this final report, such tax arrangements remain an ongoing concern for the committee. Therefore, the committee reiterates its recommendations regarding the taxation arrangements for foreign investment contained in the committee's interim report.

1.14 The committee notes and welcomes the recent progress that the Government has made in this area, including the review of transfer pricing legislation. The committee notes that tax revenue leakage due to the practices of multinational companies has been identified as major concern in other countries. Furthermore, the committee notes that international organisations including the Organisation for Economic Co-operation and Development (OECD) and the G20 are seeking to address this issue and that Australia has been actively engaged in these international processes.³

1.15 However, the committee considers that tax arrangements for foreign investment should remain an ongoing priority for the Government and that significant reforms are still required.

Recommendation 1

1.16 The committee recommends that the government further strengthen Australia's tax regulations in order to protect against the erosion of Australia's tax revenue. In particular, the government should develop more rigorous approaches to prevent tax revenue leakage that may occur due to the business structures and practices used by foreign investors in relation to:

- **transfer pricing;**
- **capital gains;**
- **passive income;**
- **thin capitalisation; and**
- **any other relevant tax mechanisms.**

3 For information about the transfer pricing review see: Bernard Pulle, *Tax Laws Amendment (Cross-Border Transfer Pricing) Bill (No. 1) 2012*, Bills Digest No. 160, 2011–12, Parliamentary Library, 19 June 2012. For the international response to tax arrangements see OECD, *Addressing Base Erosion and Profit Shifting*, OECD Publishing, 2013, <http://dx.doi.org/10.1787/9789264192744-en> and The Hon Wayne Swan MP, Deputy Prime Minister and Treasurer, media release no. 050, "G20, IMF and World Bank Meetings", 18 April 2013, <http://ministers.treasury.gov.au/wmsDisplayDocs.aspx?doc=pressreleases/2013/050.htm&pageID=003&min=wms&Year=&DocType=0> (accessed 13 June 2013).

Recommendation 2

1.17 The committee also recommends that the government continue to work towards international reforms to address tax revenue leakage, including issues relating to transfer pricing. The committee notes the current progress by the government, the OECD and the G20 in this area and urges the government to continue pursuing international taxation reforms through these organisations.

Acknowledgements

1.18 The committee acknowledges the many individuals and organisations that made contributions to the inquiry through submissions, providing briefings, hosting site visits or appearing as witnesses to the inquiry.

Note on references

1.19 References to Committee Hansard are to the proof versions. Page numbers may vary between the proof and official version of the Hansard.

Previous Senate inquiries

1.20 In the years preceding this inquiry there have been two key reviews of foreign investment in Australia by senate committees that are relevant to the current inquiry. The first, in 2009, was by the Senate Economics References Committee which conducted an inquiry into foreign investment in Australia by sovereign wealth funds and foreign state owned corporations.

1.21 The majority report of that inquiry included three recommendations about foreign investment in Australia. The first recommendation stated that FIRB should improve its communication of the national interest test.⁴ The result of this was that the government publicly released the Australian Foreign Investment Policy (AFIP) for the first time in June 2010.⁵

1.22 The final recommendation of that report was that the government tighten the FATA to deal with cases where complex transactions were used to target strategic assets (below the 15 per cent review threshold) and that FIRB should 'give adequate consideration to the interaction between the various components of an acquisition'.⁶ Although the government response stated that existing legislation covered the acquisition of small (less than 15 per cent) strategic assets, the government introduced amendments which led to the *Foreign Acquisitions and Takeovers Amendment Act*

4 Senate Economics References Committee, *Foreign Investment by State-owned Entities*, September 2009, p. ix.

5 Australian Government, *Australian Government Response to the Senate Economics References Committee Report: "Foreign Investment by State-Owned Entities"*, June 2011, p. 3.

6 Senate Economics References Committee, *Foreign Investment by State-owned Entities*, September 2009, p. x. The second recommendation was that FIRB present a more timely annual report to parliament, p. ix.

2010 to clarify that 'convertible notes and similar instruments will be treated in a similar fashion to shareholdings for the purposes of the foreign investment regime'.⁷

1.23 The second Senate report was tabled in June 2011 as the Senate Economics Legislation Committee reported on its inquiry into the Foreign Acquisitions Amendment (Agricultural Land) Bill 2010. The bill sought a number of changes to the FATA including:

- that the national interest test be formalised in legislation and listing the factors that must be considered by the Treasurer in conducting a review of applications;
- shifting the threshold of the FIRB review of purchases in agricultural land from a monetary threshold to a review of any purchases greater than five hectares; and
- publishing the applications for interest in agricultural land.⁸

Structure of the report

1.24 The remaining five chapters of this report discuss the current framework for foreign investment in Australian agriculture and the evidence presented to the committee about possible changes to this regime.

1.25 Chapter two examines the growing global food task and the international practices towards the foreign investment in agriculture in order to provide the context for Australia's management of foreign investment in the future. First, the chapter notes the benefits of foreign investment for Australian agriculture and then moves on to outlining the growing issue of global food security based on future population growth in the coming 50 years. It also discusses the challenges and opportunities that this provides for Australia's agricultural industry and national interest and evidence the committee received for a possible way forward. Second, the chapter outlines regulatory and policy responses to foreign investment in agriculture for countries that face, or have been involved with similar issues regarding foreign investment that were examined in this inquiry. In doing so it outlines the regulation of foreign investment in agriculture in countries including the United States, New Zealand, Brazil, Argentina, China and India. This chapter also notes the possible impacts that international free trade agreements could have on Australia's regulation of foreign investment.

1.26 Finally, chapter two outlines the legislative, regulatory and policy framework for foreign investment in Australian agriculture. It provides an overview of the FATA, the Foreign Acquisitions and Takeovers Regulations 1989 (FATR) and AFIP with particular reference to agriculture.

1.27 Chapter three firstly notes the concerns of many stakeholders about the lack of information regarding foreign investment in the Australian agricultural sector. The

7 Australian Government, *Australian Government Response to the Senate Economics References Committee Report: "Foreign Investment by State-Owned Entities"*, June 2011, p. 3.

8 Senate Economics Legislation Committee, *Foreign Acquisitions Amendment (Agricultural Land) Bill 2010*, June 2011, pp 13–16.

chapter goes onto examine the major attempts to date to improve the information gaps in this area: the Australian Bureau of Statistics (ABS) agriculture survey; the subsequent Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES) report about foreign investment in Australian agriculture; and the progress to date towards a register for foreign investment in agricultural land.

1.28 Chapter four examines the implementation of the legislative, regulatory and policy framework for foreign investment in Australian agriculture through the FIRB review process and that of relevant government agencies. It discusses the main criticisms of the process, the support from some stakeholders for current practice, and the mechanisms of compliance with FIRB review and conditions. Finally, it examines these issues through two short case studies of acquisitions by Hassad Australia and the sale of Cubbie Station.

1.29 Chapter five discusses the consequences of key aspects of the current framework governing foreign investment in Australian agriculture. It considers the relevance of the current threshold for FIRB review of foreign investment in agriculture, including the related issues of cumulative purchasing and the potential impacts on local economies that the high threshold level provides. It also notes that the FATA does not fully cover the foreign investment relationships for certain company structures. The chapter then focuses on the definitional issues in the framework relating to direct investment and rural land.

1.30 Finally, chapter six examines the role of foreign investment in major agricultural developments in Australia's northern regions through the case study of the Ord irrigation area. The chapter discusses the significant contribution that future agricultural developments, such as the Ord, can make for Australia's economy and future food security. In doing so, it analyses the development challenges due to land tenure, water entitlements and capital and how these issues can be addressed by encouraging and regulating both domestic and foreign investment in the national interest.

Chapter 2

Background—the global food task, comparative regulatory contexts and Australia's regulatory framework

2.1 This chapter sets out the global pressures and influences that underpin the current concerns raised by foreign investment in Australian agriculture. The chapter begins by noting the benefits of foreign investment for Australian agriculture. The chapter then discusses the growing issue of global food security based on future population growth in the coming 50 years. This has been a driving force behind many of the questions that the committee has posed throughout the inquiry. This chapter also discusses evidence received about a possible way forward regarding this issue.

2.2 The growing food task also appears to have been a cause for changing policy responses in a number of Australia's agricultural competitor countries. Therefore, the chapter outlines regulatory and policy responses to foreign investment in agriculture in other relevant countries. In doing so the chapter outlines the regulation of foreign investment in agriculture in comparable countries including Argentina, Brazil, China, India, New Zealand, and the United States. It also notes that Australia's domestic regulation for foreign investment could be affected by international free trade agreements.

2.3 Finally, the chapter discusses the legislative, regulatory and policy framework for foreign investment in Australian agriculture. It provides an overview of the *Foreign Acquisition and Takeovers Act 1975* (FATA), the Foreign Acquisitions and Takeovers Regulations 1989 (FATR) and Australia's Foreign Investment Policy (AFIP) with particular reference to agriculture. This outline focuses on the key aspects of Australia's current regulatory regime that have undermined the confidence of many stakeholders in the effectiveness of the Australian authorities to manage the current and future challenges of foreign investment in Australian agriculture.

The benefits of foreign investment

2.4 The committee supports the evidence from a wide range of stakeholders that demonstrates the historical importance and ongoing benefits of foreign investment for the agriculture industry. For example, the committee heard evidence that foreign investment is of great significance to the wine industry. At a public hearing with the Winemakers' Federation of Australia the evidence showed that a number of major foreign investments in the wine industry had been welcomed in the past and resulted in significant benefits to Australia.¹ In this respect, Mr Paul Evans, Chief Executive of the Winemakers' Federation of Australia told the committee of the feedback he received from wineries about foreign investment:

Looking at some of the feedback from some of the wineries I have spoken to who have partnered with or indeed been acquired by foreign investment,

1 Mr Paul Evans, Chief Executive, Winemakers' Federation of Australia, *Committee Hansard*, 9 April 2013, p. 4.

including Chinese investment, and talking through with them some of the benefits that have come through, the response I have got is increased access to capital and liquidity, job opportunity and creation, investment in R&D and innovation, investment horizons over the long term to improve certainty and business planning, and contribution to regional development. One particular winery spent over two years on the market. There was no other buyer. It was able to attract a Chinese investor and as a consequence 20 families in that one region then had certainty over their financial future and employment. Other benefits have been increased ability to re-invest back in the brands, business flexibility, access to global distribution channels, potential consolidation and efficiency gains and potential to commit and consider [joint ventures], [mergers and acquisitions] and strategic alliances.²

2.5 The importance of foreign investment was also noted in relation to access to capital. Gaining access to 'patient' capital (that is, capital with long-term horizons for returns) was a key issue for the wine industry.³ Foreign investment appeared to be the major path for securing such patient capital because the industry has had significant difficulty in sourcing investment domestically.⁴

2.6 In terms of other agricultural sectors, one of Australia's largest agricultural companies also highlighted the long-term importance of foreign investment. AACo stated in its submission that 'foreign investment is an essential constant in our past, our present and our future'. The AACo submission went on to explain that since the company's establishment in 1824 through an act of the British Parliament granting it about 400 000 hectares, AACo has grown to employ about 500 people, own 6.71 million hectares of land and manage 600 000 cattle, and that foreign investment was an important part of this growth.⁵

2.7 In a general sense, the committee also heard evidence of the ongoing benefits that foreign investment can provide to the Australian economy and the agriculture industry. As a representative from the Department of Foreign Affairs and Trade (DFAT) told the committee:

Foreign investment has played and will continue to play a key role, clearly, in developing our economy. It generates benefits for Australians, including creating and supporting new jobs, increasing trade, boosting household incomes, encouraging innovation and introducing new technologies. As with other parts of the economy, foreign investment in agriculture and agribusiness historically has played a vital role in linking Australia's agricultural sector to world markets. Similarly, foreign investment from

2 Mr Paul Evans, Chief Executive, Winemakers' Federation of Australia, *Committee Hansard*, 9 April 2013, p. 2.

3 See chapter six in reference to patient capital and the Ord irrigation area development.

4 Mr Paul Evans, Chief Executive, Winemakers' Federation of Australia, *Committee Hansard*, 9 April 2013, pp 1, 2 and 4.

5 AACo, *Submission 8*, p. 1.

emerging economies such as China and others will strengthen our trade links with those markets.⁶

Committee view

2.8 As noted elsewhere in this report, the committee supports foreign investment in Australian agriculture where it is in the national interest and considers that it is essential to the industry's future success. It is in this respect that the committee has reviewed Australia's regulatory framework so that future foreign investment in Australia:

- contributes to the economic growth of Australia's agricultural industry;
- remains commercially motivated; and
- improves opportunities for Australian agribusinesses.

The global food task

2.9 The future global food task is a fundamental issue for this inquiry and represents a major challenge for global agriculture over the coming decades. As the Department of Agriculture, Fisheries and Forestry (DAFF) informed the committee there are currently:

...one billion people [who] suffer chronic hunger and the United Nations estimates that food production will need to increase by about 70 per cent from 2005–07 average levels to feed the projected world population of 9.3 billion by 2050.⁷

2.10 A large number of submitters and witnesses considered that the implications of foreign investment in Australian agriculture need to be examined in this broader context. For example, Mr Julian Cribb told the committee:

I would like to comment on what I perceive as the major factors driving what is known as the global land grab, the increased trend towards foreign and speculative investment in agriculture both in Australia and worldwide. Globally, the area of farmland per person has shrunk from eight hectares in 1900 to under two hectares today and will decline to about one and a half hectares by the mid-century. The FAO's [Food and Agriculture Organization of the United Nations] land statistics show that the total area of farm and grazing land worldwide has in fact contracted in eight out of the last 10 years. The world is effectively losing an area equivalent to one Australian wheat belt per year, to multiple causes. These include land degradation, urban expansion, mining and energy expansion, recreation and sea level rise.

Marler and Wallin, and Sundquist, estimate the world is losing between 70 and 100 billion tonnes of topsoil every year. If this continues, they say the world will exhaust its soil resources in 50 to 70 years. Sundquist estimates the world has already abandoned 4.3 million square kilometres of degraded land in the last 40 years. That is an area a bit larger than half of Australia.

6 Mr Christopher Langman, First Assistant Secretary, Trade and Economic Policy Division, Department of Foreign Affairs and Trade, *Committee Hansard*, 9 May 2012, p. 17.

7 DAFF, *Submission 1 (attachment)*, p. vi.

The FAO's latest state of land and water report estimates that 18 per cent of the planet's land surface is bare and unusable, 25 per cent is highly degraded, eight per cent is moderately degraded, 36 per cent is stable or degrading slightly and 10 per cent is improving. The report concluded:

... land and water systems now face the risk of progressive breakdown of their productive capacity under a combination of excessive demographic pressure and unsustainable agricultural practices.

The area occupied by the world's cities will equal the size of China—that is nine million square kilometres—by the 2050s. That is all good land that will probably never be farmed again. The urban recreational catchment will take a similar area out of agriculture.

Global fresh water, which is closely linked to land and its tenure in most countries, is facing immense stress, with a likely doubling in demand from cities, the energy sector and industry by the 2050s, while food production too faces steep increases in demand for irrigation water. I think the FAO says that the world currently produces about 45 per cent of its food from irrigation, but by 2050 it has to produce two-thirds of its food from irrigation, because there is just not enough rain-fed land left. As major groundwater and surface resources deplete in China, the Indo-Gangetic region, North Africa, the Middle East, South-East Asia and North America, acute global water scarcities are likely to emerge by the 2030s. Generally speaking, agriculture is poorly placed to compete for its share of the water against the demands of giant industries and cities.

These factors have combined to raise global awareness of farmland and water as major opportunities for both investment and speculation.⁸

2.11 Furthermore, some countries are taking active steps to invest in Australian agriculture to meet their domestic food security needs. Hassad Australia, for example, which is an Australian-based, Qatari government-owned entity, told the committee that its investments in Australian agriculture were initially based on developing Qatari food security.⁹

Committee view

2.12 The committee is concerned about the increasing challenges arising from global food security in the coming decades and agrees with evidence received by a variety of witnesses and submitters that raised these concerns. At the same time, the committee considers that the growing global food task represents a significant opportunity for Australia's agricultural industry. Australia is currently a net exporter of food with Australia food exports worth \$27.1 billion in 2010/11.¹⁰ Furthermore, the Australian government's *National Food Plan green paper* notes that 'Australia

8 Mr Julian Cribb, *Committee Hansard*, 9 May 2012, p. 1.

9 Mr Tom McKeon, Chief Executive Officer, Hassad Australia Pty Ltd, *Committee Hansard*, 16 November 2011, p. 38. Hassad Australia also stated here that its operations have since moved to a commercial basis.

10 DAFF, *National Food Plan green paper 2012*, July 2012, p. iii.

produces enough food today to feed approximately 60 million people'.¹¹ The committee believes that Australian farmers are among the most efficient in the world and that combined with appropriate government policies designed to encourage future productivity growth, Australia can make a significant contribution to feeding the world's future population.

2.13 However, the committee considers that central to meeting these challenges is ensuring that foreign investment in Australia continues to be based on commercial motives and not strategic concerns of foreign governments about food security. Australia will not have the capability to effectively contribute to the future global food task if its agricultural capital and trading markets are distorted by foreign government-owned companies who invest in Australian agriculture but do not participate in the market on a genuinely commercial basis.

2.14 The committee also notes that a number of other countries are facing the same challenges as Australia in terms of future food security and foreign investment and are taking action to address this issue. Considering the policy frameworks adopted by other countries provides Australia with possible options to consider for its own regulatory response to the foreign investment in the context of the future global food task.

Addressing Australia's future agricultural challenges

2.15 The committee received evidence proposing a possible way forward in addressing the future challenges to Australian agriculture posed by issues including the future global food task. A supplementary submission from Mr David Farley, CEO, AACo proposed the establishment of an Independent Commission of Audit into Agribusiness (the commission). The submission states that the commission should:

...have a wide-ranging remit to look at a number of issues facing agriculture, including taxation incentives for investment and the ability of Government to either underwrite supporting infrastructure projects or participate in public-private partnerships.¹²

2.16 In providing reasoning for establishing the commission, Mr Farley noted the rising demand for food in the region:

If Australia continues to produce food at its current level it will not only miss out on an opportunity, but the lack of food provision could have catastrophic consequences for the region and Australia's diplomacy within. With the long-term, cyclical nature of agriculture, it is critical that Australia prepare in the next five years to increase production to the necessary levels.

This will take a range of initiatives and forward-thinking policies. It will require infrastructure for northern Australia – the gateway to Asia. It will require an increased focus on research and development, not just into agriculture, but into associated sectors such as logistics and international commerce. Above all, it will require policies and financial structures which

11 DAFF, *National Food Plan green paper 2012*, July 2012, p. 62.

12 AACo, *Submission 8 (supplementary)*, p. 1.

encourage and incentivise investment in agriculture. The Committee is well aware of the reluctance of many Australian investment funds, with their short-term time horizons, to invest in a long-term business such as agriculture. Many foreign funds have no such short-sighted policies and see the benefit of investing in Australian agriculture.

The policy here must be twofold – encourage Australian investment and refrain from blocking the international capital Australia will need to meet the food boom.¹³

2.17 Mr Farley argued that that the terms of reference for the commission would need to 'pull together all the strands of national policy and the national economy, rather than addressing the issues of agribusiness in a piecemeal fashion, or on a state-by-state basis.'¹⁴

2.18 In this respect Mr Farley's submission states:

[it] is not enough to simply look at the tax treatment of agricultural investment without considering other, equally important aspects of encouraging investment, such as access to markets, logistics and research and development support. Australia must demonstrate that agriculture is not just an attractive financial investment, it is a viable industry with long-term potential.¹⁵

2.19 The submission provides suggested terms of reference for the commission and an outline of the commission's structure and mandate to collect information. The proposed terms of reference are included as Appendix 5.

Committee view

2.20 The committee welcomes the input from Mr Farley, proposing an Independent Commission of Audit into Agribusiness. The committee supports the establishment of such a commission. The committee considers that three key findings of this inquiry show the need for the establishment of a comprehensive review of agricultural policy such as that proposed by Mr Farley.

2.21 First, the committee's interim report and recommendations one and two in this report show that Australia's tax arrangements for foreign investment in Australian agriculture require substantial reform in order to protect Australia's revenue base and to encourage greater domestic investment.

2.22 Second, as per recommendation four of this report, the committee considers that a wide-ranging review of Australia's foreign investment framework is required. As foreign investment will always be an essential part of continued economic and productivity growth in Australian agriculture, an extensive review of Australia's regulatory framework for foreign investment would need to be a central feature of any future comprehensive agricultural policy for Australia.

13 AACo, *Submission 8 (supplementary)*, pp 1–2.

14 AACo, *Submission 8 (supplementary)*, p. 2.

15 AACo, *Submission 8 (supplementary)*, p. 2

2.23 Finally, as noted in recommendation six, greater knowledge is needed about Australia's current circumstances in relation to foreign investment in Australian agriculture and what the future consequences will be for the industry if no changes are made.

2.24 These three broad issues, and the other recommendations of this report, should be explicitly considered in any terms of reference for the commission. The committee also notes the terms of reference for the commission already proposed by Mr Farley. The committee considers that these terms of reference provide a good starting point for wider consultations leading to the final terms of reference for the commission.

Recommendation 3

2.25 The committee recommends that the government establish an Independent Commission of Audit into Agribusiness, or similar body, to develop a comprehensive policy approach to Australian agriculture. Furthermore, the government should use this inquiry's interim report and final report, and the submission from Mr Farley (referred to above) as the basis for consultations with industry stakeholders aimed at establishing the terms of reference and general structure of the commission (including relevant commissioners and powers for information gathering).

Comparative regulatory contexts

2.26 Across the globe there are a wide variety of regulatory frameworks for foreign investment in agricultural land and business. Some countries prohibit foreign investment in agricultural land; others require the provision of information of foreign investors to the respective government; and others still have virtually no restrictions. However, in recent years certain countries, particular those with agricultural land that has experienced increasing levels of foreign investment have made regulatory changes to meet this challenge. The trends in the key states of Argentina, Brazil, China, India, New Zealand and the United States are discussed in turn to shed light on the debate in Australia about foreign investment in agriculture.

Argentina

2.27 In December 2011, Argentina enacted new legislation to restrict foreign ownership and acquisition of agricultural land. The new limitations include restricting the overall foreign ownership of Argentinean farmland to 15 per cent of the total agricultural land surface. The legislation also restricts the individual holdings of foreigners to 1000 hectares or less of agricultural land. In addition, the law 'defines future acquisitions of land as acquisition of a non-renewable resource rather than an investment.'¹⁶

16 OECD, *Inventory of investment measures taken between 1 November 2011 and 29 February 2012*, April 2012, p. 7, www.oecd.org/daf/inv/investment-policy/FOIinventorymeasures_april_2012.pdf.

Brazil

2.28 In general, the issue of foreign ownership of rural land in Brazil is covered by a regulatory framework established in 1971. This requires that a:

...foreign legal person or individual must be a resident in the territory and the purchase or renting of the rural property must be no greater than a quarter of the total area of the municipality...to which the property belongs. This restriction is more flexible when the foreigner is married to a Brazilian citizen or has Brazilian descendants. Specific authorisations are needed according to the size of the property to be purchased or rented by foreigners.¹⁷

2.29 More recently there has been consideration in Brazil of further restricting rural land ownership by foreign persons or bodies. This resulted in an August 2010 Brazil Government order further regulating farmland. This order means that the above restriction 'shall apply not only to foreign individuals of foreign legal entities, but also to Brazilian companies which [a] majority of the corporate capital is held, either directly or indirectly, by foreign individual[s] or foreign legal entities.'¹⁸

China

2.30 Foreign investment in China is codified by the *Catalogue for the Guidance of Foreign Investment* which places restrictions on foreign investment in certain industry sectors. These guidelines provide three categories of investment: encouraged, restricted, and prohibited. Sectors that are not listed in the guidelines are considered to permit foreign investment.¹⁹ In terms of agriculture (defined as the farming, forestry, animal husbandry and fishery industries), the following are 'encouraged' sectors of foreign investment:

- Planting, development and production of woody edible oil, ingredient and industrial raw material;
- Development of planting technology of green and organic vegetables (including edible fungus and melon-watermelon), dried fruits, teas and production of these products;
- Development and production of new technology of sugar-yielding crops, fruit trees, forage grass, etc;

17 OECD, *National Treatment for Foreign-Controlled Enterprises including adhering country exceptions to national treatment 2012*, updated July 2012, www.oecd.org/daf/internationalinvestment/investmentpolicy/nationaltreatmentinstrument%20english.pdf, p. 21.

18 Camila da Motta Pacheco Alves de Araujo *et al.* "New Rules – Restrictions on the acquisition of rural real properties by foreigners in Brazil" www.martindale.com/real-estate-law/article_Araujo-e-Policastro-Advogados_1147364.htm.

19 United States Government Accountability Office, "Foreign Investment: Laws and Policies Regulating Foreign Investment in 10 Countries", February 2008, www.gao.gov/new.items/d08320.pdf, p. 44.

- Production of flowers and plants, and construction and operation of nursery base;
- Planting of rubber, oil palm, sisals and coffee;
- Planting and cultivation of traditional Chinese medicines (limited to equity joint ventures or contractual joint ventures);
- Reusing in fields and comprehensive utilization of straws and stalks of crop, development and production of resources of organic fertilizers;
- Planting of forest trees (including bamboo) and cultivation of fine strains of forest trees, and cultivation of new breed varieties of polyploid trees;
- Breeding of aquatic offspring (except precious quality varieties peculiar to China);
- Construction and operation of ecological environment protection projects preventing and treating desertification and soil erosion such as planting trees and grasses, etc; and
- Breeding of aquatic products, cage culture in deep water, large-scale breeding of aquatic products, breeding and proliferation of eco-ocean products.²⁰

2.31 On the other hand foreign investment is 'restricted' in areas including 'breeding and seeds developing production of new train crop breed' and raw cotton processing. It is 'prohibited' in sectors including 'China's rare and precious breeds' genetically modified (GM) organisms, GM plant seeds and GM aquaculture, and fishing in waters under Chinese jurisdiction.²¹

2.32 In addition to these general regulations, China has region specific guidance for foreign investment which may differ between western, central and eastern China. There is also a review process for foreign investment acquisitions and mergers. This process has been considered by some as unpredictable, although a large majority of investment applications are cleared.²² In 2011, this process was updated and the review, which can apply to foreign mergers and acquisitions in major agricultural products sectors, takes into account issues such as 'national defence, national economic stability, basic order in social life, and research and development in key technologies related to national security.'²³

20 The above is text is taken directly from *Catalogue for the Guidance of Foreign Investment Industries (Amended in 2011)* as it appears on the Invest in China website www.fdi.com.cn/app?page=LawDetailEn&service=page&id=5c42bce337da5f930137db33576e004e.

21 *Catalogue for the Guidance of Foreign Investment Industries (Amended in 2011)*.

22 United States Government Accountability Office, "Foreign Investment: Laws and Policies Regulating Foreign Investment in 10 Countries", February 2008, www.gao.gov/new.items/d08320.pdf, pp 46–47.

23 OECD, *Inventory of investment measures taken between 16 February 2011 and 31 October 2011*, January 2012, www.oecd.org/investment/investmentpolicy/49449570.pdf, p. 10.

India

2.33 India permits foreign investment in Indian companies subject to its Foreign Direct Investment Policy (FDI Policy). However it also prohibits foreign investment in certain sectors or activities (such as: lottery and gambling sectors; real estate business and construction of farm houses; and sectors not open to private sector investment – for example, atomic energy and some railway transport).²⁴ In areas where foreign investment is permitted, the FDI Policy sets the circumstances under which foreign investment can occur through the 'Automatic Route' or through the 'Government Route'. The FDI Policy states:

Under the Automatic Route, the non-resident investor or the Indian company does not require any approval from the Government of India for the investment. Under the Government Route, prior approval of the Government of India is required.²⁵

2.34 In terms of the agriculture industry in India, foreign investment of up to 100 per cent of a company is permitted under the Automatic Route for the following:

- a) Floriculture, Horticulture, Apiculture, and Cultivation of Vegetables and Mushrooms under controlled conditions;
- b) Development and production of Seeds and planting material;
- c) Animal Husbandry (including breeding of dogs), Pisciculture, Aquaculture, under controlled conditions; and
- d) Services related to agro and allied sectors.²⁶

2.35 With the exception of the four areas noted above, India prohibits foreign direct investment in 'any other agricultural sector/activity.'²⁷

New Zealand

2.36 Foreign investment in agricultural land in New Zealand is highly regulated and the purchase of land above certain thresholds is subject to a national interest test. According to a New Zealand treasury official, the attitude to foreign investment in

24 Government of India, Department of Industrial Policy and Promotion and Ministry of Commerce and Industry, *Consolidated FDI Policy*, http://dipp.nic.in/English/Policies/FDI_Circular_01_2013.pdf (accessed 13 June 2013), p. 13.

25 Government of India, Department of Industrial Policy and Promotion and Ministry of Commerce and Industry, *Consolidated FDI Policy*, http://dipp.nic.in/English/Policies/FDI_Circular_01_2013.pdf (accessed 13 June 2013), p. 29

26 Government of India, Department of Industrial Policy and Promotion and Ministry of Commerce and Industry, *Consolidated FDI Policy*, http://dipp.nic.in/English/Policies/FDI_Circular_01_2013.pdf (accessed 13 June 2013), p. 40. Note, "controlled conditions" relates to the artificial control of the climate or environment under which the relevant agriculture takes place. For further information see p. 41 of the FDI Policy.

27 Government of India, Department of Industrial Policy and Promotion and Ministry of Commerce and Industry, *Consolidated FDI Policy*, http://dipp.nic.in/English/Policies/FDI_Circular_01_2013.pdf (accessed 13 June 2013), p. 40.

agricultural land developed in the context of the view that large aggregations of land ownership being concentrated among a few individuals should be avoided.²⁸

2.37 The key legislation framework for investment in agricultural land is the *Overseas Investment Act 2005* (New Zealand) and the *Overseas Investment Regulation 2005* (New Zealand). Under this framework foreign investment in agriculture is overseen by the Overseas Investment Office.

2.38 The land subject to foreign investment regulation in New Zealand is determined by size, type of land and the type of adjoining land. Such land is referred to as "sensitive land" and is subject to review. Among a number of different criteria, all non-urban land above 5 hectares is sensitive land.²⁹ The regulatory framework also requires that overseas investors need to be of good character, have relevant business acumen, experience and financial commitment, and be able to show that the investment will have an overall benefit to New Zealand.³⁰ There are about 20 factors that need to be considered, where relevant, for applications of foreign investment – which cover social, economic and environmental issues. In January 2011 this included the addition of an "economic benefit" test.³¹

2.39 According to New Zealand officials the Overseas Investment Office receives approximately 75 to 100 foreign investment applications a year and a recent review showed that about 98 per cent of applications passed. There is also the option for judicial review in the case of an application being rejected and summaries of the decisions are posted on the office's website.³²

2.40 There is no significant difference in the treatment of sovereign investors and private foreign investors in New Zealand. As a New Zealand Treasury official told the Senate Economics Committee inquiry 'we do not have any differences in our [New Zealand] regime for sovereign investors. Sovereign investors and private investors are treated the same through our [New Zealand] screening regime. It is not a specific consideration in our regime.'³³

2.41 In February 2012, the New Zealand High Court decided a case involving the foreign purchase of a collection of dairy farms in New Zealand. The court ordered that the New Zealand Government review its decision to permit Milk NZ (a company owned by Chinese based Shanghai Pengxin) to purchase the farms from the previous

28 Senate Economics Committee, *Committee Hansard*, 12 April 2011, p. 33.

29 www.linz.govt.nz/overseas-investment/applications/technical-resources/sensitive-land.

30 Senate Economics Committee, *Committee Hansard*, 12 April 2011, p. 33.

31 Senate Economics Committee, *Committee Hansard*, 12 April 2011, p. 33. These are set out in Section 17 of the *Overseas Investment Act 2005* and Regulation 28 of the *Overseas Investment Regulations 2005*.

32 Senate Economics Committee, *Committee Hansard*, 12 April 2011, p. 35. For the summaries of decisions see: www.linz.govt.nz/overseas-investment/decisions.

33 Senate Economics Committee, *Committee Hansard*, 12 April 2011, p. 37.

owner (following bankruptcy).³⁴ The New Zealand Government publicly indicated that it would not appeal the court's decision.³⁵

*United States of America*³⁶

2.42 There are two major levels for the regulation of foreign investment in agricultural business and land in the United States: the national level and the state level. At a national level, foreign investment is regulated by the *Agricultural Foreign Investment Disclosure Act 1978* (AFIDA). According to one study, the AFIDA developed in a similar context of media attention to that which is occurring presently in Australia.³⁷ The AFIDA does not restrict foreign investment in United States farmland but requires all foreign persons who obtain or hold an interest in United States agricultural land to notify the Secretary of Agriculture. Furthermore, changes in ownership holdings of agricultural by foreign persons must also be reported.³⁸

2.43 This established a nation-wide system for the collection of information regarding foreign ownership in United States agricultural land.³⁹ This information is used for periodic reports to the President and Congress and, as at December 2010, foreign investors held an interest in 24.2 million acres of U.S. agricultural land, including forest land. This represented 1.9 per cent of all privately held agricultural land.⁴⁰

2.44 At a state level there can be additional regulations of the ownership of agricultural land by foreign individuals or corporations. There are variations across states on the level of regulations. For example, a recent OECD report noted that Iowa, Minnesota, Missouri, Nebraska, North Dakota, Pennsylvania, and South Dakota have regulations that prevent or significantly restrict foreign ownership of agricultural land. In addition, the states of California, Illinois, Kansas, Nevada, New Hampshire, New

34 OECD, *Inventory of investment measures taken between 1 November 2011 and 29 February 2012*, April 2012 p 18, www.oecd.org/dataoecd/36/61/50053970.pdf, see also High Court of New Zealand, Decision CIV-2012-485-101 [2012] NZHC 147.

35 *Otago Daily Times*, 13 March 2012.

36 This section draws heavily on www.apfo.usda.gov/FSA/webapp?area=home&subject=ecpa&topic=afa.

37 Derek Byerlee and Klaus Deininger "Foreign Investment in Farm land: Worries About a Land Grab in Australia are Unfounded", *Farm Policy Institute*, vol. 8, no. 2, 2011, pp 7–8.

38 A 1995 OECD review of Foreign Direct Investment in the US does not suggest any restrictions per se on investment in agricultural land. See: www.oecd.org/dataoecd/4/54/34383483.pdf

39 The Farm Service Agency, *Foreign Investment Disclosure Handbook* includes definitions of who is a foreign person, what is agricultural land and what is a reportable interest. Available at www.fsa.usda.gov/Internet/FSA_File/1-afida_r02_a02.pdf.

40 See USDA, Foreign Holdings of U.S. Agricultural Land: Through December 31, 2010 www.apfo.usda.gov/Internet/FSA_File/afida_thru_12312010.pdf.

Jersey, New York, and North Carolina, also have some level of restriction on the foreign ownership of agricultural land.⁴¹

Committee view

2.45 In the context of restrictions and oversight of foreign investment in agricultural businesses and land in the countries listed above, the committee considers that a significant review of Australia's regulatory process is warranted. Although the committee acknowledges that some other countries may have less regulatory restrictions than Australia, those countries noted above provide useful comparison for Australia. For example, the U.S. requirement for foreign companies to register ownership has been long-standing, and as noted later in this report, it is concerning that a register is only now being formally developed in Australia.

2.46 On the other hand, the committee does not consider the approach from some countries that significantly restricts or may deter commercially orientated foreign investment to be an appropriate approach for Australia's agricultural and economic environment. Nevertheless, considering the approaches of the countries listed above is a valuable part of the investigation into the effectiveness of Australia's regulatory regime for managing foreign investment in light of the challenges of the growing global food task.

Recommendation 4

2.47 The committee recommends that, given the future challenges arising from the global food task and the changing approaches to the regulation of foreign investment that have occurred in countries comparable to Australia, the government should commission an independent and wide-ranging review of Australia's foreign investment regulatory framework. In particular, the review should examine the ways that the government can ensure that foreign investments in Australian agriculture:

- **are made on a genuinely commercial basis;**
- ***do not* distort the capital market;**
- ***do not* distort the trade in agricultural products; and**
- **compete fairly with domestic Australian farmers and agribusinesses.**

2.48 The review should take into account the issues raised, and the recommendations made, in this report and the committee's interim report of November 2012.

2.49 The review should be used as a reference point for the government's strengthening of the national interest test, improvement of relevant compliance

41 OECD, *National Treatment for Foreign-Controlled Enterprises including adhering country exceptions to national treatment 2012*, updated July 2012, p. 95, www.oecd.org/daf/internationalinvestment/investmentpolicy/nationaltreatmentinstrument%20english.pdf.

regimes, and the other policy and legislative changes recommended in this report.

Implications of free trade agreements for Australia's foreign investment regulations

2.50 Free trade agreements between Australia and its trading partners may have implications for foreign investment regulation in Australia. As noted in this chapter below, there are much higher thresholds for the Foreign Investment Review Board (FIRB) review of foreign investment for private investors based in the United States and New Zealand. The higher review threshold for investors based in the United States was a result of the Australian-United States Free Trade Agreement. The threshold for New Zealand investors arose from the Protocol on Investment for the Australia-New Zealand Closer Economic Relations.⁴²

2.51 There are also two key multilateral agreements that may impact on foreign investment arrangements in Australia in the future. First, Australia is currently involved in negotiations with other countries with the aim of developing the Trans Pacific Partnership Agreement (TPP). The TPP negotiations currently include: Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam. According to DFAT the:

Australian Government will pursue a TPP outcome that eliminates or at least substantially reduces barriers to trade and investment. The TPP is more than a traditional trade agreement; it will also deal with behind-the-border impediments to trade and investment.⁴³

2.52 Second, Australia is part of the negotiations for the Regional Comprehensive Economic Partnership (RCEP) which began in November 2012. The negotiations include the 10 member countries of ASEAN and Australia, China, India, Japan, the Republic of Korea and New Zealand.⁴⁴ DFAT has stated that the:

...objective of launching RCEP negotiations is to achieve a modern, comprehensive, high-quality and mutually beneficial economic partnership agreement that will cover trade in goods, trade in services, investment,

42 FIRB, *Australia's Foreign Investment Policy*, 2013, pp 3, 16 and 18. The Hon David Bradbury MP, Assistant Treasurer and Minister Assisting for Deregulation and the Hon Craig Emerson MP, Minister for Trade and Competitiveness and Minister Assisting the Prime Minister on Asian Century Policy, Joint Media Release "Milestone in Investment Ties with New Zealand", No. 22, 1 March 2013, [http://assistant.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2013/022.htm&pageID=003&min=djba&Year=&DocType](http://assistant.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2013/022.htm&pageID=003&min=djba&Year=&DocType;); Department of Foreign Affairs and Trade, "Australia-United States Free Trade Agreement: Fact Sheet – Investment: www.dfat.gov.au/fta/ausfta/outcomes/09_investment.html (accessed 13 June 2013).

43 Department of Foreign Affairs and Trade, "Trans-Pacific Partnership Agreement negotiations", www.dfat.gov.au/fta/tpp/ (accessed 13 June 2013).

44 ASEAN members states are Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam.

economic and technical cooperation, intellectual property, competition, dispute settlement and other issues.⁴⁵

2.53 In terms investment between potential signatory countries, the Guiding Principles and Objectives for Negotiating the RCEP state that the RCEP aims to create 'a liberal facilitative, and competitive investment environment in the region.'⁴⁶

Committee view

2.54 The committee notes that both the TPP and the RCEP specifically include negotiations about foreign investment between the countries that sign on to the respective agreements. The committee also notes that the FIRB review thresholds for the United States and New Zealand were raised as a result of bilateral agreements between Australia and the two countries, respectively.

2.55 In light of this, the committee considers that the Government should ensure that the role of FIRB in reviewing foreign investment is fully considered as part of Australia's negotiations for the TPP and the RCEP. Furthermore, the Government should avoid making international commitments through the TPP and the RCEP that unduly restrict the ability of FIRB to review foreign investment in terms of the national interest and apply conditions on such investment where appropriate. In particular, any such international commitments should allow the Australian Government to apply appropriate FIRB review thresholds for private foreign investments and should not compromise FIRB's ability to review investments by foreign government owned entities regardless of value.

Australia's foreign investment framework

2.56 This section provides a brief overview of the current framework of foreign investment in Australian agriculture. A detailed discussion of the relevant parts of Australia's regulation is provided in chapter four regarding the transparency and scrutiny of foreign investment and chapter five regarding the investment threshold and related issues.

2.57 The key legislation for the approval of foreign investment in agriculture in Australia is the *Foreign Acquisitions and Takeovers Act 1975* (FATA) and the corresponding regulations are the Foreign Acquisitions and Takeovers Regulations 1989 (FATR). In June 2010, the government published Australia's Foreign Investment Policy (AFIP) for the first time. The FATA, FATR and AFIP set out the conditions under which foreign companies and foreign government owned entities can invest in Australian businesses and purchase Australian property.

2.58 The Foreign Investment Review Board (FIRB) is a non-statutory government body which examines cases and provides advice to the Treasurer regarding cases of

45 Department of Foreign Affairs and Trade, "Regional Comprehensive Economic Partnership negotiations", www.dfat.gov.au/fta/rcep/ (accessed 13 June 2013).

46 *Guiding Principles and Objectives for Negotiating the RCEP*, available at: Department of Foreign Affairs and Trade, "Regional Comprehensive Economic Partnership negotiations", www.dfat.gov.au/fta/rcep/ (accessed 13 June 2013).

foreign investment. It is the Treasurer rather than FIRB that ultimately makes decisions regarding the approval, the setting of conditions, or rejection of applications for foreign investment in Australia. The Treasurer has 30 days from notification of a foreign investment proposal to reject such a proposal or place conditions on a proposal, although this can be extended through an interim order.⁴⁷

2.59 There are a number of different restrictions for foreign investment in urban land and developments and 'sensitive' industries such as the media. However, agricultural businesses and agricultural (or 'rural') land, which is defined as 'land used wholly and exclusively for carrying on a business of primary production',⁴⁸ are treated in the same way as foreign investment in other businesses.⁴⁹

2.60 In general, the legislation and regulations set out various threshold levels which trigger the review of a foreign investment proposal by FIRB. For the agriculture industry, the FIRB review trigger for completely private individuals or companies—that is those companies that are not owned by foreign governments—is the proposed acquisition of a 'substantial interest in a corporation or control of an Australian business that is valued above \$248 million' (this also applies to 'rural land').⁵⁰ The exception to this is that the threshold for New Zealand and US investors is \$1078 million. These thresholds are subject to annual indexation and were last set at 1 January 2013.⁵¹ Different threshold levels apply to investment into urban land and real estate developments.

2.61 Under the current AFIP any 'direct investment' in land or businesses by 'foreign government investors' (such as, foreign state-owned companies and foreign sovereign wealth funds) is also subject to review by FIRB. Direct investment is defined as 'investment of an interest of 10 per cent or more'.⁵² In addition, direct investment maybe considered to be an interest that is less than 10 per cent where the 'acquiring foreign government investor is building a strategic stake in the target, or can use that investment to influence or control the target'.⁵³ For the purpose of the report, foreign direct investment is referred to as foreign investment, unless otherwise stated. The FIRB definition of 'foreign governments investors' is stated as including:

- a body politic of a foreign country;

47 *Foreign Acquisitions and Takeovers Act 1975*, Part II, sections 22 and 25.

48 FIRB, *Australia's Foreign Investment Policy*, 2013, p. 13.

49 FIRB, *Australia's Foreign Investment Policy*, "Annex 2, Policy Statement: Foreign Investment in Agriculture", 2013, p. 19.

50 FIRB, *Australia's Foreign Investment Policy*, 2013, pp 2 and 13.

51 FIRB, 'Recent Changes to Policy', www.firb.gov.au/content/policy.asp?NavID=1n (accessed 23 April 2013). Note: when this inquiry began in 2011, the relevant review threshold was \$231 million. In 2012, this was increased to \$244 million and in 2013 to \$248 million which is the current figure. The \$248 million figure will be used for all corresponding threshold figures throughout this report.

52 FIRB, *Australia's Foreign Investment Policy*, 2013, p. 14.

53 FIRB, *Australia's Foreign Investment Policy*, 2013, p. 14.

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- entities in which governments, their agencies or related entities from a single foreign country have an aggregate interest (direct or indirect) of 15 per cent or more;
 - entities in which governments, their agencies or related entities from more than one foreign country have an aggregate interest (direct or indirect) of 40 per cent or more; or
 - entities that are otherwise controlled by foreign governments, their agencies or related entities, and any associates, or could be controlled by them including as part of a controlling group.⁵⁴

2.62 In addition, it is a requirement that these entities notify the FIRB before an investment takes place.

2.63 In general, when FIRB conducts a review (and provides recommendations to the Treasurer), it considers whether the proposal will be contrary to the national interest. The national interest is not formally defined in the legislation but the AFIP states that the following issues will be taken into account:

- national security;
- competition;
- impact on the economy and community;
- Australian government policies such as tax; and
- the character of the investor.⁵⁵

2.64 The reviews are flexible rather than prescriptive and conducted on a case by case basis.⁵⁶ The government has also released a policy statement on foreign investment in agriculture which states that foreign investment proposals in the agriculture sector will be reviewed in light of the following:

- the quality and availability of Australia's agricultural resources, including water;
- land access and use;
- agricultural production and productivity;
- Australia's capacity to remain a reliable supplier of agricultural production, both to the Australian community and our trading partners;
- biodiversity; and

54 FIRB, *Australia's Foreign Investment Policy*, 2013, p. 15. Note: footnote 20 on this page states: 'Entities include companies, trusts and limited partnerships.'

55 FIRB, *Australia's Foreign Investment Policy*, 2013, pp 7–8.

56 FIRB, *Australia's Foreign Investment Policy*, 2013, p. 7.

- employment and prosperity in Australia's local and regional communities.⁵⁷

2.65 In addition to the FATA, the regulations, and the AFIP, foreign investors in Australia must abide by a number of other key legislative frameworks that apply to businesses such as those governing competition and taxation. As noted elsewhere, taxation arrangements are discussed in detail in the committee's interim report of 28 November 2012.⁵⁸ A brief overview of the role of other key agencies, such as the Australian Competition and Consumer Commission and the Australian Taxation Office in the conduct of the FIRB review process is provided in chapter four.

2.66 Finally, the committee heard evidence from the Chair of FIRB noting the limited changes to the FATA that had occurred since the late 1980s. When asked about whether the FATA was currently covering relevant foreign investment scenarios, Mr Wilson responded:

...I will simply say that the Foreign Acquisitions and Takeovers Act was put in place in 1975 and, as I recall, was last modified in 1989 and it is now 2013 so you could draw your own conclusions about how up to date it might be.⁵⁹

Committee view

2.67 Although the above issues are detailed at greater length in chapters four and five, the committee considers that the current regulatory framework poses many questions. For example, it is clear to the committee that the following issues require further examination:

- the FATA definition of 'rural land' and 'urban land' (see chapter five);
- the investment review threshold, as the current of \$248 million for private companies means only a very small percentage of foreign investments in agricultural assets are reviewed (see chapter five);
- the 'flexibility' of the national interest test, as this limits the transparency of the test's application (see chapter four); and
- the compliance mechanisms regarding the requirements for notification of foreign investment (see chapter four).

2.68 It is on this basis and in response to the changing regulatory context in comparable countries towards foreign investment and the challenges of the global food task that the committee has examined the FIRB national interest test.

57 FIRB, *Australia's Foreign Investment Policy*, "Annex 2, Policy Statement: Foreign Investment in Agriculture", 2013, p. 19.

58 Senate Rural and Regional Affairs and Transport References Committee, *Inquiry into 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.

59 Mr Brian Wilson, Chair, Foreign Investment Review Board, *Committee Hansard*, 9 May 2013, p. 8.

2.69 Given this contextual framework, the committee is unsurprised by the concerns of many stakeholders in the agricultural industry about the adequacy of the FATA, its regulations and the AFIP, implemented by FIRB, to effectively manage the issues.

Chapter 3

Foreign investment—information gaps

3.1 Over recent years there has been increasing level of community and industry concern regarding the level of foreign ownership of agricultural businesses and the acquisition of agricultural land by foreign companies. The committee heard evidence that these concerns have been exacerbated because the current levels of foreign ownership are poorly documented, and the impact of foreign investment is poorly understood. This chapter begins by outlining some of the evidence received on the lack of accurate data about foreign investment in Australia.

3.2 In acknowledging the information gaps on foreign investment in agriculture, there have been several steps taken by the government over the last two years to address this issue. Therefore, the chapter examines the three key government initiatives to address the paucity of information: the Australian Bureau of Statistics (ABS) agriculture survey, the Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES) report, and the national register on foreign investment in agricultural land.¹

3.3 Specifically, the chapter notes the evidence received showing the significant limitations of the ABS agriculture survey and the ABARES report which were intended to improve the level of knowledge about foreign investment in agriculture. Finally, the chapter outlines the information available to date about the agricultural land register and puts forward the committee's recommendations about what should be included as the register is developed.

Concerns about lack of information

3.4 The committee heard evidence from many submitters and witnesses that while they were supportive of foreign investment in Australian agriculture that could provide significant ongoing benefits to the industry, they were also strongly concerned about the dearth of information about levels and trends of foreign investment in Australia. For example, the lack of information on the level of foreign acquisitions in Australian agriculture was raised by one submitter as a constraint in responding to this inquiry. The Western Australian Farmers Federation (WAFF) noted specifically that it had not attempted to address all the inquiry's terms of reference:

...as we believe that there is a lack of detailed and reliable information on the level of foreign investment in not only Western Australian, but in Australian, agricultural businesses, and further, the Foreign Investment Review Board's assessment criteria has precluded its investigation of much of the investment that has already occurred. As such, the relative

1 For the purposes of this report the ABS Agricultural Land and Water Ownership Survey, Australia 2010, is referred to as the ABS agriculture survey. In addition, the ABARES report is the abbreviated term used for the following report: Mr Brian Moir, *Foreign Investment in Australian Agriculture*, RIRDC, Canberra, November 2011.

effectiveness of the national interest test in respect of agriculture investment is difficult to comment on.²

3.5 The South Australian Farmers Federation (SAFF) indicated its belief that the majority of agricultural land in South Australia is still locally owned. However, it acknowledged that, at present, there is no data available on the level and nature of foreign investment in South Australia's agriculture industry.³

3.6 SAFF argued that whilst investment (domestic or foreign) is vital for the growth and success of industry, foreign investment needs to be scrutinised 'in order to ensure maintenance of the national interest test'.⁴ SAFF also argued that the government should increase its scrutiny of proposed foreign purchases of Australian agricultural land, and recommended that:

- there is a need to assemble much needed data on foreign acquisitions (and current governance of them local and globally) and assess any potential changes;
- all foreign purchases should be detailed in a register (enabling Australians to see who owns and is buying prime agricultural land); and
- there be a requirement for information about foreign acquisitions of agricultural to be published online.⁵

3.7 The NSW Farmers' Association (NSW Farmers) also indicated support for foreign investment generally, and noted that it would encourage productive investment within agriculture that will 'benefit the national economy and is in the best long term interest of the nation'.⁶ In addition, NSW Farmers stressed the importance of being able to monitor foreign investment and argued strongly in favour of a foreign investment register:

NSW Farmers welcomes the Government's decision to collect data on foreign investment in agriculture, which has been partially released. This information will give a greater understanding as to the scope of investment across the country. However, a one-off survey is not adequate in this situation. NSW Farmers believes that a register is required that records all foreign investment in Australia's agricultural assets in order to guide future policy decisions. Information is an imperative when composing an informed policy response to a perceived change in circumstances. This register would be particularly useful in clearly demonstrating when or if creeping acquisitions are occurring. NSW Farmers believes that the

2 Western Australian Farmers Federation, *Submission 7*, p. 1.

3 South Australian Farmers Federation, *Submission 11*, p. 4.

4 South Australian Farmers Federation, *Submission 11*, p. 3.

5 South Australian Farmers Federation, *Submission 11*, pp 3–6.

6 NSW Farmers' Association, *Submission 17*, p. 1.

establishment of a national register is far more important initially than the alteration of the national interest test.⁷

3.8 The information gap was also acknowledged by the commonwealth government. Indeed, in a paper supplied to the committee as part of its submission, the Department of Agriculture, Fisheries and Forestry (DAFF) noted that it was constrained in its ability to respond appropriately to community and industry concerns about foreign investment because of the 'limited available data on the current level of foreign ownership'.⁸

3.9 The paper also noted that in November 2010, the government attempted to address the lack of information and 'strengthen the transparency of foreign ownership of rural land and agricultural food production'.⁹ The result was that the government requested the ABS to collect more information about rural land and water ownership.¹⁰

ABS agriculture survey

3.10 In November 2010 the government announced that the ABS would undertake a survey to review foreign ownership of agricultural business, agricultural land and water entitlements. The ABS worked with the Treasury, ABARES and DAFF to identify the key data requirements.¹¹

3.11 The information gathered in the ABS agriculture survey was collected under the *Census and Statistics Act 1905*. The ABS agriculture survey was undertaken to provide an 'up-to-date view of ownership of business operating in agriculture in Australia and their land and water entitlements'. It was also designed to deliver 'Australian level estimates' with data by state/territory or by industry group provided where available.¹²

3.12 In undertaking the survey, a sample of roughly 11 000 businesses was selected to represent the approximately 165 000 businesses which currently undertake agricultural activity across the country. The ABS argued that, with a sample of 11 000

7 NSW Farmers' Association, *Submission 17*, p. 2.

8 Department of Agriculture, Fisheries and Forestry, *Issues paper to inform development of a national food plan*, June 2011, p. 40.

9 Department of Agriculture, Fisheries and Forestry, *Issues paper to inform development of a national food plan*, June 2011, p. 40.

10 Department of Agriculture, Fisheries and Forestry, *Issues paper to inform development of a national food plan*, June 2011, p. 40.

11 Dr Jill Charker, Acting First Assistant Statistician, Australian Bureau of Statistics, *Committee Hansard*, 16 November 2011, p. 65.

12 Australian Bureau of Statistics, *Agricultural Land and Water Ownership*, Explanatory Notes December 2010, p. 1.

agricultural businesses, the survey was a large one, and one which was representative of the Australian farming industry.¹³

Summary of the ABS results¹⁴

3.13 The ABS agriculture survey achieved a response rate of 92 per cent of the approximately 11 000 agricultural businesses selected. There were three key findings:

- 98.5 per cent of agricultural businesses in Australia were entirely Australian owned;
- 88.6 per cent of agricultural land area was entirely Australian owned; and
- 91 per cent (12 500 gegalitres) of water entitlements for agricultural purposes were entirely Australian owned.

3.14 There was little variation of Australian ownership in agricultural businesses across sub-industries, with all sub-industries (including mushroom and vegetable farming, dairy cattle farming and sheep, beef cattle and grain farming) having more than 96 per cent of businesses entirely Australian owned. There was also little variation across the states and territories.

3.15 In terms of agricultural land ownership, 5.5 per cent of agricultural land had levels of foreign ownership between 10 per cent and 50 per cent. In addition, 5.8 per cent of agricultural land was majority foreign owned.

3.16 There was some variation in foreign ownership of agricultural land across industry classifications, with 88.3 per cent of sheep, beef cattle and grain farming land being entirely Australian owned. The remaining industries had at least 92 per cent of agricultural land entirely Australian owned. The extent of Australian ownership in agricultural land varied across states from 76.2 per cent of land in the Northern Territory to 98.5 per cent in Victoria entirely Australian owned.

3.17 Foreign ownership of agricultural water entitlements represented, in the committee's view, perhaps the most troubling results. An amount of 1169 gegalitres of water entitlements had some level of foreign ownership and of this, 915 gegalitres of water entitlements were owned by businesses with majority foreign ownership.

3.18 There was significant variation in the levels of full Australian ownership of water entitlements for agricultural purposes across states.¹⁵ There was also significant variation of the level of foreign ownership of water entitlements for agricultural purposes across industry classification. Just over 50 per cent of the water entitlements

13 Dr Jill Charker, Acting First Assistant Statistician, Australian Bureau of Statistics, *Committee Hansard*, 16 November 2011, p. 65.

14 The information in the following section is summarised from information contained in ABS, *Agricultural Land and Water Ownership*, December 2010 (the ABS agriculture survey). The information presented in terms of Australian ownership (unless otherwise stated) because of the differing levels of statistical confidence that apply to the results regarding foreign ownership. The ANZSIC 2006 classification was used for categorising businesses.

15 The potential sample error for the different levels of foreign ownership was too large for precise figures in all states.

for the beef cattle feedlots (specialised) classification were entirely Australian owned. All other industry classifications had more than 80 per cent of water entitlements entirely Australian owned.

Concerns about the ABS methodology and results

3.19 The committee's questioning of the ABS raised significant concerns about the usefulness of the ABS agriculture survey data. According to the survey, the measure of business size 'was based on the ABS' Estimated Value of Agricultural Operations [estimated value of agribusiness] or a derived value based on Business Activity Statement (BAS) turnover.'¹⁶ Businesses were included in the survey if they had an estimated value of \$5000 or more.

3.20 The ABS's use of businesses valued as low as \$5000 raised questions about whether the survey results might give a misleading impression of the levels of foreign ownership in Australia. This is because very small businesses are likely to be of little or no interest to foreign investors.

3.21 The ABS defended its selection of businesses based on the estimated minimum value of agribusiness of \$5000. The ABS stated that the sampling focused on gaining significant coverage of large businesses. As one official explained:

...based on our proportional methodology, that the final sample selection resulted in 54 per cent of all large businesses with an estimated value of agricultural operations greater than \$5 million, on the survey frame being selected. Only six per cent of the microbusinesses, which are those that have less than \$125,000, were selected, and seven per cent of small businesses, which are those between \$125,000 and less than \$500,000. So the majority of the actual sample that we selected were large businesses.¹⁷

3.22 However, this evidence can paint an inaccurate picture. While the survey sample selected a much higher percentage of large businesses from the total large business pool than small and micro businesses from the total small and micro business pool, the proportion of large versus small/micro businesses in the ABS agriculture survey sample is significantly different.

3.23 The following table illustrates an approximate percentage of number of businesses by size (micro, small, medium and large) making up the survey sample of approximately 11 000 businesses.

16 Australian Bureau of Statistics, *Agricultural Land and Water Ownership*, Explanatory Notes December 2010, p. 3. Note the ABS use the acronym EVAO for Estimated Value of Agricultural Operations.

17 Ms Jacqueline (Jacky) Hodges, Regional Director, Tasmania, and Program Manager, Environment and Agriculture Business Statistics Centre, Australian Bureau of Statistics, *Committee Hansard*, 16 November 2011, p. 67.

Table 3.1—Percentage of businesses by size selected in the ABS agriculture survey¹⁸

Business size	Range of Business Estimated Value	Number of businesses in sample	Percentage of total survey sample
Large Businesses	Greater than \$5 000 000	330	3
Medium-sized Businesses	\$500 001 to \$5 000 000	1870	17
Small Businesses	\$125 001 to \$500 000	3080	28
Micro Businesses	\$5000 to \$125 000	5720	52
Total		11 000	100

3.24 With micro or small businesses (i.e. businesses with an estimated value of agribusiness of between \$5 000 and \$500 000) comprising 80 per cent for the ABS agriculture survey, the committee considers that the survey does not appropriately target the businesses of foreign investment interest which are likely to be large or even medium sized businesses.

3.25 The ABS also acknowledged that the value of agricultural land was not covered in the survey:

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

Dr Charker: Value is a different concept.

Senator XENOPHON: Yes. Was that covered in this survey?

Dr Charker: No. What we have reported on here is number of businesses; proportion of land owned and proportion of water entitlements, not value of production.¹⁹

3.26 The absence of information in the survey about the *value* of agricultural land under foreign ownership further undermines the usefulness of the survey for determining the level of foreign investment in Australian agriculture. As the following exchange with the ABS indicates:

18 Note: the number of businesses is approximate and based on the percentage figures and approximate sample size provided in ABS, answer to question on notice, 16 November 2011, (received 8 December 2011).

19 Dr Jill Charker, Acting First Assistant Statistician, Australian Bureau of Statistics, *Committee Hansard*, 16 November 2011, p. 71.

Senator NASH: Can I just follow up on the value issue, because this is spot on the money. As you say, you did not do it on value. The 99 per cent of businesses being Australian owned could, hypothetically, be only 30 per cent of the total value of the 100 per cent of businesses.

Dr Charker: It could be. We do not know what their contribution is in a financial production sense.

Senator NASH: That is the point. Just so I am clear, a very small per cent of businesses that are not Australian owned could own a significant portion of the overall percentage value of the 100 per cent?

Dr Charker: They may or they may not. We have no information to inform that.²⁰

Self-reporting and company structures

3.27 Another criticism regarding the ABS agriculture survey was that it was a self-reporting survey that had potential weaknesses in terms of compliance and in uncovering complex company ownership structures, or alternative uses of agricultural land, such as mining. For example, the committee heard evidence that there were limitations to the extent to which responses were independently verified as the following exchange suggests:

Senator JOYCE: In following any of this [the survey] up, did you ever go out and say, 'Righto, I'm going to take a sample of this section of country in northern New South Wales'? Why? I can think right now of 10 farmers who have been approached in extremely good farms in northern New South Wales—right now. Did you ever go and take a sample and say, 'Right, let's go for a wander around Moree. Drive up and down the road and actually go in and knock on the door and say g'day to people and do some on-the-ground assessment'? Did you ever do that?

Dr Charker: For this collection, no. There was certainly not the time nor the funding available to support that. But, as I said, we do maintain field visits for our broader agricultural collections, and to the extent that we had any information at all from that or other statistics we have got which indicated to us that a particular area or a particular company may have had a degree of foreign ownership, then automatically we made sure that that area or that company was included and received a survey form.²¹

3.28 The committee also heard evidence that complex ownership structures, that may have had significant foreign investment component, were not covered in the survey. The ABS told the committee that for the survey it was 'unable to track all the

20 Dr Jill Charker, Acting First Assistant Statistician, Australian Bureau of Statistics, *Committee Hansard*, 16 November 2011, p. 72.

21 Dr Jill Charker, Acting First Assistant Statistician, Australian Bureau of Statistics, *Committee Hansard*, 16 November 2011, p. 69.

way back through complex chains of ownership'.²² This was further explained by the ABS in the following exchange:

CHAIR: Not included in your survey were the title details, not included in your survey were trusts, and not included in your survey were mining companies.

Dr Charker: It is not as black and white as that. The situation is that we—

CHAIR: That is your own advice to us.

Dr Charker: were unable to track back to really complex chains of ownership. What we were able to do was go back a certain way, so that, where a respondent indicated that they themselves were not the owner, we asked them who the owner was and we went back to the owner. But if that owner in turn were owned by another sovereign fund, or there was some sort of situation beyond that, we were not necessarily able to track back as far as that.²³

3.29 A related issue was that the ABS agriculture survey only covered those companies that continued to use the purchased agricultural land for agricultural production. As the following exchange shows, it is likely that, for example, companies that transferred the use of the land from agriculture to mining were not included:

CHAIR: They [surveys] were sent to the minimum turnover you had of an ABN that was agriculture related?

Mr Hockman: Yes, or you had to have indicated in registering for your ABN that you had either primary or secondary agricultural activity.

CHAIR: So the 42 farms that were bought around the Shenhua mine [in the Liverpool plains region] were not in the register, were they?

Mr Hockman: We cannot talk about specifics, but if those businesses had an ABN—

CHAIR: If the business is a mining business, it would not have been included—put it that way.

Mr Hockman: If they were under the \$5,000—

CHAIR: No. Shenhua is 68 per cent owned by a provincial government. It is a mining company that bought 42 farms. That company would not have been included in your survey, because it is a miner—it does not have an ABN that relates to agriculture.

Mr Hockman: No. However, if they were—

22 Dr Jill Charker, Acting First Assistant Statistician, Australian Bureau of Statistics, *Committee Hansard*, 16 November 2011, p. 70.

23 Dr Jill Charker, Acting First Assistant Statistician, Australian Bureau of Statistics, *Committee Hansard*, 16 November 2011, p. 67.

CHAIR: No, that is the answer—that is all I want: 'No, it wasn't included'.²⁴

3.30 The ABS clarified the scope and coverage of the ABS agriculture survey in an answer to question on notice:

The frame or list of businesses which were potentially in scope for this survey was drawn from the ABS Business Register. Examples of types of business included in the list of businesses surveyed in the ABS agriculture survey are listed below:

- A mining company which purchased land or an agricultural business, and conducts some agricultural activity was in scope for the ABS agriculture survey;
- A blind trust that has an Australian shelf company which owns agricultural land or operates an agricultural business was in scope for the ABS agriculture survey. There were a number of examples of these identified and their level of foreign ownership confirmed;
- A company that owns agricultural land but does not operate was in scope of the ABS agriculture survey. There were a number of these identified by farming businesses which provided details of the owners of the agricultural land they were leasing in their survey form. Subsequent action was taken to despatch survey forms to those land owners.
- A company which was only leasing agricultural land but did not own it was in scope of the ABS agriculture survey for the purposes of business counts. The owner of the leased land was also in scope of the ABS agriculture survey, as per the point above.²⁵

Information on the regions, farmland type and industry type

3.31 The ABS summarised the survey's information as 'providing quality estimates of foreign ownership at the Australian and state levels'.²⁶ However, the limitations of the survey were clearly outlined by the 'agreed output specifications' that ABS received for the survey from Treasury, DAFF and ABARES:

- Foreign ownership of agricultural businesses:
 - Count and percentage of businesses by level of foreign ownership by State;
 - Count and percentage of businesses by level of foreign ownership by agricultural industry at the Australian level only;

24 Mr Bruce Hockman, First Assistant Statistician, Business, Industry and Environment Statistics Division, Australian Bureau of Statistics, *Committee Hansard*, 10 August 2012, p. 2.

25 ABS, answer to question on notice, 10 August 2012, (received 31 August 2012).

26 Dr Jill Charker, Acting First Assistant Statistician, Australian Bureau of Statistics, *Committee Hansard*, 16 November 2011, p. 68.

- Foreign ownership of Australian agricultural land:
 - Area of holding (Ha) and percentage of agricultural land by level of foreign ownership by State;
 - Area of holding (Ha) and percentage of agricultural land by level of foreign ownership by agricultural industry at the Australian level only;
- Foreign ownership of water entitlements (used for agricultural purposes):
 - Water entitlement (megalitres) by level of foreign ownership by State;
 - Water entitlement (megalitres) by level of foreign ownership by agricultural industry at the Australian level only;²⁷

3.32 In addition, the ABS representatives told the committee at a private briefing that levels of foreign investment in 'prime agricultural land', as opposed to marginal land, could not be determined from the survey.²⁸

Comparison with previous information

3.33 The committee also heard evidence that compared the results of the ABS agriculture survey with the ABS's agricultural census in 1983-84 which also examined levels of foreign ownership. At the committee's hearing held on 16 November 2011, Dr Jill Charker, Acting First Assistant Statistician, ABS, told the committee that:

The businesses reporting that they were not fully Australian owned may have been either partially or entirely foreign-owned and, as such, the survey provides information about business land and water entitlements by the extent of their foreign ownership. The survey results are broadly comparable with levels of foreign ownership of agricultural businesses and land collected in the ABS's agricultural census of 1983-84, and I note that the ABS has not previously collected data on foreign ownership of agricultural water entitlements.²⁹

3.34 The committee is therefore concerned by seemingly contradictory evidence provided by the ABS at a hearing held on 10 August 2012. At the hearing Ms Helen

27 Senate Economics Legislation Committee, answer to question on notice, Treasury Portfolio, *Supplementary Budget Estimates*, 19–20 October 2011, question no. 214.

28 ABS representatives, *Private Briefing with the Senate Rural Affairs and Transport Committee*, 21 September 2011. The ABS was asked to comment on the above text regarding prime agricultural land. The ABS noted that '[the] delineation between 'prime' and 'marginal' agricultural land was not identified as an information requirement of the ALWOS [ABS agriculture survey] and therefore estimates could not be produced to inform the level of foreign ownership in these land types.' ABS, correspondence received 9 May 2013.

29 Dr Jill Charker, Acting First Assistant Statistician, Australian Bureau of Statistics, *Committee Hansard*, 16 November 2011, p. 65. This comparison was also reflected in the ABS agriculture survey as published on the ABS website: ABS, 7127.0 - *Agricultural Land and Water Ownership (December 2010)*, September 2011.

Baird, Director, Rural Environment and Agriculture Statistics, ABS, stated that the methodology used for the 1983-84 Agricultural Census was significantly different:

Senator Gallacher: Your final statement on the summaries of key Australian reports, says that, according to the ABS, these levels of foreign ownership for agriculture businesses and land are broadly comparable to that found in the 1983-84 agricultural census and water entitlements were not measured.³⁰ What is the difference between what you have done now and what you did in 1983-84?... You are saying that the conclusions are about the same, and I am interested in whether the methodology of calculation was the same. How was the agricultural census working out compared to what you have done now?...

Ms Baird: ...I would make the comment that the frameworks under which each of the surveys – a census being a very large survey, I guess – were undertaken was different. So the list of businesses of interest was constituted differently [in the 1983-84 census] than the one with respect to 2010. The methodology also for understanding the area of land, for example, was more on an equity basis than as a single [asset] then attributable to a level of ownership within ranges.³¹

3.35 This response was elaborated on in an answer to question on notice:

Data has been collected by the ABS on foreign ownership in agriculture in respect of 1983-1984 and 2010. The two sets of data are not directly comparable for two main reasons.

- The entity from which information was collected, and to which the ownership status pertained, were different in the two collections. In 1983-1984, data were collected in respect of farms – that is the entity which was operating the agricultural land. The survey did not seek to understand the ownership status of the owner of the agricultural land if that owner was not also the operator of the land. In the 2010 ABS agriculture survey, the survey addressed the question through the business operating the agricultural land and also sought to understand the ownership status of the owner of the land if they were not operating the land.
- The methodology used to report the area of agricultural land with a level of foreign ownership was fundamentally different. In 1983-1984, an equity methodology was used whereby the percentage of foreign ownership of the operating entity was applied to the area of operated land to provide an area of foreign operated agricultural

30 Senator Gallacher was quoting from the comparison made in the media release by the ABS about the agriculture survey. See ABS, Media Release, 'Agricultural businesses almost entirely Australian owned', 9 September 2011, www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/7127.0Media%20Release1December%202010?opendocument&tabname=Summary&prodno=7127.0&issue=December%202010&num=&view.

31 Ms Helen Baird, Director, Rural Environment and Agriculture Statistics, Australian Bureau of Statistics, *Committee Hansard*, 10 August 2012, p. 8.

land. In the 2010 ABS agriculture survey, the land was treated as a single asset and the level of foreign ownership (in ranges) was identified for that asset.³²

3.36 In January 2012, the government announced that it would fund future ABS agriculture surveys in 2013 and 2018. This would be complemented by an expansion of the agricultural census in 2016 and 2021 to provide more information on foreign ownership of agricultural land and water entitlements.³³ The ABS also made a submission to the consultation paper on the foreign ownership register (discussed below) and noted that the working group should consider ways that the register information could link with other sources, including the ABS agriculture survey. However, the ABS also stated in this submission that 'the [ABS agriculture survey] information could not provide a substitute for [an initial] stocktake [of foreign ownership], as it produces only aggregate, point-in-time statistics which would not allow for tracking of flows in acquisitions and disposals of land between surveys.'³⁴

Committee view

3.37 The committee is highly concerned by the significant limitations of the results from the ABS agriculture survey. Three key problem areas make the committee very weary of the characterisation of the results as a reliable indicator of the level of foreign investment in agricultural land and businesses in Australia.

3.38 First, foreign investment is likely to be directed towards medium and large farming enterprises. The committee is therefore concerned that the ABS has included a very large number of very small farming enterprises in the sample selection. In the committee's view this significantly undermines the credibility of the survey. The use of an estimated value of agribusiness of between \$5000 and \$125 000 is far too low as it captures over half of the businesses surveyed. These are micro businesses that are likely to be highly irrelevant to the interests of foreign investment, as the committee believes that it is highly unlikely that a foreigner buyer would consider a business valued as low as \$5000.

3.39 It appears to the committee that either 52 per cent or potentially 80 per cent of the businesses included in the ABS survey were irrelevant to the question the ABS was seeking to report on. The inclusion of these businesses is likely to have significantly skewed the findings of the ABS study.

3.40 Second, the committee considers that the self-reporting aspect of foreign ownership in the questionnaire undermines the veracity of the survey results as it clearly relies on the goodwill of companies to report foreign ownership. The committee is conscious that it would be tempting for some companies to not fully

32 ABS, answer to question on notice, 10 August 2012, (received 31 August 2012).

33 See ABS, Survey of Agricultural Land and Water Ownership, www.abs.gov.au/AUSSTATS/abs@.nsf/DOSSbytitle/7D1341AF14A92E5ECA257829007BA6D0?OpenDocument (accessed 3 May 2013).

34 ABS, *ABS Submission to the consultation paper: 'Establishing a national foreign ownership register for agricultural land'*, January 2013, p. 5.

report the levels of either direct or indirect foreign ownership. In the case of large companies, this would only need to happen on a few occasions to distort the results in the survey.

3.41 Third, the committee is concerned by the lack of ability of the survey results to drill down to regional levels, quality of farmland, and Australian and New Zealand Standard Industrial Classification (ANZSIC) groups. The committee is aware that farmlands differ greatly in their productive and agricultural value. The ABS agriculture survey provides virtually no ability to analyse its data in a way that could shed light on the levels of foreign ownership of prime farmland, for particular rural communities, or the beyond the most cursory examination of different agricultural industries.

3.42 Due to these problems the committee is disturbed by public references to the ABS agriculture survey to dismiss the concerns about the levels of foreign investment in Australian agriculture. In addition, given the significantly differing methodologies that were used for the ABS agriculture survey and the survey published in 1983-84 regarding foreign ownership, the ABS's claim that the two surveys show 'broadly comparable' results significantly misleads the public debate on foreign investment in Australian agriculture.

3.43 Finally, the committee considers that the major concerns noted above seriously undermine the value of the ABS agricultural survey in informing public debate about the levels of foreign investment in Australian agriculture. The committee also notes that the government has committed to implementing a national register of foreign ownership of agricultural land (discussed below). In light of this, the committee considers that there is little value in the ABS conducting future agricultural surveys. However, in regard to the agricultural census, the committee considers that it has and will continue to provide important information about the agricultural industry. Therefore, the committee agrees with the government's proposal to collect additional data about foreign investment in future agricultural censuses.

Recommendation 5

3.44 The committee recommends that the ABS does *not* conduct future ABS agricultural surveys on foreign investment. The committee considers that the national register for foreign ownership of agricultural land should be the primary mechanism for collecting and publishing information about foreign investment in Australian agriculture (as per the recommendations below).

ABARES' study

3.45 As noted above, on 23 November 2010, the government announced an 'information-gathering process to address some emerging community concerns about foreign ownership of agricultural land and agricultural food production'.³⁵ As part of

35 Mr Brian Moir, *Foreign Investment in Australian Agriculture*, RIRDC, Canberra, November 2011, p. iii.

this process, the Rural Industries Research and Development Corporation (RIRDC) commissioned ABARES to undertake an evaluation of the economic impact of foreign investment in Australian agricultural industries and agribusiness. ABARES was also asked to review of the extent to which some other countries monitor and regulate foreign investment in agricultural land.

3.46 It was the government's intention that this work would complement the data being collected by the ABS in relation to foreign ownership of rural land and water.³⁶ The result was the ABARES report, entitled *Foreign investment and Australian agriculture*, which was released in January 2012.

3.47 Some of the key findings of the report that are relevant to the committee's inquiry are:

- 1.6 per cent (worth \$2.33 billion) of foreign direct investment approvals in 2009/10 were in agriculture, forestry and fishing.
- Since 2008 (with deregulation of wheat export arrangements) there has been an increased foreign investment interest in grain bulk handlers and exporters, e.g. Viterra (Canadian) acquiring ABB Grain and Cargill (US) now owning AWB Ltd. Half of the 23 licensed wheat exporters in Australia are foreign owned.
- Since 2000 (with deregulation of the dairy industry) about half of Australian milk production is processed by foreign owned firms (e.g. Fonterra (NZ), Lion (Japan), and Parmalat (France)).
- Three foreign owned milling groups make up almost 60 per cent of Australia's raw sugar production (the foreign companies involved in sugar refining are Finasure (Belgium), Wilmar (Malaysia, Singapore) and COFCO (China, state owned)).
- About 40 per cent of Australian red meat production is processed by foreign owned firms (based on throughput).³⁷

3.48 These examples highlight some important recent changes in foreign investment in Australian agriculture. However, it should be noted that the report does not undertake major new data collection but relies on other data sets and publicly available information. These information sources included: the ABS agriculture survey and other ABS data sets regarding foreign investment; the Queensland State Government's register of foreign ownership of land and water entitlements; other reports and case studies of various companies and sub-industries in agriculture.³⁸

36 Department of Agriculture, Fisheries and Forestry, *Submission 1*, p. 2.

37 Mr Brian Moir, *Foreign Investment in Australian Agriculture*, RIRDC, Canberra, November 2011, pp 26–34.

38 Mr Brian Moir, *Foreign Investment in Australian Agriculture*, RIRDC, Canberra, November 2011, pp 1–5 and 18–25.

3.49 Indeed the report conceded that while some sources were accessible to develop the conclusions of the report:

...there is no systematic source of data on the foreign ownership of agribusiness companies. Nor is there regular information on the nationality of foreign investors or about the type of entity involved. The extent of investment by foreign government entities is also not known.³⁹

Committee view

3.50 Given that the ABARES study was one of the key announcements of the government to improve the information regarding foreign investment in agriculture, the committee is disappointed that ABARES were not directed to collate significant new empirical information.

3.51 The report certainly brought together some useful existing information about foreign investment in Australian agriculture, and the case studies discussed above help confirm some of the anecdotal evidence that the committee has received elsewhere about significant levels of foreign investment.

3.52 However, the committee is concerned about the reliance on the ABS data for parts of the report, given the concerns outlined with it above. The ABARES report, therefore, was not able to provide the in depth information of foreign investment that stakeholders and rural communities are desperately seeking.

The national register of foreign ownership of agricultural land

3.53 The most promising development from the government to address the information gaps in foreign investment in agricultural assets was the commitment to, following consultation with stakeholders, establish a national register of foreign ownership of agricultural land. The committee strongly supports its establishment, based on the overwhelming evidence received through submissions and witnesses, as outlined above.

3.54 The committee discussed the development of the consultation for the register at a public hearing on 16 August 2012. The process at that staged was outlined by one Treasury official as:

The government issued a press release on 15 June [2012] to say that they wanted a working group to consult on the development of a Commonwealth foreign ownership register for agricultural land. Realistically, the purpose of all of this is to give greater transparency on the ownership of agricultural land in Australia and what is described as a more comprehensive picture of the specific size and locations of foreign agricultural land holdings, over and above what we know at the moment.⁴⁰

39 Mr Brian Moir, *Foreign Investment in Australian Agriculture*, RIRDC, Canberra, November 2011, p. 1.

40 Mr Jim Murphy, Executive Director, Markets Group, Treasury, *Committee Hansard*, 16 August 2012, p. 22.

3.55 In November 2012, a discussion paper for public consultation was released by the Treasury. The paper sought submissions on the following issues:

- The scope of the register in terms of information collected and the definition of relevant terms such as agricultural land;
- The use of a threshold to exclude small transactions;
- The need for an initial stocktake of foreign investment;
- The monitoring of divestments as well as investments;
- Australia's international obligations;
- Compliance issues, including the timeframe for registration; and
- Public access to the information.⁴¹

3.56 Submissions under the Treasury consultation process have closed. Treasury received 33 submissions and all but 6 (which remain confidential) are available on the Treasury website.⁴² The committee notes that these submitters indicated broad support for a register and that more information about levels of foreign investment would be beneficial. However, some submitters were also concerned about cost, administrative burden, privacy issues and potential disincentives to foreign investment. There were also varying views on the extent to which the information should be collected and made public.⁴³

Committee view

3.57 The committee strongly supports the development of the register for foreign ownership of agricultural land. The committee also believes that the register should be as streamlined as possible to avoid unnecessary costs and administrative burdens. Where appropriate, it should protect personal privacy and commercial confidentiality.

3.58 However, the committee also believes that if established properly, the register will not cause a disincentive to legitimate and commercially orientated foreign investment. Consistent with the issues outlined above regarding the agricultural survey and in later chapters regarding the definition of 'rural land' in the FATA, and the importance of transparent management of water entitlements, the committee recommends that the register incorporate the following recommendations.

41 The Treasury, *Establishing a national foreign ownership register for agricultural land, Consultation paper*, November 2012, www.treasury.gov.au/~media/Treasury/Consultations%20and%20Reviews/2012/agricultural%20land/key%20documents/pdf/Consultation_Paper.ashx (accessed 7 November 2012).

42 www.treasury.gov.au/ConsultationsandReviews/Submissions/2012/agricultural-land.

43 See, for example, submission by AAG Investment Management, the Institute of Chartered Accountants Australia, the Macquarie Group, the National Australia Bank, the National Farmers Federation and state based farmers' federations. Some individual submitters opposed foreign ownership, in general, and therefore the register, www.treasury.gov.au/ConsultationsandReviews/Submissions/2012/agricultural-land.

3.59 Finally, the committee is mindful of the significant lack of information regarding foreign investment in agriculture (discussed in this chapter). The committee also considers that in addition to improving the knowledge of current circumstances, modelling of future circumstances is needed to inform the public debate. To this end, the committee considers that it is essential that the public is provided with modelling that shows the possible costs to the agricultural industry should current arrangements (including current regulation and barriers to domestic investment) regarding foreign investment in Australian agriculture remain unchanged.

Recommendation 6

3.60 The committee recommends that when establishing the agricultural land register, the government conduct an initial stocktake of foreign ownership of agricultural land, agribusiness and water entitlements. In addition to numbers of businesses, land size and volume of water entitlements, the value of foreign investment acquisitions should be captured. The initial stocktake should be comprehensive, as far as possible consistent across states, and take into account complex company structures including foreign trusts, "shell companies", ownership of agricultural assets by foreign mining companies, and debt structuring and ultimate liability.

3.61 Furthermore, on the basis of this initial stocktake, the government should commission independent modelling of the level of foreign investment in Australian agriculture in 20 years' time if current trends and regulatory arrangements are assumed to remain. The modelling should also include estimated costs to the industry over the same period based on current constraints to domestic capital investment in Australian agriculture. Finally, the modelling should have regard to the future opportunities provided by the growing global food task over this period.

Recommendation 7

3.62 The committee recommends that the ongoing information collected in the register include the information that the committee recommended be included as part of the stocktake of foreign ownership (as per recommendation 6).

Recommendation 8

3.63 The committee recommends that the register include divestments as well as investments. This will ensure that the information from the register remains current and can reflect changes over time.

Recommendation 9

3.64 The committee recommends that participation in the register be a legal requirement for foreign investors and that appropriate mechanisms for compliance apply in cases where such participation is avoided.

Recommendation 10

3.65 The committee recommends that the register *not* use the current definition of 'rural land' in the FATA. Instead the definition adopted should be that which results from the update of 'rural land' as per recommendation 25. This would maintain consistency with the regulatory framework for foreign investment in Australian agriculture.

Recommendation 11

3.66 The committee recommends that there be no minimum threshold for reporting and that all foreign investment should be captured in the agricultural land register. However, this data should be collected in a manner that can clearly delineate foreign investments in terms of value and business size.

3.67 Although the committee is mindful of privacy and the need for business transactions to be protected by certain levels of commercial confidentiality, it also considers that the information collected be as accessible to public and parliamentary scrutiny as possible. In general, the committee considers that the public debate on this issue will benefit greatly with the availability of significantly more information about the levels and nature of foreign investment in agriculture.

Recommendation 12

3.68 The committee recommends that the register's data be held in a manner that is centralised and can provide comprehensive information about all foreign ownership that is recorded.

Recommendation 13

3.69 The committee recommends that levels and trends of foreign ownership of land, agribusiness and water entitlements should be published annually by the national register for foreign ownership of agricultural land. Aggregate level data about the respective value and level of interest of foreign government investors and private foreign companies should be included. The data should also be made available in categories such as state, sub-industry (ANZSIC levels), water catchment areas, and local shires.

Recommendation 14

3.70 The committee recommends that country of origin of all foreign government investors and specific foreign government investments should be published annually by the national register for foreign ownership of agricultural land.

Recommendation 15

3.71 The committee recommends that, in order to prevent possible disincentives for foreign investment, the country of origin details for private foreign companies should be published by the national register for foreign ownership of agricultural land at aggregate levels only. However, country of origin details for specific private foreign investments should be made available to parliamentarians, parliamentary committees, and any relevant government agency upon request.

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.¹

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

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.²

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.'³ 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.⁴

4.7 FIRB officials also described the screening process as 'rigorous', 'thorough', and 'relatively broad and consultative'.⁵ 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.⁶

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

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.⁷

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.⁸

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

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.⁹

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.¹⁰

4.12 Some submitters were concerned about possible negative impacts from changing the current system.¹¹ 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.¹²

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.¹³

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.

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.¹⁴

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.¹⁵ 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.¹⁶

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.¹⁷

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.¹⁸

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

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.¹⁹ 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]...²⁰

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.²¹

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?

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.²²

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.²³

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.²⁴

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.²⁵

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,

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.²⁶

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.²⁷ 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.²⁸

4.27 There were also no divestiture orders made at all by FIRB in 2011/12.²⁹

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.³⁰

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

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.³¹

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.'³²

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.³³ 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.³⁴

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

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.³⁵

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.³⁶

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.³⁷

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,³⁸ 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.³⁹

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.⁴⁰

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?

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.⁴¹

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.⁴²

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.⁴³

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.⁴⁴

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.⁴⁵

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.⁴⁶

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.⁴⁷

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

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 (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.

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.⁴⁸

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.⁴⁹ 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.'⁵⁰

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.⁵¹

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.⁵²

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

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.⁵³

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.⁵⁴

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.⁵⁵

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.

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.

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.⁵⁶ The committee notes that Cubbie Station

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.

Chapter 5

Investment threshold and related issues

5.1 This chapter examines the issue of the investment threshold which triggers the Foreign Investment Review Board (FIRB) review process. In doing so, the chapter first considers the appropriateness of the current threshold for foreign acquisitions of agricultural land and businesses, the issue of cumulative purchasing, and potential impacts on local economies.

5.2 In addition, this chapter discusses two definitional issues that are fundamental to the operation of an investment threshold: the definition of rural land (and by implication agriculture) in the *Foreign Acquisitions and Takeovers Act 1975* (FATA), and the definition of direct investment in the Australian Foreign Investment Policy (AFIP).

FIRB foreign investment review threshold

5.3 The FIRB review threshold is the level of proposed foreign investment that a private foreign person or private foreign company (as opposed to foreign government owned company) must notify FIRB of prior to undertaking an acquisition in Australia. Although special arrangements have been established for certain sectors of the economy, such as residential real estate and media interests, rural land and agricultural businesses are covered by the general threshold level.¹ The threshold applies when a foreign private investor seeks to acquire 'a substantial interest in a corporation or control of an Australian business that is valued above \$248 million', or a 'substantial interest in an offshore company whose Australian subsidiaries or gross assets are valued above \$248 million.'² A 'substantial interest' is defined in the AFIP as occurring:

...when a single foreign person (and any associates) has 15 per cent or more, or several foreign persons (and any associates) have 40 per cent or more, of the issued shares, issued shares if all rights were converted, voting power, or potential voting power, of a corporation.³

5.4 In the case of foreign investment from United States persons or companies in Australia, the United States-Australia free trade agreement specifies the threshold for the review of investment is \$1078 million. On 1 March 2013, the government

1 As noted earlier in the report, for consistency, the 2013 figure of \$248 million is used throughout this report.

2 FIRB, Australia's Foreign Investment Policy, 2013, pp 2–3.

3 FIRB, Australia's Foreign Investment Policy, 2013, p. 17. Note: this quote in the AFIP includes a footnote (no. 22) stating: 'See section 6 of the *Foreign Acquisitions and Takeovers Act 1975* for the list of 'associates'.'

announced that New Zealand based private investors would also be subject to the \$1078 million threshold. These thresholds are indexed on 1 January annually.⁴

5.5 In the case of a foreign government entity, the review threshold is \$0 meaning that any proposed foreign direct investment in Australia from a foreign government entity (such as a state-owned corporation) requires FIRB approval before proceeding.⁵ The definition of 'direct investment' is discussed towards the end of the chapter.

5.6 The committee heard a wide variety of views on the relevance of the current threshold level to agricultural land and businesses, as well as suggestions for more appropriate new levels.

5.7 For example, the South Australian Farmers Federation (SAFF) recommended that the threshold that should apply to agricultural land be \$2 million.⁶ At the public hearing on 16 November 2011, Mr Peter White, President, SAFF, was adamant that the \$248 million was too high:

...Certainly the [\$248] million threshold is an absolute joke. It has never been triggered and is never likely to be triggered. Our suggestion is the limit should be \$2 million. It does not matter whether the investment is for mining or agricultural purposes; if it is done on agricultural land they should both come under the same scrutiny.⁷

5.8 The NSW Farmers Association (NSW Farmers) provided evidence that put the application of the threshold to agricultural assets into stark perspective. As Mr Bill McDonnell, Chairman, Business Economics and Trade Committee, NSW Farmers told the committee:

Concerns such as...the threshold for the national interest test are raised regularly...

I will give you an example. The average land value of grain producing farms in New South Wales in 2011 was valued at \$1.25 million. This information is courtesy of a report by PRDnationwide in 2011. Their source was the Valuer-General of land and property of the government of New

4 See FIRB website: www.firb.gov.au. The \$248 million threshold was \$244 million in 2012 and \$231 million in 2011 when the committee's inquiry began. Regarding the New Zealand threshold see: The Hon David Bradbury MP, Assistant Treasurer and Minister Assisting for Deregulation and The Hon Craig Emerson MP, Minister for Trade and Competitiveness and Minister Assisting the Prime Minister on Asian Century Policy, Media Release No. 22, 'Milestone in Investment Ties with New Zealand', 1 March 2013. Also note, the indexation of the thresholds was announced in August 2009, which stated that the thresholds are 'indexed on 1 January each year to the GDP price deflator in the Australian National Accounts for the previous year.' The Hon Wayne Swan MP, Deputy Prime Minister and Treasurer, Media Release, 'Reforming Australia's Foreign Investment Framework', 9 August 2009.

5 As set out in FIRB, Australia's Foreign Investment Policy, 2013, pp 2 and 14–15.

6 South Australian Farmers Federation, *Submission 9*, p. 6.

7 Mr Peter White, President, South Australian Farmers Federation, *Committee Hansard*, 16 November 2011, p. 21.

South Wales. Extrapolating these figures to market value—and let's be generous and double that figure to \$2.5 million...⁸

5.9 Based on the \$2.5 million figure (quoted above) and the 2012 FIRB review threshold of \$244 million, a private foreign investor could acquire a property valued 97 times an average farm or a property of about 194 000 hectares without being subject to FIRB review.⁹

5.10 Evidence of this sort regarding the threshold was also reflected in the Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES) report *Foreign investment and Australian agriculture* which states that:

The threshold of [\$248] million is above the value of most agricultural land transactions, with only large enterprises such as aggregations of properties in managed investment schemes being subject to FIRB examination.¹⁰

5.11 Similarly, evidence provided by the Australian Taxation Office (ATO) suggests that there are only a very small number of companies that may be captured under current FIRB threshold levels. In response to a question on notice about the number of agricultural entities with a turnover¹¹ of more than \$250 million, the ATO stated:

Australian Taxation Office data shows that there were 10 entities (all of which were companies) in 2009-10 (the latest year for which Taxation Statistics have been released) with a turnover of more than \$250 million and with "agriculture" as their main industry. Of these 10 companies, none were described as 'non resident' for tax purposes.¹²

5.12 Like a number of other witnesses, the National Farmers Federation (NFF) argued for a significant reduction in the threshold. However, the NFF noted the potential burden of a threshold that was too low and that this needed to be balanced against appropriate scrutiny:

We have not been prescriptive about any kind of reduction. We are just saying that the [\$248] million at the moment is clearly not a relevant threshold for the vast majority, if not all, of the agricultural purchases...

8 Mr Bill McDonnell, Chairman, Business Economics and Trade Committee, NSW Farmers Association, *Committee Hansard*, 17 February 2012, p. 9.

9 This calculation is based on details from 2012 provided by the Mr Bill McDonnell of the NSW Farmers Association – who made a similar point to the committee. Mr Bill McDonnell, Chairman, Business Economics and Trade Committee, NSW Farmers Association, *Committee Hansard*, 17 February 2012, p. 9.

10 ABARES report, *Foreign investment and Australian agriculture*, p. 16.

11 The committee is aware that 'turnover' and the 'value' of the business are different concepts, however, it considers that this evidence supports the general agricultural industry view, that only a very small number of agribusinesses and agricultural land is large enough to be captured by the FIRB review threshold.

12 ATO, answer to question on notice, 9 May 2012, (answered 5 June 2012).

Some of the discussions that we have had internally at the NFF have been talking about: what is the top 10 per cent of agricultural land values or land purchases? Ultimately, this kind of activity is happening in the bigger end of town and the larger purchases. If you set the threshold too low obviously there is the risk of putting in a new level of bureaucracy and administration that is pretty unnecessary...

We want to make sure it is well targeted. We have not been prescriptive about those but obviously there has been some discussion at a higher level maybe around the \$30 million dollar mark for some, but we need to get some greater clarity around the actual FIRB compliance processes—these other issues that were raised—before we will be in a position to really appropriately make a call.¹³

5.13 The committee heard evidence of two key problems arising from the current size of the threshold at \$248 million. These were the potential of cumulative purchases by foreign companies avoiding FIRB review and the lack of review for major purchases that could significantly impact local economies. These issues will be discussed in turn.

Cumulative purchases

5.14 The issue of cumulative purchases was of significant interest to the committee during the course of the inquiry. The issue arises because under the current FIRB review framework, foreign companies can make series of smaller purchases of agricultural interests to avoid the application of the FIRB national interest test.

5.15 The committee was concerned that the FIRB did not have appropriate oversight of such cumulative purchases. As acknowledged by the former FIRB Chair, Mr John Phillips:

Senator WILLIAMS: Do you have any system to monitor the accumulation of land by a company?...

Mr Phillips: With some companies, where we become available, yes, but I would not like to pretend that we can monitor all of them, because we do not have the information at this stage.¹⁴

5.16 The explanation continued, highlighting that in early 2012 FIRB needed to further develop its approach to the issue:

Senator NASH: ...if the situation proceeds as it is—and, as you say, you are trying to monitor that accumulation—surely it is too late by the time you potentially identify the accumulation of parcels of land? They have already been acquired, so what would you do at that point anyway, once they have been identified?

13 Mr Charles McElhone, General Manager, Policy, National Farmers' Federation, *Committee Hansard*, 17 February 2012, p. 8.

14 Mr John Phillips, Chair (former), FIRB, *Committee Hansard*, 9 February 2012, p. 5.

Mr Phillips: No, I was not really talking that way. I was really talking about ways in which one becomes aware of accumulation as it happens or before it happens rather than after the event. After the event is not much good.

Senator NASH: That is my point. I am just wondering if any consideration has been given to how you actually do that.

Mr Phillips: Yes is the short answer, but I could not go any further than that at this stage.

CHAIR: Because at the present time you have no idea, have you?

Mr Phillips: Some, but not a lot. The answer is yes, we do have some, but it is not as good as any of us would like.¹⁵

5.17 The relationship between the review threshold and the issue of progressive agricultural asset purchases was also highlighted by some submitters. Indeed, the SAFF considered it as a major reason of its recommendation of a \$2 million threshold. As stated in its submission:

A \$2 million limit would be low enough to be able to monitor any progressive buying that may be taking place. There are often allegations that there is progressive buying of properties just below any trigger level of price and/or size.¹⁶

5.18 Similarly, the NFF was concerned about how to govern cumulative purchase in the future:

The concern primarily from our members is around what the [\$248] million would take in and what it would exclude. For the vast majority of agricultural land there are not too many single purchases that are even going to hit that threshold. That has been the primary concern of our members to say: 'Well, if that's the case, and we are concerned about that, we are concerned about creeping acquisitions, then what should the threshold be.' The overwhelming view has been that it should be lower.¹⁷

Local economy impacts

5.19 The concern expressed by a number of submitters that large-scale foreign investment could have on local communities was articulated well by NSW Farmers:

...if there is a local community and a larger company or foreign investment company comes in, they generally are not buying in the local community. They will go out to the bigger companies, put tenders out and source it all out. Then the small business owner in that small community does not receive the benefit of that business...¹⁸

15 Mr John Phillips, Chair (former), FIRB, *Committee Hansard*, 9 February 2012, pp 5–6.

16 South Australian Farmers Federation, *Submission 9*, p. 6.

17 Mr Matthew Linnegar, Chief Executive Officer, National Farmers' Federation, *Committee Hansard*, 17 February 2012, p. 4.

18 Mr Bill McDonnell, Chairman, Business Economics and Trade Committee, NSW Farmers Association, *Committee Hansard*, 17 February 2012, p. 10.

5.20 Although this witness was expressing a concern about the impacts of foreign investment generally, the committee is of the view that it would apply directly to the foreign purchases of agricultural assets because the vast majority of agricultural purchases do not reach the value required for FIRB review (unless undertaken by foreign government entities).

5.21 The Western Australian Farmers Federation (WAFF) also noted that there were situations where foreign investment arrangements were making it difficult for local producers to gain access to farm assets in their region. As explained in the following exchange:

CHAIR: ...One of the things that I have noticed, Mr Norton, concerns a property over there [WA], and this is about distorting the market in terms of return on your investment with regard to what the commodity prices are. It concerns, without naming anyone, a serious wheatgrower who has got himself into a fair bit of a tangle financially. An American super fund which has some representatives here in New South Wales has bought a property with him—the right to lease it back. I think this particular gentleman is having great trouble meeting the lease payments which are related to return on the superannuation fund's invested capital. The super fund were looking to buy another lump of this particular property, as I understand it, and made a bid for it but they were gazumped by a Chinese company who offered nearly double what the super fund offered. Given that the return on the investment for the super fund made the lease unviable, do you understand...that you can actually price farmers, based on returns on produce, out of the market?

Mr Norton: That is what is causing the angst, Senator. The wheat grower you are talking about had \$700,000 quarterly lease payments on that block, and the Americans padlocked the front gate in about September or October of last year. I do not know what has happened down there since then. But with the other property back towards Lake King, there were a lot of local farmers around that 70,000-acre property who wanted to buy pieces of it. They certainly contacted the land agent, but the land agent virtually shut them out and was only doing business with the Chinese to try to sell it in one lump. Once again, even as late as yesterday I was out in that neck of the woods, and nobody really knows yet whether that property has been sold. This has been going on for about nine months, and the owner is busily stripping a lot of the fixed assets off that block. It is a very confused, twisted debate that is going on out there at the moment, and the locals just are not getting an opportunity to have a crack at those assets.¹⁹

5.22 In response to a question about the impacts of cumulative purchases, the WAFF President, Mr Mike Norton, argued for a local interest test. As Mr Norton stated:

Mr Norton: ...In the rural towns, as farms amalgamate, you just strip all the assets and the people out of those communities. There is nobody left in

19 Mr Mike Norton, President, Western Australian Farmers Federation Inc, *Committee Hansard*, 17 February 2012, p. 16.

the fire brigade, the ambulance, the golf club falls apart, the bowling club—all those communities fall apart. We need to do a lot more in-depth analysis on what we are doing to our rural communities. As this type of investment takes hold, it has enormous knock-on effects.²⁰

5.23 On the other hand, there was one case of foreign investment examined by the committee that provided an alternative view on the local impacts. For background in this case, the company's (BFB Pty Ltd) Chief Executive Officer and Managing Director, Mr Terry Brabin, described its relationship to its major foreign investor:

BFB Pty Ltd is located in Temora, New South Wales, and was founded on 20 May 1985... The bulk of our staff live in Temora on a property owned by the company. We also hire contractors and seasonal help as may be required... BFB has two major shareholders. My family and I own 12 per cent of the company and two investment funds managed by Black River Asset Management own, collectively, 83 per cent...

The Black River funds first invested in BFB in June 2009 As private equity funds, they raised capital from qualified third-party investors, such as pension funds and university endowments—an investing company such as ours, taking a long-term view. Black River Asset Management is a global alternative asset management firm based in Minnetonka, Minnesota. It is an independently managed subsidiary of Cargill—an international producer and marketer of food, agricultural, financial and industrial products and services. Cargill is a passive minority investor through one of the Black River funds and its ownership translates to less than five per cent ownership in our company.²¹

5.24 The committee was also told that for the purposes of the FATA, BFB Pty Ltd was not considered to be a foreign company. As the following exchange shows:

CHAIR: ...For the purposes of the act of foreign investment [FATA], given that 83 per cent of [BFB Pty Ltd] is owned financially by a foreign entity [Black River Asset Management], for the purposes of the act, do you think you are a foreign company? Mr McBride, you might like to comment.

Mr McBride: My understanding is that we [BFB Pty Ltd] are not, according to the act.²²

5.25 Mr Brabin, then went on to indicate that the company purchased significantly from businesses in the area:

Through our relationship with Black River, BFB has the capital resources to grow our company, which allows us to continue creating good jobs in the Temora community. Our company believes strongly in giving back to the

20 Mr Mike Norton, President, Western Australian Farmers Federation Inc, *Committee Hansard*, 17 February 2012, p. 16.

21 Mr Terry Brabin, Chief Executive Officer and Managing Director, BFB Pty Ltd, *Committee Hansard*, 17 February 2012, p. 23.

22 Mr Peter McBride, Director, Corporate Affairs, Cargill, *Committee Hansard*, 17 February 2012, p. 25.

community. We have given in excess of \$750,000 to the community since inception. We support most of the Temora area sports and have given to numerous projects, such as our community heated pool.²³

5.26 Mr Brabin also highlighted that the decisions for developing the business were not direct by the foreign investors:

...basically in our business we have a strategy of developing our core property and getting some efficiencies by having some properties close to each other. When we got to a certain level, we undertook to buy strategically rather than commercially. Hence our Billabong, Jugiong and Kara purchases. They were bought purely for strategic reasons—for drought risk management. I should make it clear that for every single property that we have bought we have had no influence from our investors. I have made the decision on every single property that we have bought.²⁴

Committee view

5.27 The committee notes the evidence it received stating that BFB Pty Ltd was not considered a foreign company for the purposes of the FATA. This is despite clear ties that BFB Pty Ltd has to the foreign entity, Black River Asset Management. As a result, the committee is concerned that there are structures that companies can use to avoid coverage of the FATA despite clear financial relationships to foreign entities. Therefore, as per recommendation six (chapter three), the committee considers that it is essential that the agricultural land register capture comprehensive information about company structures and foreign investment, including foreign debt structuring and ultimate liability.

5.28 The committee considers that the current investment threshold for private foreign entities is not appropriate for agricultural land and business. Very few Australian farm purchases trigger a FIRB review yet the impact of foreign investments below the \$248 million threshold on local economies could be significant. The committee is concerned that many and perhaps virtually all private foreign acquisitions of agricultural land and business are proceeding without any consideration of whether it is in Australia's national interest. In the committee's view this is largely out of step with contemporary community expectations. Accordingly the committee believes that a new threshold for foreign acquisitions of agricultural land and business is needed.

5.29 In addition, the committee is concerned about the prospect of progressive purchases below the FIRB threshold having significant cumulative effects. The committee is pleased that FIRB has acknowledged this as an issue and it encourages FIRB to continue to develop mechanisms to identify cases of cumulative purchases. However, the committee is also of the view that FIRB does not currently have the

23 Mr Terry Brabin, Chief Executive Officer and Managing Director, BFB Pty Ltd, *Committee Hansard*, 17 February 2012, p. 23.

24 Mr Terry Brabin, Chief Executive Officer and Managing Director, BFB Pty Ltd, *Committee Hansard*, 17 February 2012, p. 30.

capability to make significant in-roads in this area unless it is required to review foreign investment cases well below the current threshold of \$248 million.

5.30 Although the committee acknowledges the positive work of certain privately-owned foreign companies to contribute to local economies and communities, the committee is far from reassured that this is always the case. At the very least the lack of scrutiny of significant agricultural purchases makes local communities very concerned that their interests are being overlooked. It is the committee's view that under the current foreign investment rules, the future of rural communities impacted by significant purchases by foreign entities relies more on the goodwill of individual companies than effective government regulation.

Recommendation 20

5.31 The committee recommends that the threshold for private foreign investment in agricultural land be lowered to \$15 million.

Recommendation 21

5.32 The committee also recommends that once cumulative purchases of \$15 million of private investment in agricultural land has been reached by a private business or associated entities, any further investment by that business or entity be required to receive FIRB approval regardless of value.

Recommendation 22

5.33 The committee recommends that FIRB reviews any proposed foreign acquisition of an agribusiness where investment exceeds 15 per cent or more in an agribusiness valued at \$248 million (indexed annually) or exceeds \$54 million.

Recommendation 23

5.34 The committee recommends that the zero trigger required for approval by FIRB for any purchase of agricultural land or an agribusiness by a state owned enterprise will continue to apply.

Recommendation 24

5.35 The committee recommends that Australia's Foreign Investment Policy (AFIP) be amended to clearly define the "interests of local economies" and the "interests of local communities". Furthermore, there should be a greater requirement for FIRB to take into account these local interests in the assessment of foreign purchases of agricultural assets.

Definition of "rural land"

5.36 The committee received evidence raising concerns about the appropriateness of the definitions of 'Australian rural land' and 'Australian urban land' in the FATA. This was of particular concern because "agricultural land" and "agricultural businesses" are not specifically defined in the FATA. Agricultural businesses are treated the same as any other businesses and the distinction between 'rural land' and 'urban land' provides the clearest guidance in the FATA regarding the arrangements for the agriculture industry.

5.37 The definition of rural land is set out in the FATA as follows:

Australian rural land means land situated in Australia that is used wholly and exclusively for carrying on a business of primary production.²⁵

5.38 Furthermore, the FATA defines urban land simply as land that is not rural land:

Australian urban land means land situated in Australia that is not Australian rural land.²⁶

5.39 The implication of such a definition was illustrated by the former Chair of the FIRB, Mr John Phillips. The explanation shows how the definition came about and why the focus on urban land existed:

...The legislation that we deal with deals with urban land. It only deals with rural land as a business. My involvement does not go back to the time when that legislation was written, but my understanding is that at the time the legislation was put into the parliament one of the major concerns of the legislators was what was happening in the housing market, particularly what was happening with foreign investment in the housing market. This was still the case when I first became the chairman. So there was a concentration on making sure that the law covered what was described as urban land, but it seems that people did not regard the rural land as being a problem in those days. So it was just regarded as part of the normal turnover of business.²⁷

5.40 The current Chair of the FIRB, Mr Brian Wilson expanded the reasoning for the urban and rural land distinction:

When the act was first put in place in 1975, land in total was entirely excluded. In 1989 urban land, which was defined as everything other than wholly rural land, was included largely, as I said earlier, around concerns about Japanese investment in Queensland tourism and the like. As I understand it, the main reason that all land was not brought into the net

25 *Foreign Acquisitions and Takeovers Act 1975*, ss. 5(1).

26 *Foreign Acquisitions and Takeovers Act 1975*, ss. 5(1).

27 Mr John Phillips, Chair (former), FIRB, *Committee Hansard*, 9 February 2012, p. 2.

back in 1989 was as a result of relatively effective lobbying by the farming lobby back at that time.²⁸

5.41 The committee received evidence that showed the inconsistency in the definitions of rural land and urban land in the FATA to the common understandings of what such land is in reality. The consequence of the current definitions is that land used exclusively for agricultural production (i.e. 'rural land') is subject to the higher national interest test threshold of \$248 million, while very similar land that was not used for agricultural purposes could be categorised as urban land and subject to the much stricter review process for urban land.²⁹

5.42 This inconsistency was clearly demonstrated by following exchange with the committee and the former Chair of the FIRB and other FIRB officials:

CHAIR: ...Can you explain the difference between urban land and rural land under the act.

Mr Phillips: ...Everything that is not urban land is rural land.

...

Ms Reinhardt: So rural land is land that is used for 12 months of the year for producing agricultural outputs. Urban land is all non-rural land.

Mr Phillips: We get some very funny situations—and I blame you legislators for this—because we get some things that look as though they are rural land but which, by definition under the act, are clearly—

CHAIR: ...does that mean you class land in the middle of the Simpson Desert as urban land and you class a mine in the middle of the Kimberleys as urban land but not the pastoral property next door?

Mr Phillips: We do not; the act does.

CHAIR: So that is actually the description?

Mr Phillips: I think that is fair enough. The act defines one [Australian rural land] and everything else falls into the second basket [Australian urban land].

CHAIR: So the Kimberleys is urban land?

...

Mr Phillips: If there is no agricultural production on it.

...

28 Mr Brian Wilson, Chair, FIRB, *Committee Hansard*, 16 August 2012, p. 22.

29 For example, The AFIP states that for types of urban land such as real estate: 'Regardless of value, foreign persons generally need to notify the Government and get prior approval to take an interest in residential real estate, vacant land or to buy shares or units in Australian urban land corporations or trusts. Foreign persons also need to notify for prior approval if they want to take an interest in developed commercial real estate that is valued at \$54 million or more...'. See FIRB, Australia's Foreign Investment Policy, 2013, p. 4.

Senator STERLE: I just want to clarify this, as a regular visitor to the Kimberley for the last 30 years. What is the Kimberley? It is cattle country, but what do you classify it as?

Ms Reinhardt: It would depend on the particular piece of land and how it was used through the year.

Mr Phillips: If it was used for grazing cattle it would be rural land.

...

Senator STERLE: ...The west Kimberley, particularly the Dampier Peninsula, where there is no cattle grazing, would be urban?

Ms Reinhardt: Nonrural.

Mr Phillips: It would be nonrural, therefore it would be treated as though it was urban land. But bear in mind the propositions that would come forward in foreign investment there would almost certainly qualify for examination not because of the land but because of the activity.³⁰

5.43 Aside from producing seemingly incongruous cases (such as the remote Dampier Peninsula being defined as urban land rather than rural land), one submitter argued that, because agricultural industry was included in the FATA in terms of the 'rural land' definition, this has negative impacts on agricultural policy. This submitter, the Agribusiness Council of Australia (ACA), noted that:

The restrictive definition of 'agriculture' in the [FATA] restricts appropriate policy responses appropriate to Australia's competitive positioning of agriculture and agribusiness in the global marketplace.³¹

5.44 The ACA explained further that the restrictive scope of the definition limits the FATA to deal with important areas of the agricultural economy and policy debates regarding the broader agricultural sector:

The definition of 'agriculture' used by the FIRB is restricted, in the main, to agriculture or 'farming operations' and it consequently detrimentally affects much of the administration of the *Foreign Acquisitions and Takeovers Act 1975 (FATA)*. There is much more to agribusiness than farming. Therefore, contemporary approaches to analyses of the economy is restricted to that, and thus whole swathes of the wider 'agribusiness economic system' are absent. This is a major flaw in this and other modern policy debates on the Australian economy. Agribusiness is the world's largest industry – it is how the world feeds its entire peoples. In that regard, the smaller subset of agriculture or farming grossly understates the importance of the agribusiness sector (Australia's the 2nd largest industry), and effects its competitive stances in the global economy accordingly [i.e. there is a

30 *Committee Hansard*, 9 February 2012, p. 16.

31 *ACA, Submission 28 (supplementary)*, p. 7.

constant tendency to devise piecemeal rather than whole-of-system competitive stances (private sector) and policy responses (public sector)].³²

5.45 The ACA argued that the issue of definitions in the FATA should be reviewed to reflect agribusiness more broadly and to this end it recommends:

That the RRAT Committee recommends to the government that the FATA definition of “Australian Rural Land” be amended to reflect contemporary meaning of the term ‘agribusiness’ so as to improve the efficacy of the application of the [FATA] and its regulations in the national interest (i.e. to enable strategic assessments on a whole-of-industry/economic sector basis).³³

5.46 Concern about the issue of land definition in the FATA is emerging as an issue that also needs to be examined by the government as part of the set up a register on foreign ownership of agricultural land. A Treasury official summarised the alternative approaches to the definitions well:

It seems to me that if you were to come to a definition of agricultural land there are a couple of ways you could do that. You could adopt the land use definitions. There are a range of those. One of them you would be familiar with in the FIRB area—the rural land definition. That is just one. That is a regulatory definition. There are other definitions for land use that might go to the ABS methods that use the ANZSIC classification. When you step away from land use definitions you start to go into where land is located. That is another way you can define agricultural land. That might be based on a zoning arrangement that the states currently use. So there are a range of options that we will need to explore.³⁴

5.47 This diversity of approaches shows the complexity of defining rural land. The difficulty of applying the FATA definition of rural land appears to be tacitly acknowledged by the Treasury because it is seeking consultation on which definition should apply to the national foreign ownership register for agricultural land that the government has announced it will establish.³⁵

Committee view

5.48 The committee recognises that the FATA's definitions of 'urban land' and 'rural land' were developed in the context of concerns about foreign investment in urban real estate purchases in the 1980s. As a result, urban land came to be treated as all land not exclusively used for primary production—and, as noted in chapter two

32 ACA, *Submission 28 (supplementary)*, p. 8. The original footnotes from this quote have been omitted. To see the original footnotes refer to p.8 of the submission.

33 ACA, *Submission 28 (supplementary)*, p. 15.

34 Mr John Hill, Senior Adviser, Foreign Investment and Trade Policy Division, the Treasury, *Committee Hansard*, 16 August 2012, p. 25.

35 The Treasury, *Establishing a national foreign ownership register for agricultural land*, Consultation paper, November 2012, pp 6–7.
www.treasury.gov.au/~media/Treasury/Consultations%20and%20Reviews/2012/agricultural%20land/key%20documents/pdf/Consultation_Paper.ashx (accessed 7 November 2012).

there has been little change to the FATA since 1989.³⁶ However, the committee is of the view that these definitions lead to a range of unintended consequences in today's context as the definitions provide separate triggers for the application of the FIRB national interest test. First, the current definitions make it difficult for interested parties, including the public, parliamentarians, farmers and investors to interpret the nature and governance of foreign investment in Australia.

5.49 In addition, the existence of seemingly absurd cases, such as large tracts of outback and remote Australia being classed as urban land (and therefore requiring FIRB to undertake a national interest assessment), has the potential to erode public confidence in how the foreign investment review processes operates.

5.50 Finally, if the definitions of 'rural land' in the proposed national register on foreign interest in agricultural land and in the FATA are different, then the usefulness of the information that can be obtained from the register will be undermined. The committee considers that there is little value in having different definitions of rural land for the FATA and the national register, as the national register will be a key feature of assessing the ongoing effectiveness of Australia's foreign investment framework as it applies to the agriculture sector.

Recommendation 25

5.51 The committee recommends that the government update the definitions of 'Australian rural land' and 'Australian urban land' in the FATA with the aim of more accurately reflecting the common understandings of these terms.

Definition of "direct investment"

5.52 It emerged during the inquiry that the definition of foreign "direct investment" was somewhat imprecise despite an extensive definition of direct investment being articulated in the 2012 version of the AFIP. The case that brought this issue to light was Etihad's purchase of shares in Virgin Australia (Virgin) in June 2012. While not an agriculture-related example, the committee considered that the Etihad/Virgin issue could have a significant impact on the conduct of the general FIRB process which covers the sale of agricultural land and businesses to foreign entities.

5.53 At public hearings on 16 August 2012 and 11 October 2012, the committee questioned FIRB regarding Etihad's investment in Virgin. The questions related to Etihad's investment in June 2012 of a 4.99 per cent stake in Virgin and a subsequent approval by FIRB in July 2012 for Etihad to invest in up to 10 per cent of Virgin. FIRB was not notified by Etihad or Virgin about the initial investment of 4.99 per cent.³⁷ Because Etihad is a foreign government entity, the committee was interested in the operation of the \$0 threshold for FIRB reviews in such instances.

36 See Mr Brian Wilson, Chair, Foreign Investment Review Board, *Committee Hansard*, 9 May 2013, p. 8.

37 Mr Matt O'Sullivan, 'Etihad gets government nod to double Virgin stake', *Sydney Morning Herald* (online), 19 July 2012.

5.54 The debate centred on the issue of whether Etihad's investment was defined as "direct investment" in accordance with the AFIP (at the time). In the 2012 AFIP, the obligation of foreign governments and related entities to contact FIRB was stated as follows:

All foreign governments and their related entities should notify the Government and get prior approval before making a *direct investment* in Australia, regardless of the value of the investment.³⁸

5.55 The definition of "direct investment" in the 2012 version of the AFIP was:

A direct investment has the objective of establishing a lasting interest in an asset(s), or a strategic long-term relationship with a target enterprise. It may allow a significant degree of influence by the investor in the management of the target.

It is common international practice to consider any investment of 10 per cent or more as a direct investment. However, Australia's foreign investment regime is concerned with all investments that provide the investor with influence or control over the target, including any indirect acquisition.

Therefore, we consider that interests below 10 per cent may also be direct investments and must also be notified if the acquiring foreign government or related entity can use that investment to influence or control the target. In particular, investments of less than 10 per cent which include any of the following must be notified:

- preferential, special or veto voting rights;
- the ability to appoint directors; and
- contractual agreements including, but not restricted to, for loans, provision of services and off take agreements...³⁹

5.56 Based on the evidence the committee received at the hearing on 16 August 2012 (discussed below) it was unclear whether or not, in circumstances such as the Etihad investment in Virgin, FIRB should have been advised of the 4.99 per cent investment. Two competing views of whether this should have happened were explained to the committee.

5.57 The first view was that FIRB should have been notified of the 4.99 per cent purchase. Mr Murphy, Executive Director, Markets Group, the Treasury stated that although the AFIP was a 'little unclear in terms of direct and portfolio investment', it was nevertheless 'the preference of the government and the rule under the policy that

38 FIRB, *Australia's Foreign Investment Policy*, January 2012, p. 2, www.firb.gov.au/content/downloads/AFIP_Aug2012.pdf, emphasis added. The 2013 version of the AFIP uses the term foreign government investors. This definition is briefly discussed in chapter two of this report, or can be found at: FIRB, *Australia's Foreign Investment Policy*, 2013, p. 15.

39 FIRB, *Australia's Foreign Investment Policy*, January 2012, p. 12.

all investments by state owned enterprises are notified to the government as of zero dollars.⁴⁰

5.58 This first view also appears consistent with information on the FIRB website (in 2012) that stated that proposals for the acquisition of assets or shares should be notified to the government 'where any doubt exists as to whether they are notifiable.'⁴¹

5.59 The alternative view was that FIRB did not need notification of such an investment because it did not qualify as 'direct investment'. Under this view, the 4.99 per cent purchase (because it was less than a 10 per cent stake) would be direct investment only if it 'has the objective of establishing a lasting interest in an asset(s), or a strategic long-term relationship with a target enterprise.'⁴²

5.60 The FIRB Chair told the committee that 'Etihad *already had* a strategic and long-term interest in Virgin... [including] a codeshare agreement and a cooperation agreement'.⁴³ Because this condition existed, it was open to interpretation that the 4.99 per cent purchase was not a direct investment because it was not *establishing* the strategic interest (and it was less than 10 per cent investment).

5.61 At the public hearing on 16 August 2012, the FIRB Chair indicated that information would be published on the FIRB website to clarify the issue discussed above.⁴⁴ The committee followed up on the issue of website information at the hearing on 10 October 2012. To this the FIRB Chair responded:

Yes, we have looked hard at the definition... In looking at the definition we considered that there were a number of aspects that needed to be worked through so that we have something that is watertight. When you have these definitions, particularly when some of the issues are those that are subtle, to the extent we are codifying it, it is important to get it right. To get it absolutely right this time we are working through that. We are consulting widely in a legal sense, and the like, to ensure that when we do get it up on the site it is absolutely clear.⁴⁵

5.62 The 2013 version of the AFIP has changed the definition of 'direct investment'. These changes include the addition of 'building or *maintaining* a strategic

40 Mr Jim Murphy, Executive Director, Markets Group, the Treasury, *Committee Hansard*, 16 August 2012, p. 20, emphasis added.

41 FIRB website: www.firb.gov.au/content/other_investment/acquisition.asp?NavID=29 (accessed 11 October 2012).

42 FIRB, *Australia's Foreign Investment Policy*, January 2012, p. 12.

43 Mr Brian Wilson, Chair, Foreign Investment Review Board, *Committee Hansard*, 16 August 2012, p. 20, emphasis added.

44 Mr Brian Wilson, Chair, Foreign Investment Review Board, *Committee Hansard*, 16 August 2012, p. 20.

45 Mr Brian Wilson, Chair, Foreign Investment Review Board, *Committee Hansard*, 11 October 2012, pp 9–10.

or long-term relationship with a target entity' to the definition of direct investment [emphasis added].⁴⁶

Committee view

5.63 The committee is pleased that the FIRB has recognised that the previous definition of direct investment was an issue that required further examination. The committee is also pleased that the government subsequently updated the definition of 'direct investment' in the 2013 version of the AFIP. Had the government not made this change, the committee would have recommended that it did so. The committee considers that the FIRB should continue to monitor the issue to ensure that the updated definition effectively prevents similar misinterpretations (as discussed in the case above) from occurring in the future.

46 FIRB, *Australia's Foreign Investment Policy*, 2013, p. 14. The full new definition can also be found on this page.

Chapter 6

Foreign investment and agricultural development: the Ord irrigation area case study

6.1 As part of the committee's inquiry, it considered the issue of foreign investment in major agricultural developments. As a specific and topical example, the committee focussed on the Ord irrigation area development as a case study. In April 2013, the committee held public hearings in Perth and Kununurra and undertook site visits of agricultural properties in northern Western Australia.

6.2 This chapter considers the issues arising from foreign investment in the region and the implications it has for foreign investment in future agricultural developments. Following an outline of the Ord irrigation area, the chapter discusses the key issues of capital investment, water entitlements (in order to assist capital investment), land tenure and the community views towards foreign investment in this region.

Figure 6.1—Rural and Regional Affairs and Transport Committee members visiting agricultural producers in northern Western Australia





The Ord irrigation area

6.3 The Ord irrigation area was established in 1971 when the Ord River Dam was completed and created Lake Argyle near Kununurra, Western Australia. This resulted in the Ord Stage 1 development of 14 000 hectares of irrigated agricultural land. The current produce in this area includes a variety of horticultural produce, chia¹, and sandalwood. A map of the Ord irrigation expansion is included in Appendix 6.

6.4 In November 2012, the Western Australian Government announced that Kimberley Agricultural Investments (KAI), the Australian wholly owned subsidiary of the privately owned Chinese based company Shanghai ZhongFu (Group) Co, was the successful bidder for the development of the Ord Stage 2 under the Ord-East Kimberley Expansion Project.²

6.5 Under the proposed arrangements, KAI would lease land from the Western Australian Government and develop 13 400 ha of farmland, primarily for growing sugar cane. At the time of the committee's visit to the Ord irrigation area, the KAI and the Western Australian government had not reached a formal agreement on the development of the Ord and the negotiations are expected to be completed by

1 Chia is a commercially grown seed crop that contains high levels of omega 3 and dietary fibre.

2 Hon Colin Barnett MLA and Hon Bredon Grylls MLA, Media Release, "Ord-East Kimberley Proponent Announced" 20 November 2012.

mid-2013.³ Therefore, details about this aspect of the Ord development were not fully available to the committee for examination.

Figure 6.2—Committee members' aerial viewing of the Ord River Dam



Key issues

Capital investment

6.6 The committee heard evidence that the challenges in attracting domestic capital investment for major agricultural developments was a significant reason that foreign investment was sought after by agricultural businesses.⁴ The committee heard that for major agricultural developments to occur, the industry should move to more concentrated capital investment. Foreign investment was said to provide sources for such capital more readily than from domestic investors. The committee also heard that agriculture was an industry that required 'patient' capital, that is, capital investment that took a long-term view to returns on the investment. Finally, the committee was told of the barriers imposed by the Australian banking sector towards domestic investment in agriculture which led companies to source capital off-shore. These three issues will be discussed below, in turn.

Structure of capital – concentrated and patient capital in agriculture

6.7 The committee heard evidence that for major agricultural developments to occur in Australia, the agriculture industry needed to move from its traditional

3 The Hon Colin Barnett MLA, Premier and Minister for State Development, Western Australia, correspondence to the Senate Rural and Regional Affairs and Transport References Committee, 5 April 2013 (received 11 April 2013). KAI was announced as the *confirmed* proponent of the Ord development on 29 May 2013, see Hon Colin Barnett MLA and Hon Brendon Grylls MLA, media release, "Ord development takes important step", 29 May 2013, www.mediastatements.wa.gov.au/pages/StatementDetails.aspx?listName=StatementsBarnett&StatId=7425 (accessed 14 June 2013).

4 The committee's interim report noted evidence from the AACo that there were a number of tax barriers to domestic companies competing in fair and even terms with foreign investors. In addition to the taxation issues, the committee heard evidence of other key challenges for capital investment in agricultural developments. Senate Rural and Regional Affairs and Transport References Committee, 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*, November 2012, pp 16–20.

diversified capital structure to more concentrated capital investments. As Mr Andrew Murray, Chair, Western Australian Regional Development Trust, told the committee:

If you look at the use of capital in Australia historically, it mirrors the use of capital elsewhere. Most people, when confronted by the modern way in which capital is applied and used in mineral resources, forget that once the resourcing of mines and the exploitation of resources were similar to what has applied to farming. In other words, they were small-scale, and the great mining houses resulted from a collection and an aggregation of small mining operations, because they needed economies of scale, basically, on both the finance and the technical basis. A similar thing is happening now in agriculture, where you find that the formerly dispersed financial model, where money was fed into small family or corporate organisations, is now shifting into larger corporate concentrations of capital.⁵

6.8 Furthermore, Mr Murray noted foreign investors were providing more concentrated levels of capital in Australia:

Interestingly, [corporate concentrations of capital]...is much more a feature of the foreign investor than the Australian investor, and one of the issues you need to address—which I do not know the answer to—is why Australian capital is much more negative about that sort of investment and application of financial know-how and investment than is foreign capital, especially bearing in mind that it is expensive for foreigners to invest in Australia—it is not cheap; it is very expensive. So they see an application of capital in ways which Australians, so far, have not.⁶

6.9 In a similar respect, the committee heard about high level of 'patient' capital required for sugar development in the Ord irrigation region. A local producer from the Ord stage 1 area was sceptical of the possibilities for the development of land from Ord stage 2 to occur without significant foreign investment, which he implied was a key source of patient capital:

Senator EDWARDS: But the actual development of the land [at Ord stage 2] is secondary investment. Somebody has to clear it all, somebody has to level it all, somebody has to put the channels in and somebody has to redevelop the land. All of those things still have to happen, don't they?

Mr Boshammer: That is right, and that is a significant investment. It will be done gradually by people in private capacities. If it is given to them, however, I doubt very much whether we will have a sugar industry if it is left in a private capacity without significant foreign investment. That is a huge investment, and there is just no patient capital available in Australia for an investment like that. And we probably don't know the market well enough to know that we can market the product long-term.⁷

5 Mr Andrew Murray, Chair, Western Australian Regional Development Trust, *Committee Hansard*, 9 April 2013, p. 33.

6 Mr Andrew Murray, Chair, Western Australian Regional Development Trust, *Committee Hansard*, 9 April 2013, p. 33.

7 Mr Robert Boshammer, private capacity, *Committee Hansard*, 11 April 2013, p. 4.

Figure 6.3—Aerial view of the Ord Stage 1 area showing the scale of current agricultural production



Domestic banking constraints

6.10 The TFS Corporation noted that it was required to look for sources of capital off-shore due to difficulties in obtaining finance from Australian banks. TFS representatives told the committee that it received 'unfair' treatment from its bank when seeking finance for its business. As a result TFS stated that it was forced to seek capital investment off-shore.⁸ As the Hon Mr Chris Ellison, Advisory Director, TFS Corporation further explained:

...We believe that we abided by our banking covenants. We believe that we were charged banking fees which were exorbitant, somewhere in the region of three-quarters of a million dollars. That is what we are saying. We are saying that the bank had made a decision to get out of agriculture and used that decision, that policy, and followed it and pursued whatever means it could to get out of the agricultural sector.

We do not believe that we are alone on this issue. We think that other businesses in Australia have experienced the same thing. When you talk about foreign investment, TFS would like nothing more than to have an Australian banking system providing finance to have Australian investors.⁹

6.11 In a similar context, the committee heard evidence about the limited access of finance for agricultural businesses due to the level of interest rates and the difficulty this creates for financial returns.¹⁰ However, another witness noted that the risk-averse bank lending by Australian banks provided a greater level of security and protection from the global financial crisis.¹¹

8 The Hon Mr Chris Ellison, Advisory Director, TFS Corporation, *Committee Hansard*, 11 April 2013, p. 27.

9 The Hon Mr Chris Ellison, Advisory Director, TFS Corporation, *Committee Hansard*, 11 April 2013, p. 27.

10 Mr Mike Introvigne, private capacity, *Committee Hansard*, 9 April 2013, pp 11–14.

11 Mr Tony Chafer, CEO, Cambridge Gulf Limited, *Committee Hansard*, 11 April 2013, pp 50–51.

Figure 6.4—Aerial view showing the scale of the current Ord development



Committee view

6.12 The committee notes that the typically diverse and small-scale structure of domestic capital in the agricultural industry is a major driver of companies accepting large-scale capital investments from off-shore. This, in turn, has fuelled the current concerns regarding foreign investment in Australia. Foreign investment has been, and will continue to be, a legitimate and important source of capital in Australian agriculture. However, this does not mean that greater efforts should not be made to improve access to capital from Australian sources.

6.13 The committee understands that agriculture is an industry which is subject to many short-term and medium-term uncertainties. However, the committee also considers that increased long-term investment in agriculture is not only beneficial for the industry and the nation, but can also provide suitable financial returns to investors. Such returns are likely to improve with future growth in capital investment and the resulting development of the industry. So that the Australian economy can maximise the benefits from growth in agriculture, the committee considers it necessary that the government develop policies and establish structures that will encourage long-term (or patient) capital investment from Australian investors, including Australian superannuation funds and other domestic investors with long-term horizons.

Recommendation 26

6.14 The committee recommends that the Australian government commission an extensive and independent review of possible incentives and barriers for long-term capital investment in major Australian agricultural developments by

Australian investors, including superannuation funds and other domestic investors with long-term horizons. The review should make a comparative analysis with the incentives for foreign investors to invest in major Australian agricultural developments.

6.15 Based on the findings of the review, the Australian government should develop, publish and implement policies to encourage long-term domestic capital investment in Australian agriculture. The policies should specifically identify opportunities for Australian superannuation funds and other domestic investors with long-term horizons and where appropriate, the policies should be coordinated with relevant state governments and agencies.

6.16 The committee acknowledges the evidence provided by TFS Corporation that outlined the financial disincentives that the business faced in obtaining capital through Australian banks. The committee is also mindful that other industry participants found that current domestic banking arrangements made borrowing difficult. One of the consequences is that local business may be pushed towards foreign investment when they would prefer domestic sources of capital.

6.17 The evidence received regarding this issue came late in the inquiry and it was impractical for the committee to fully examine the issue with input from relevant stakeholders. However, as the committee considers that appropriate access to domestic finance from banks is related to the broad themes of the inquiry, the committee intends to write to a number of banking industry stakeholders seeking explanations of these matters and, where appropriate, publish the responses received on the committee's website. Furthermore, the committee encourages the government to use any of the responses that the committee may publish and the evidence already available as part of this inquiry, to address the broader issue of improving access for Australian agricultural businesses to domestic finance.

Recommendation 27

6.18 The committee recommends that, as part of the review and policies established under recommendation 26, and with appropriate consultation with the banking industry, the agricultural sector and other interest parties, the government should consider appropriate avenues for improving access for Australian agricultural businesses to domestic finance from Australian banks.

Water entitlements and access to domestic capital

6.19 The committee was informed that water infrastructure and subsequently a water market were essential to the development of agricultural regions in northern Australia. As Mr Andrew Murray explained to the committee, water was one of a number of key factors in this regard:

Regional development cannot occur sustainably unless the basic development underpinnings are available; water, power, transportation,

communications, housing and social resources. Of these, in WA water is often the biggest challenge to regional development.¹²

6.20 Mr Murray went on to add:

Water use must be sustainable. Sustainability is predicated on good data, experience and science. WA has an estimated 12½ thousand gigalitres of unallocated surface and ground water. Since only 15 per cent of WA has been water mapped, inadequate water mapping and a lack of data—which is not surprising in a state the size of Western Europe—means that any estimate of water for development must presently be viewed as conservative... Water priorities and projects must feed in to such Commonwealth and state planning.¹³

6.21 The committee heard evidence that the creation of a water market would help manage diverse cropping in the Ord irrigation area and potentially assist the development of the sugar industry that is being considered by foreign investors. As a local Kununurra producer told the committee in the following exchange:

CHAIR: ...if there were a market and a price on the water, wouldn't what happens with the water be driven by the commercial return on the water, rather than you getting the land and 17 megalitres a hectare...¹⁴

Mr Boshammer: Absolutely. There would be some advantages and there probably would be a good combination between the sandalwood, which now is not using very much water as it gets older and it has got its roots fairly deep down, and actually doing some good for the watertable and maintaining that. There would be some real benefits for the sandalwood companies in being able to sell their allocation to the Chinese sugar companies.¹⁵

6.22 Another witness at the Kununurra public hearing noted the role that market-driven water entitlements could play in the future development of the Ord irrigation area. Mr Tony Chafer commented based on his previous experience with the issue in the following exchange:

CHAIR: ...there is about 80,000 hectares [in the Ord region] if you take the rising sand country. With good technology, there [are] many thousands of hectares there. If you had freehold title on Ord stage 1 and a water licence entitlement, were in the sandalwood business, only needed two

12 Mr Andrew Murray, Chair, Western Australian Regional Development Trust, *Committee Hansard*, 9 April 2013, p. 32.

13 Mr Andrew Murray, Chair, Western Australian Regional Development Trust, *Committee Hansard*, 9 April 2013, p. 32.

14 Farmers in the Ord Stage 1 area have a water allocation of 17 megalitres per hectare, see: Cr John Moulden, Shire President, Shire of Wyndham and East Kimberley, *Committee Hansard*, 11 April 2013, p. 21.

15 Mr Robert Boshammer, private capacity, *Committee Hansard*, 11 April 2013, pp 7–8. However, Mr Boshammer also noted the limited benefits that a water market would have for attracting capital: Mr Robert Boshammer, private capacity, *Committee Hansard*, 11 April 2013, p. 8.

megalitres a hectare a year and could trade your other water, and there might be someone out on that sand country, like down at Carnarvon, doing fertigation who wanted to fund his fertigation through the sale of some of his water, all of that would make it more of an incentive for young blokes to get into the market, wouldn't it?

Mr Chafer: It definitely would, and it would make an incentive for people to use their water a little more smartly. I would love to see trading. In fact, in a previous life I was the Chief Executive Officer of the Ord Irrigation Cooperative here...and we had the biggest water allocation licence in Western Australia. Unfortunately, we could trade between ourselves, but we could not trade externally. In fact, we effected the only trade in the Ord when another farmer in the sand country wanted to come along. We spent a million dollars on improvements in the irrigation infrastructure and sold a bit of the water entitlement that we had saved to that person. But it had to remain within our licence...

CHAIR: If we built it to 100,000 or 80,000 hectares, that would be enough, I reckon, to create a market.

Mr Chafer: Yes.

CHAIR: If the sugar job got a pain in the guts and it was a rotation a couple of years out of sugar, you might be able to grow something, sell some water and fund it. It just gives more flexibility.¹⁶

Mr Chafer: Absolutely.

Committee view

6.23 The committee is of the view that irrigation areas such as the Ord irrigation area, should establish a system of water entitlements that are environmental sustainable, tradable, commercially viable, and that attribute appropriate value to the water used. The committee is mindful of the difficult lessons that can be learnt from the over-allocation of water resources in the Murray-Darling Basin and over-confidence about the long-term availability of water. It urges relevant government agencies and stakeholders to move to a water market early and to give adequate consideration to these factors if and when such a system is created.

6.24 Furthermore, the committee considers that the creation of appropriate water entitlements is a key mechanism for creating levels of certainty around the monetary value of irrigated farming in areas such the Ord. A likely corollary of the monetary value that water entitlements would attribute to farms is that it will provide more scope for relevant businesses to borrow from domestic banks in order to raise capital. This in turn could reduce the pressures on companies to source capital from foreign financiers and reduce the associated risks to Australia's national interest.

16 Mr Tony Chafer, CEO, Cambridge Gulf Limited, *Committee Hansard*, 11 April 2013, p. 48.

Recommendation 28

6.25 The committee recommends that the Australian government encourage the Western Australian and Northern Territory governments to consider possibilities for establishing a water market (including tradable water entitlements) for irrigation developments, including the Ord, in Australia's north. The information about foreign ownership of any water entitlements established under this regime should be included in the national foreign ownership register for agricultural land.

6.26 In establishing water entitlements, the committee urges the relevant bodies to consider lessons from the Murray-Darling Basin, including avoiding problems such as over-allocation, the value of different water security types, and water efficiency mechanisms. In addition, any new water entitlements should be developed in a manner that can allow for transparent oversight of the use water resources by foreign investors. As such, the committee recommended in chapter three that foreign interests in Australian water entitlements should be included as information collected under the government's national foreign ownership register for agricultural land.

Land tenure

6.27 The committee heard evidence that agricultural development in Western Australia is intimately related to the issue of land tenure. For example, Mr Murray noted the commitment of relevant state and federal governments to developing agriculture in Australia's northern regions, while noting the relationship of land tenure arrangements in Western Australia:

It is worth noting the broad federal, state and territory intergovernmental support for agricultural development in Northern Australia. At the fifth meeting of the Northern Australia Ministerial Forum, on 22 November 2012:

Ministers agreed that the development of agriculture in northern Australia is a rapidly emerging policy priority across the north, supporting national and international food security and regional development more broadly.

WA is a vast underdeveloped state of great variety and resource. It is the size of Western Europe, or five times the size of France, with just over two million people in it. Only seven per cent of WA is freehold. Of all tenures, freehold is the most important in underpinning modern societies and economies.¹⁷

6.28 However, the extensive leasehold arrangements could have longer-term benefits in relation to foreign investment in Western Australia. As Mr Murray noted when questioned about the leasehold arrangements for the Ord development:

...If you want to retain and store and increase value, the best thing you can do as a government which has an investment is have a leasehold because eventually you get it back. So without going into the pros and cons of that

17 Mr Andrew Murray, Chair, Western Australian Regional Development Trust, *Committee Hansard*, 9 April 2013, p. 32.

specific deal about which I do not have deep understanding, I would suggest to you that the model is a pretty good one because you have not sold it off permanently. You have retained an asset that you have leased out.¹⁸

6.29 Despite the potential benefits of such leasehold arrangements, the committee also heard that where foreign acquisitions in agricultural land are made from state governments, such as crown land, the Foreign Investment Review Board (FIRB) is not involved in the review process. As Mr Wilson noted in the following exchange, FIRB is constrained in reviewing such acquisitions because of the provisions in the *Foreign Acquisitions and Takeovers Act 1975* (FATA):

Mr Wilson: It is not a matter for the board [FIRB], it is a matter under the act (FATA). Ever since the Foreign Acquisitions and Takeovers Act was put in place in 1975, there has been a blanket exemption for sales by governments.

CHAIR: Government to government.

Mr Wilson: Or government to private. So any sale by a state or territory or Commonwealth government is explicitly excluded from the actual Foreign Acquisitions and Takeovers Act.

CHAIR: That is very interesting. So, in the national interest, when we measure all this stuff—given the unexploited mosaic of opportunities of a lot of Crown land in Northern Australia—there is the possibility that could run off the rails if there isn't some sort of oversight. Is that going out too far with the thought?

Mr Wilson: I suppose that is a matter for the legislators.

Mr Rollings: I would hazard a guess there could be some constitutional constraints behind that legislation. That is just a thought.¹⁹

6.30 On the other hand, outside of crown land, the committee was told of the limits of leasehold arrangements for managing foreign investment. In particular, it was noted that such an arrangement was unlikely to be suitable for private-owners of freehold titles. The Western Australian Farmers Federation (WAFF) was asked whether leasing was a 'pathway' for foreign investment in Australia. This resulted in the following exchange:

Mr Park: Well, let me know when you convince someone that holds a freehold title to give it back and let the government have the leasehold. The next one will be the first I suspect—willingly anyway.

18 Mr Andrew Murray, Chair, Western Australian Regional Development Trust, *Committee Hansard*, 9 April 2013, pp 34–35.

19 Mr Brian Wilson, Chair, Foreign Investment Review Board, and Mr Jonathan Rollings, General Manager, Foreign Investment and Trade Policy Division, Treasury, *Committee Hansard*, 9 May 2013, p. 10.

Senator HEFFERNAN: That would be the catch. Who is going to pay for the title to let the cocky get out and retire while someone else takes on the lease?

Mr Park: That is exactly right. So who is going to buy that?

Senator HEFFERNAN: It would have to be very patient capital.

Mr Park: Traditionally we are leaseholders with it being government owned.²⁰

Committee view

6.31 The committee understands and respects that land tenure is an issue for State governments. However, given the feedback from stakeholders in Western Australia that is outlined above, the committee encourages the Western Australian government to address these concerns in a manner that promotes the ability of Australian companies to develop agricultural land in the region.

6.32 At the same time, the committee is mindful of some of the benefits that large state government held leases have for managing foreign investment in new developments such as the Ord irrigation area. The committee considers that there are significant limitations to suggestions that all foreign investment should be based on leasing arrangements as this would make foreign investment impractical for the large number of privately-owned freehold farms. However, the use of long-term lease arrangements to encourage foreign investment in crown land is generally supported by the committee. This is because in such cases, the overall ownership of the agricultural asset remains within Australia and ultimately under Australian control.

6.33 In addition, the committee urges the commonwealth, state and territory governments to consider developing a common policy for FIRB to be consulted in the case of significant foreign acquisitions from respective governments. The committee considers that FIRB would only be consulted in those cases that FIRB would review equivalent foreign acquisitions from private Australian businesses. The committee also acknowledges that any final decision for foreign acquisitions from federal, state or territory governments should remain the prerogative of the respective government.

Recommendation 29

6.34 The committee recommends that the commonwealth, state and territory governments work together to consider appropriate policy options for consulting with FIRB in cases of proposals for significant foreign acquisitions from respective governments bodies.

Community sentiment towards foreign investment

6.35 The lack of confidence of local communities about the benefit of foreign investment has been a common theme throughout this inquiry. However, unlike some

20 Mr Dale Park, President, Western Australian Farmers Federation, *Committee Hansard*, 9 April 2013, p. 30.

of the concerns expressed elsewhere, the Kununurra council expressed general support for foreign investment in the Ord irrigation case. The shire President, described this perspective as part of the following exchange:

Councillor Moulden: ...This is a very practical town. We do not have an ideological standpoint to start with. I have been asked the question before: what would happen and what would be the reaction here if the bid went to the Chinese? My response to that is: if that is the best outcome for the community here, the state and the country, how could you oppose it?

CHAIR: I guess you would like the capacity, the sovereignty of Australia, to provide the hospitals and the roads, so we must make sure they are in the revenue base.

Councillor Moulden: Absolutely. I can tell you from my observation that, by and large, there has not been any negative reaction to the success of the Chinese bid. The principals of Shanghai Zhongfu fronted a public meeting in Kununurra in December [2012] after it had been announced they were the preferred tenderer. Maybe 200-plus people were in the room. There was opposition voiced by maybe three people. Generally, the community is excited that something is happening. They were curious to see the people who are going to be living with them. From my point of view, the Chinese have handled their relations with this community absolutely perfectly. They have been visible. They have been upfront and they have explained themselves.²¹

6.36 Similar support was expressed by other stakeholders.²²

Committee view

6.37 The committee was encouraged by the general support for the large-scale foreign investment in the Ord irrigation area among local community representatives and stakeholders. The committee considers that the Ord development with KAI appears to be proceeding in a manner that will provide significant economic benefit for the region while at the same time sensitively managing local relationships and social interests.

6.38 In this respect, the committee notes correspondence received from the Premier of Western Australia that the KAI proposal forms part of 'future potential for irrigated agriculture in the region [that] based on best practice irrigation practices has been

21 Cr John Moulden, Shire President, Shire of Wyndham and East Kimberley, *Committee Hansard*, 11 April 2013, pp 22–23.

22 For example see Mr Robert Boshammer, *Committee Hansard*, 11 April 2013, p. 1. Another stakeholder expressed that he was generally 'pro-investment' and ambivalent regarding the investment source being foreign or domestic, see Mr Anthony Chafer, Chief Executive Officer Cambridge Gulf Limited, *Committee Hansard*, 11 April 2013, p. 49.

estimated...to be as much as 100,000 ha.²³ The result of such a development could greatly assist Australia's contribution to the future global food task.

6.39 Therefore, the committee is generally supportive of the project and the approach taken to date by the Western Australian Government. However, the committee urges the Western Australian Government to manage remaining arrangements with KAI in a way that will maximise the potential for Australian producers to participate in the market created by the Ord expansion. Furthermore, the Western Australian Government should ensure that KAI participates fully in the marketplace in a manner that is commercially motivated, fair to Australian businesses, and that protects Australia's tax revenue.

Senator the Hon Bill Heffernan

Chair

23 The Hon Colin Barnett MLA, Premier and Minister for State Development, Western Australia, correspondence to the Senate Rural and Regional Affairs and Transport References Committee, 5 April 2013 (received 11 April 2013).

Dissenting report by Government Senators

1.1 This dissenting report reflects the views of Government senators to the issues raised in the majority's interim report and the majority's final report of the committee's inquiry into the Foreign Investment Review Board National Interest Test.

1.2 We acknowledge the work of the Committee in this inquiry and note the majority's report on this issue. Government senators have significant concerns with the assertions of the majority's report and its recommendations.

1.3 The Committee has received detailed testimony from a number of sources over the course of this inquiry. However, the majority's report does not adequately balance the weight of evidence before the Committee.

1.4 Foreign investment has helped build Australia's economy and will continue to enhance the wellbeing of Australians by supporting economic growth and prosperity.

1.5 The issue of foreign investment has received significant attention in the last few years and has been the subject of numerous inquiries from both the Senate and Australian Government agencies. These reports have provided significant amounts of information and analysis upon which Australia's foreign investment policy should be guided.

1.6 Government senators suggest that the majority failed to pay due regard to much evidence before the Committee and, most significantly, the findings of many of these thorough and well-researched reports in coming to its conclusions.

Regulatory regime for foreign investment in Australia

1.7 Australia has a rigorous and robust foreign investment screening regime. The *Foreign Acquisitions and Takeovers Act 1975* provides the legislative framework for the Government to review significant foreign investment proposals on a case-by-case basis. It enables the Treasurer to block proposals that he finds contrary to the national interest or impose conditions on an investor to address national interest concerns. All foreign governments and their related entities must notify the Foreign Investment Review Board and receive approval for direct investments, new businesses and land acquisitions, irrespective of the value of the investment.

1.8 This case-by-case approach under the screening process maximises investment flows while protecting Australia's national interest. In the agricultural sector, it helps ensure that investments do not adversely affect the sustainability of Australia's national agricultural resources, including their economic, social and environmental contribution to Australia.

1.9 It is also important to note that investors are not only subject to the national interest test under the *Foreign Acquisitions and Takeovers Act*, they are also subject to all Australian and State and Territory laws, including in regards to taxation, land use, the environment and competition.

1.10 There have been numerous inquiries into foreign investment, and in particular in the agriculture sector, over the last few years. These reports have consistently endorsed the current foreign investment screening process under the Foreign Acquisitions and Takeovers Act and administered by the Foreign Investment Review Board.

1.11 In 2009, the Senate Economics References Committee inquiry into Foreign investment by state-owned entities, Chaired by Liberal Senator Alan Eggleston, found that the current arrangements were adequate in protecting the national interest.

The Committee believes that the current regulatory framework for assessing foreign investment proposals, whether they are made by private commercial interests, sovereign wealth funds or state-owned entities, is sufficient.¹

1.12 The committee went on to say:

The Committee is also of the belief that, having considered all the evidence, the system of case-by-case assessment, based on the national interest, has also served Australia well.²

1.13 This view was reaffirmed in June 2011 when the Senate Economics Legislation Committee, looked at a bill to change the foreign investment rules in relation agricultural land. In its report, the Committee concluded that current laws, including the Foreign Acquisitions and Takeovers Act had served Australian well in protecting the national interest, stating:

The Committee continues to hold the view that the current regulatory framework for assessing foreign investment proposals is adequate. The combined powers of the *Foreign Acquisitions and Takeovers Act 1975*, the *Foreign Acquisitions and Takeovers Regulations 1989*, the *Competition and Consumer Act 2010* and the system of case-by-case assessment based on the national interest, has served Australia well.³

1.14 Finally, in 2010 the Government asked the Australian Bureau of Agricultural Resource Economics and Sciences to look at and report on foreign investment in agriculture. The report, released in January 2012, found that the current laws were providing a considerable level of scrutiny that was sufficient to protect the national interest.

These mechanisms amount to a considerable level of scrutiny of foreign investment proposals and operations of foreign-owned agribusinesses in Australia. With such scrutiny, it appears Australia's regulatory framework is likely to be sufficient to ensure Australia's national interest in relation to

1 Senate Economics References Committee, *Foreign investment by stat-owned entities*, September 2009, pp 61–62.

2 Senate Economics References Committee, *Foreign investment by stat-owned entities*, September 2009, p. 62.

3 Senate Economics Legislation Committee, *Foreign Acquisitions Amendment (Agricultural Land) Bill 2010*, June 2011, p. 41.

new foreign investment in agribusiness and the competitive behaviour of foreign owned agribusinesses in the Australian market.⁴

1.15 These three reports are a sample of the in-depth analysis that has looked at this issue. Their consistent findings illustrate the strong protections in place and the adequacy in protecting the national interest.

1.16 There are areas though where the Government can improve transparency around foreign investment and the foreign investment screening process. Much of the anxiety around foreign investment in agriculture appears to be based on misunderstandings of the levels of investment and the motives of foreign investors in Australia.

1.17 To address these concerns and provide the community with more information the Government has made a number of improvements to Australia's Foreign Investment Policy.

1.18 In 2008, the Treasurer released six national interest principles to apply to foreign government investors.

1.19 In 2010, the Government released a publicly available Foreign Investment Policy to provide guidance to investors and the community on Australia's foreign investment screening regime.

1.20 In 2011, the then Assistant Treasurer, the Hon Bill Shorten MP, commissioned a survey from the ABS on ownership of agricultural land and water. This survey showed that the overwhelming majority of agricultural land and businesses are Australian owned. This survey was conducted according to the Australian Bureau of Statistics' high standards of data collection.

1.21 In January 2012, the Government released a new policy statement on foreign investment in agriculture, which outlined the national interest considerations for foreign investments in the agriculture sector.

1.22 The Government has also announced that it will introduce a register of foreign ownership of agricultural land to provide even greater transparency over agricultural land holdings.

1.23 There is, however, a balance to be struck between providing greater transparency and the disclosure of private or commercially sensitive investor information, which may impact on investor perceptions of Australia as an attractive destination for investment. Transparency also needs to be balanced against trade obligations under international agreements. The Government should continue to look at ways to improve transparency, mindful that such measures should not discourage foreign investment or breach our international trade obligations.

4 Mr Brian Moir, *Foreign Investment in Australian Agriculture*, RIRDC, Canberra, November 2011, p. 36.

Recommendation 1

1.24 The Government should continue to look at ways to ensure the community has more and accurate information about foreign investment, particularly in agricultural land.

1.25 In considering these initiatives, the Government should be careful to avoid disclosing private or commercially sensitive information or breaching Australia's international obligations.

Motivations of investors in the agricultural sector

1.26 Government Senators note that there is concern in the community about the motivations behind investment from some state-owned entities.

1.27 Evidence presented to the Committee shows that this investment is commercially motivated, including the following testimony from Hassad Australia:

when they [Hassad Food company] 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 outcome. To invest just for the purposes of producing food is not sustainable in the long term.⁵

1.28 This statement is reinforced by the expert ABARES report, which found that suggestions that investors are coming to Australia to invest on a non-commercial basis does not stand up to scrutiny. Their conclusion was that such an approach would be unsustainable in the long term, much more expensive than alternative options and would need to take place on a scale that vastly exceeds present levels of investment:

But the suggestion that the purchase of farmland in a foreign country is an effective means of increasing the supply of food at home demands some analysis. Australia and many other world food suppliers have well-established and efficient marketing institutions for food exports, and bypassing these to make direct shipments from one or a few farms would be an expensive way to move produce abroad. To achieve economies in this process, and to have a significant impact on the food supply in the investing country, would require land purchases on a scale that vastly exceeds present levels. The cost would be extreme – purchasing food from the world market, even with the aid of government subsidies if required, is likely to be a significantly cheaper option. There is also considerable uncertainty as to whether such a strategy would be fiscally sustainable in the long term, if no consideration is given to profitability.⁶

Contribution of foreign investment to Australia

1.29 Government members are conscious that many of the recommendations from Coalition members would put at risk beneficial foreign investment in Australia. This

5 Mr Tom McKeon, Chief Executive Officer, Hassad Australia Pty Ltd, *Committee Hansard*, 16 November 2011, p. 40. See also paragraph 4.30 of the majority report.

6 Mr Brian Moir, *Foreign Investment in Australian Agriculture*, RIRDC, Canberra, November 2011, p. 25.

is because the further barriers on foreign investment will create uncertainty and increase risk for investors. In a competitive investment environment, this capital will flow to other nations, boosting their competitiveness and further disadvantaging the Australian agriculture sector.

1.30 According to the expert ABARES report,

Any measures that put further barriers in the way of foreign investors and reduce the flow of foreign capital into Australian agriculture would adversely affect the performance of the agricultural sector. Lower investment would result in lower output, exports and incomes than would otherwise be the case. Opportunities for improved efficiencies could be lost, and distortions, such as increased use of foreign credit, would be encouraged.⁷

1.31 This finding reinforces data from the Australian Bureau of Statistics, the Organisation for Economic Cooperation and Development, the Australian Bureau of Agricultural and Resource Economics and Sciences and private organisations. This data dispels many of the myths propagated in the community by opponents of foreign investment. Some of these key facts include:

- The overwhelming majority of businesses are entirely Australian owned - 96.8 per cent as at June 2011.⁸
- Our agriculture sector is overwhelmingly Australian owned - 99 per cent of agricultural businesses and 89 per cent of agricultural land was entirely Australian owned as at 2010.⁹
- Chinese investment is hugely overstated - out of a total of \$2.2 trillion of foreign investment in Australia in 2012, investment from China made up less than 1.1 per cent of that.¹⁰
- Our economy needs additional investment to keep growing – the gap between our national savings and our investment needs has averaged around 4 per cent of GDP over the past few decades, which means we need around \$50–70 billion of new capital from overseas every year to supplement this deficit.¹¹

7 Mr Brian Moir, *Foreign Investment in Australian Agriculture*, RIRDC, Canberra, November 2011, p. 48.

8 Australian Bureau of Statistics, ABS cat 8167.0, *Selected Characteristics of Australia Business 2010-11*, "Business Structure and Arrangements", 13 September 2012, www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/8167.0Main%20Features32010-11?opendocument&tabname=Summary&prodno=8167.0&issue=2010-11&num=&view.

9 Australian Bureau of Statistics, *Agricultural Land and Water Ownership*, December 2010, released 9 September 2011.

10 Australian Bureau of Statistics, ABS cat 5352.0, *International Investment Position, Australia: Supplementary Statistics, 2012*, "Table 2 - Foreign Investment in Australia, Level of Investment by Country and Country Groups by type of investment and year: (\$million)", released, 2 May, 2013, www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/5352.02012?OpenDocument.

11 2013-14 Budget, BP1 BS2 Box 5 Chart A, www.budget.gov.au/2013-14/content/bp1/download/bp1_bs2.pdf.

- The agriculture sector is one sector in particular that needs significant capital investment – an ANZ Research Report suggests that the agriculture sector could generate up to \$1.7 trillion in export revenue by 2050.¹²
- Businesses with foreign ownership make a huge contribution to the economy - 12 per cent of private sector employment, 25 per cent of gross fixed capital formation and 21 per cent of total value added in Australia, according to a 2004 ABS study.¹³
- Foreign investment brings innovation, a key factor in productivity – firms with foreign ownership spend more on innovation than the average Australian-owned firm. A 2010 ABS study found that firms with some foreign ownership accounted for 42 per cent of Australia's research and development spending.¹⁴
- Claims that we have the most liberal regime simply aren't true - at a national level, regulation of foreign investment in Australia is greater than that of most other OECD countries.¹⁵
- Raising barriers to foreign investment will hurt Australian farmers – places that do have high restrictions on foreign investment, like Alberta Province in Canada, generate lower incomes for farmers.¹⁶
- Limiting foreign investment will hurt wages and shrink the economy - Treasury analysis shows a reduction of investment of 1 per cent of GDP will see unemployment increase by 0.5 per cent in the first year and over a decade will see the economy 0.7 per cent smaller, wages 2.0 per cent lower, and investment 3.1 per cent lower.¹⁷

1.32 This data shows that foreign investment has been crucial to the Australian economy for a number of years. It provides significant benefits and will continue to do

12 Jackson Partners (Commissioned by ANZ), ANZ Insight, *Greener Pastures: The Global Soft Commodity Opportunity for Australia and New Zealand*, Issue 3, October 2012, p. 1.

13 Australian Bureau of Statistics, *Economic Activity of Foreign Owned Business in Australia, 2000-01*, 5494.0, 9 January 2004
[www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/B57862618642D2B4CA256E1500752AC7/\\$File/54940_2000-01.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/B57862618642D2B4CA256E1500752AC7/$File/54940_2000-01.pdf).

14 Australian Bureau of Statistics, ABS cat 8104.0, *Research and Experimental Development, Businesses, Australia, 2010-11*, released 11 September 2012,
www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/8104.0Main+Features12010-11?OpenDocument.

15 OECD, "FDI regulator restrictiveness index 2012", www.oecd.org/daf/inv/ColumnChart-FDI_RR_Index_2012.pdf.

16 Mr Brian Moir, *Foreign Investment in Australian Agriculture*, RIRDC, Canberra, November 2011, p. 43.

17 Jyothi Gali and Bruce Taplin, "The macroeconomic effects of lower capital inflow", Treasury Economic Roundup, Issue 3 2012,
www.treasury.gov.au/~media/Treasury/Publications%20and%20Media/Publications/2012/Economic%20Roundup%20Issue%203/Downloads/PDF/01.ashx.

so and the impact of raising barriers to foreign investment will be hard felt, particularly in agricultural communities.

Food Security

1.33 Australia has a high level of food security and there are steps being taken to further secure our food supplies and opportunities for Australia farmers to supply world food markets.

1.34 For a start, Australia produces enough to feed the country twice over. In fact, we are in the top five countries in the world for access to affordable food.¹⁸ The recently announced National Food Plan lays out a strategy for Australians to continue to have access to safe and nutritious food and contribute to global food security. Progress towards the goals laid out in the National Food Plan will be assessed every five years in a State of the Food System report. This will ensure Australians are kept well informed about food security issues.

1.35 As part of the National Food Plan, the government has also established the Australian Council on Food, a high-level policy advisory body bringing together Government Ministers and non-government members from a range of sectors. This Council will meet bi-annually and ensure that food policy issues – including food security issues – are placed at the centre of government policy making. Similarly, the government will also ask the Productivity Commission to identify priority areas for reform of food supply chain regulations looking from the paddock to the plate in Australia. This will make it easier for our farmers and food manufacturers to focus on what they do best – produce high quality food instead.

1.36 The greater risk to food security comes from barriers which will reduce investment in our agriculture sector. The expert ABARES report found that,

Australia's food security is likely to be further enhanced by ongoing foreign investment in agriculture.¹⁹

1.37 The ABARES report goes on to find that restrictions which lowered the level of investment '*would result in lower output*'(emphasis added).²⁰

1.38 The first ever National Food Plan will ensure our agriculture sector remains at the forefront of technology and innovation, and has access to the capital needed to grow and invest in the industry. It's clear from the evidence that cutting off reliable and stable sources of investment would have many impacts on our food security and our economy.

18 Department of Agriculture, Fisheries and Forestry, *National Food Plan, Our food future*, 2013, Canberra, p. 56.

19 Mr Brian Moir, *Foreign Investment in Australian Agriculture*, RIRDC, Canberra, November 2011, p. 13.

20 Mr Brian Moir, *Foreign Investment in Australian Agriculture*, RIRDC, Canberra, November 2011, p. 48.

Taxation

1.39 Tax revenues are an important way that foreign investors contribute to the Australian community. Tax can be a complex area of law and is easily susceptible to misinterpretation or misunderstanding.

1.40 There have been some concerns from the majority of the committee that foreign government investment in rural land could lead to Australia not receiving tax revenue related to the production that takes place here. There are a number of safeguards in place to prevent this. Most importantly revenue implications are an important element of the national interest test and the Australian Taxation Office is regularly consulted to advise on proposed investments.

1.41 Importantly, neither the Australian Taxation Office nor the Foreign Investment Review Board could point to a single case where investment in rural land by overseas entities has involved arrangements that potentially circumvent Australia's tax laws.

1.42 Australia's transfer pricing rules also play an important role in ensuring appropriate income is assessable in Australia. Australia's transfer pricing laws seek to ensure that Australia receives an appropriate return for the economic contribution made by Australian operations. There is currently a bill before the Senate, the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013, which implements reforms to ensure these important rules continue to be robust and effective.

1.43 The doctrine of sovereign immunity has also been raised as a possible area of risk in relation to the tax outcomes of proposed investment in rural land. The doctrine of sovereign immunity has very limited application and again the Australian Taxation Office could not point to a single case where farming activities have satisfied the criteria for concessional treatment under the sovereign immunity rules. Further the Government has released a discussion paper on reforms to the sovereign immunity regime that would specifically preclude concessional tax treatment of investments in land of any kind as a result of sovereign ownership.

Recommendation 2

1.44 The Senate should pass unamended the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013 to ensure that Australia's transfer pricing rules are robust and effective.

**Senator Glenn Sterle
Deputy Chair**

**Senator the Hon. Lin Thorp
Labor Senator from Tasmania**

Minority report from the Australian Greens

Inquiry into the Foreign Investment Review Board National Interest Test

General support

1.1 The Australian Greens support the thrust of the main recommendations of the majority report, calling for a registry of agricultural land. This will bring a much needed improvement in the available information and so enable a more informed debate. The Greens also endorse the independent review of the foreign investment regulatory framework proposed in recommendation 4, but an appropriate membership for the review will be essential.

1.2 Recommendation 17 for more effective compliance measures to ensure adherence to undertakings given before Foreign Investment Review Board (FIRB) approvals would also be an important improvement. The Greens also endorse recommendation 24 for greater weight to be given to the interests of local communities in FIRB assessments.

1.3 While arguably straying from the topic of this report, recommendations 1 and 2 for a more rigorous approach to the taxation treatment of transfer pricing is also something we strongly support.

Food security

1.4 The majority report acknowledges the importance of the food security issue in Chapter 2 but the Greens wish to emphasize this.

1.5 Around 2007 global food stocks fell to low levels following extreme weather events, including drought in Australia. Food prices soared, in response, a number of countries, such as Brazil, Russia and Vietnam, started banning the export of grain, exacerbating the situation. Climate change means many food importing countries fear such events will recur because of the increased intensity and frequency of dramatic events such as droughts, floods, and other natural disasters along with more subtle adverse impacts on crop yields from changing seasons, increased weeds, pests and diseases and shifting fresh water availability.

1.6 These concerns have led to government owned or controlled entities taking strategic ownership stakes in farmland in countries such as Australia.¹ Even if these

1 Oxfam released a report in October 2012 on this global 'land grab' which estimated 'in the past decade an area of land eight times the size of the UK has been sold off globally as land sales rapidly accelerate. This land could feed a billion people, equivalent to the number of people who go to bed hungry each night'; *Our Land, Our Lives*, p 1. This is occurring while the global amount of farmland is shrinking and the remaining farmland losing topsoil; Mr Julian Cribb, *Committee Hansard*, 9 May 2012, p. 1.

operations may operate commercially most of the time, when the crunch comes their priority will be providing food to the home country. And climate change will mean that crunch years occur increasingly often in coming decades.

1.7 Countries such as China, Qatar and Saudi Arabia appear to be pursuing this approach. Commendably transparent are the operations of Hassad Food, the agricultural arm of the Qatar sovereign wealth fund. Hassad Food has made clear that its primary goal is to secure food security for Qatar, a country whose desert landscape give it limited capacity for growing its own food:

...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...they [the Qatari government] have preference on the produce from our farms...²

1.8 While this approach is sensible from the Qatari perspective, it may not be in Australia's national interest. It should be examined by the independent review into the foreign investment regulatory framework

The threshold

1.9 The Greens support the majority report's recommendation 20 that the threshold that triggers a FIRB review of proposed private foreign investments in agricultural land be reduced from the current absurdly unrealistic \$248 million, which may be more than any Australian farm has ever been worth.³ It is also a significant improvement that 'creeping acquisitions' that cumulatively take investments over the new threshold will also be examined.

1.10 But the recommended new threshold of \$15 million is still quite high. The South Australian Farmers' Federation suggested \$2 million.⁴ The NSW Farmers' Association told the Committee that the average farm was worth around \$2½ million.⁵ When the FIRB framework was introduced in 1975 the rural land threshold was set at \$1 million, and then increased to \$3 million in 1986. It was subsequently hiked to \$50 million in 1999 and \$100 million in 2006 and \$219 million in 2009.⁶ The vast leaps in the thresholds from 1999 do not appear to have been properly considered or been

2 Mr Tom McKeon, Chief Executive Officer, Hassad Foods, *Committee Hansard*, 16 November 2011, p. 40. Hassad owns around 250,000 hectares of agricultural land over multiple states.

3 Cubbie Station, which has been described as 'the largest irrigated property in the Southern hemisphere', was rumoured to have sold for \$240 million; *The Australian*, 26 January 2013. The president of the South Australian Farmers Federation was unaware of any farms in that state worth that amount; Mr Peter White, *Committee Hansard*, 16 November 2011, p. 24.

4 Mr Peter White, President, South Australian Farmers Federation, *Committee Hansard*, 16 November 2011, p. 21.

5 Mr Bill McDonnell, Chairman, Business Economics and Trade Committee, NSW Farmers' Association, *Committee Hansard*, 17 February 2012, p. 9.

6 Mr Frank Di Giorgio, Principal Adviser, Foreign Investment and Trade Policy Division, Department of the Treasury, Senate Economics Committee Inquiry into Foreign Acquisitions Amendment (Agricultural Land) Bill 2010, *Committee Hansard*, 12 April 2011, p. 13.

the subject of sufficient community debate.⁷ Given subsequent inflation, the original \$1 million threshold and the \$3 million threshold in 1986 are both equivalent to a little over \$5 million in today's money and this would be a more appropriate threshold.

1.11 As noted in the majority report when negotiating international trade agreements governments should avoid commitments which unduly restrict the ability of FIRB to review foreign investment in terms of the national interest, such as by setting high threshold values.

Recommendation 1

1.12 That the threshold for private foreign investment in agricultural land and water licences be lowered to \$5 million.

Senator Christine Milne
Leader of the Australian Greens

Senator Peter Whish-Wilson
Australian Greens

7 Senate Economics Legislation Committee, *Foreign Acquisitions Amendment (Agricultural Land) Bill 2010 Dissenting Report* by Senator Nick Xenophon and Senator Christine Milne, p. 56.

Additional Comments by Senator Nick Xenophon

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

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

The current foreign investment information vacuum

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

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

Dr Charker: Value is a different concept.

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

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

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

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

The appropriate foreign investment threshold

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

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

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

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

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

16 Criteria for consent for overseas investments in sensitive land

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

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

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

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

17 Factors for assessing benefit of overseas investments in sensitive land

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

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

(2) The factors are the following:

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

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

Recommendation 1

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

Recommendation 2

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

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

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

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

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

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

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

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

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

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

1.14 Mr Farley continued:

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

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

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

Cubbie Station

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

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

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

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

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

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

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

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

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

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

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

BRENDAN TREMBATH: Was this a credible bid?

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

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

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

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

Here's an extract from that exchange.

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

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

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

UNIDENTIFIED OFFICIAL: Well I think she has.

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

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

SAMANTHA REINHARDT: No that's not what-

UNIDENTIFIED OFFICIAL: No, no.

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

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

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

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

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

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

NICK XENOPHON: Correct.

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

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

Application of the national interest test for non-agricultural businesses

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

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

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

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

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

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

Senator Nick Xenophon
Independent Senator for South Australia

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

8 Ibid.

9 Ibid.

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

Appendix 1

Terms of Reference

On 6 July 2011, the Senate moved that the following matters be referred to the Rural Affairs and Transport References Committee for inquiry and report by 30 November 2011.

An examination of the Foreign Investment Review Board (FIRB) national interest test (the test), including:

- (i) how the test was applied to purchases of Australian agricultural land by foreign companies, foreign sovereign funds and other entities in the past 12 months;
- (ii) how the test was applied to purchases of Australian agri-businesses by foreign companies, foreign sovereign funds and other entities in the past 12 months;
- (iii) the role of the Government, regulators and receivers, including their obligations under the Corporations Act 2001 and/or the Foreign Acquisitions and Takeovers Act 1975, including the role of the Australian Securities and Investments Commission, in upholding the test;
- (iv) the global food task and Australia's food security in the context of sovereignty;
- (v) the role of the foreign sovereign funds in acquiring Australian sovereign Assets;
- (vi) how similar national interest tests are applied to the purchase of agricultural land and agri-businesses in countries comparable to Australia; and
- (vii) any other related matters; and

In conducting this inquiry, the committee should examine ways of improving the transparency of decisions made by the FIRB under the test and all other rules which govern its operation.

Appendix 2

Submissions Received

Submission Number	Submitter
1	DAFF
2	National Farmers Federation
3	Robert Maher
4	CassTech Limited
5	Dominique Mathieu
6	Sandra Fasullo
7	The Western Australian Farmers Federation (Inc.) (WAFarmers)
8	Australian Agricultural Company Limited (AAco)
9	Cargill
10	Growcom
11	South Australian Farmers Federation (SAFF)
12	Ruth Trigg
13	Shann Turnbull
14	TFS Corporation
15	Yorke Peninsula Community Group
16	Baw Baw Shire Council
17	NSW Farmers Association
18	Australian Grain Exporters Association
19	Mr Michael Wolf
20	Mr Phillip Capicchiano
21	Mr Wayne Van Balen
22	Vicstock International Ltd/Vicstock (Aust.) Pty Ltd
23	Country Women's Association of NSW
24	Gwenda Sheridan
25	Regional Development Australia South Coast
26	Dr Jeffrey Wilson
27	Hon. Wilson Tuckey
28	Agribusiness Council of Australia
29	Canegrowers
30	Ms Margaret McLennan
31	Mr Geoff Edwards
32	Adelaide Produce Market
33	John Dunne
34	Department of Primary Industry and Fisheries Northern Territory
35	Australian Food and Grocery Council

Additional Information Received

- Received on 7 December 2011, from Hassad Australia. Answers to Questions taken on Notice on 16 November 2011.
- Received on 8 December 2011, from the Australian Bureau of Statistics (ABS). Answers to Questions taken on Notice on 16 November 2011.
- Received on 9 February 2012, from the Department of Treasury. Answers to Questions taken on Notice on 16 November 2011.
- Received on 8 March 2012, from Cargill. Answers to Questions taken on Notice on 17 February 2012.
- Received on 9 March and 18 April 2012, from the Department of Treasury. Answers to Questions taken on Notice on 17 February 2012.
- Received on 15 March 2012, from the Australian Competition and Consumer Commission (ACCC). Answers to Questions taken on Notice on 17 February 2012.
- Received on 4 May 2012, from the Australian Taxation Office (ATO). Answers to Questions taken on Notice on 17 February 2012.
- Received on 27 May 2012, from Mr Julian Cribb. Answers to Questions taken on Notice on 9 May 2012.
- Received on 1 June 2012, from the Department of Foreign Affairs and Trade (DFAT). Answers to Questions taken on Notice on 9 May 2012.
- Received on 5 June 2012, from the Australian Taxation Office (ATO). Answers to Questions taken on Notice on 9 May 2012.
- Received on 16 August 2012, from the Foreign Investment Review Board (FIRB). Answers to written Questions taken on Notice on 12 July 2012 (from hearing 16 November 2011).
- Received on 16 August 2012, from the Foreign Investment Review Board (FIRB). Answers to Questions taken on Notice on 9 February 2012.
- Received on 16 August 2012, from the Australian Taxation Office (ATO). Answers to Questions taken on Notice on 10 August 2012.
- Received on 31 August 2012, from the Australian Bureau of Statistics (ABS). Answers to written Questions taken on Notice on 10 August 2012.
- Received on 31 August 2012, from the Australian Bureau of Statistics (ABS). Answers to Questions taken on Notice on 10 August 2012.
- Received on 2 September 2012, from Mr John Craig. Correspondence.
- Received on 6 September 2012, from the Australian Taxation Office (ATO) and the Treasury. Answers to written Questions taken on Notice on 16 August 2012.
- Received on 6 September 2012, from the Australian Taxation Office (ATO) and the Treasury. Answers to Questions taken on Notice on 16 August 2012.
- Received on 10 September 2012, from the Western Australian Farmers Federation (WAFF). Answers to Questions taken on Notice on 17 February 2012.

- Received on 11 September 2012, from the Foreign Investment Review Board (FIRB) and the Treasury. Answers to Questions taken on Notice on 16 August 2012.
- Received on 11 September 2012, from the Working Group on the Commonwealth Foreign Ownership Register for Agricultural Land and the Treasury. Answers to Questions taken on Notice on 16 August 2012.
- Received on 14 September 2012, from the Australian Competition and Consumer Commission (ACCC). Answers to written Questions taken on Notice on 16 August 2012.
- Received on 9 October 2012, from the Australian Competition and Consumer Commission (ACCC). Answers to written Questions taken on Notice on 16 August 2012.
- Received on 5 February 2013, from the Foreign Investment Review Board. Answers to written Questions taken on notice on 16 August 2012.
- Received on 5 February 2013, from the Foreign Investment Review Board. Answers to written Questions taken on notice on 11 October 2012.
- Received on 6 February 2013, from The Treasury. Correspondence.
- Received on 25 April 2013, from the Wunan Foundation. Answers to Questions taken on Notice on 11 April 2013.
- Received on 9 May 2013, from Hassad Australia. Answers to Questions taken on Notice on 9 April 2013.
- Received on 16 May 2013, from TFS Corporation. Answers to Questions taken on Notice on 11 April 2013.

TABLED DOCUMENTS

- Tabled by Mr Frank Di Giorgio, General Manager, Foreign Investment and Trade Policy Division; and Executive Member of the Foreign Investment Review Board, Department of the Treasury on 16 November 2011 in Canberra. Opening Statement.
- Tabled by Mr Phillip Capicchiano on 16 November 2011 in Canberra.
 - Copy of the Victorian Funds Management Corporation – Government's strategic direction for VFMC, October 2011 report;
 - Copy of an article, Dairy farmers' bush clearing boost, 12 September 2011, The Mercury;
 - Copy of the WA Government Department of Agriculture, Farmnote No. 62/2002, Farm forestry and revegetation series – Resuming agriculture after a blue gum plantation, reviewed July 2005;
 - Two photos showing examples of contractor preparing land after trees are harvested;
 - Plantable land per shire spreadsheet data;
 - Copy of Foreign Investment Decision media release [no.30], 4/8/11, by the Hon. Wayne Swan MP, Deputy Prime Minister & Treasurer.
- Tabled by Mr Wayne van Balen on 16 November 2011 in Canberra. Opening statement with references.
- Tabled by Mr Terry Brabin, Chief Executive Officer, BFB Pty Ltd on 17 February 2012 in Canberra. Opening statement.
- Tabled by Senator Heffernan, on 16 August 2012 in Canberra. Correspondence from the Australian Taxation Office to Senator Heffernan dated 22 June 2012.
- Tabled by Senator Heffernan, on 21 March 2013 in Canberra. Junee shire Council, Map of top two agricultural landholdings by size.
- Tabled by Ms Zoe Higgins, Operations Manager, Kununurra, TFS Corporation on 11 April 2013 in Kununurra. TFS Annual Net Planted Area (ha).
- Tabled by Mr Chris Vedelago, Property Reporter, The Age on 9 May 2013 in Sydney. Freedom of Information Request.

Appendix 3

Public Hearings and Witnesses

16 November 2011, Canberra, ACT

- CAPICCHIANO, Mr Phillip Julian,
- CHARKER, Dr Jill, Acting First Assistant Statistician, Australian Bureau of Statistics
- CORBETT, Mr John, Director, Hassad Australia Pty Ltd
- DI GIORGIO, Mr Frank, General Manager, Foreign Investment and Trade Policy Division, Treasury; and Executive Member, Foreign Investment Review Board
- HILL, Mr John, Senior Adviser, Foreign Investment and Trade Policy Division, Treasury
- HODGES, Ms Jacqueline (Jacky), Regional Director, Tasmania, and Program Manager, Environment and Agriculture Business Statistics Centre, Australian Bureau of Statistics
- McGAUCHIE, Mr Donald, Chairman, Australian Agricultural Company Limited
- McKEON, Mr Tom, Chief Executive Officer, Hassad Australia Pty Ltd
- ROSSER, Mr Michael, Senior Adviser, Foreign Investment and Trade Policy Division, Treasury
- van BALEN, Mr Wayne,
- WHITE, Mr Peter, President, South Australian Farmers Federation

9 February 2012, Canberra, ACT

- DI GIORGIO, Mr Frank, General Manager, Foreign Investment and Trade Policy Division, The Treasury; and Executive Member, Foreign Investment Review Board
- HILL, Mr John, Senior Adviser, Foreign Investment and Trade Policy Division, The Treasury
- PHILLIPS, Mr Mervyn John (John) AO, KGCSG, Chairman, Foreign Investment Review Board

- REINHARDT, Ms Sam, Principal Adviser, Foreign Investment and Trade Policy Division, Foreign Investment Review Board, The Treasury

17 February 2012, Canberra, ACT

- BRABIN, Mr Terry, Chief Executive Officer and Managing Director, BFB Pty Ltd
- BURNS, Mr Craig, Managing Director, Rural Industries Research and Development Corporation
- COSSINS, Mr Neil, Director, International Branch, Australian Taxation Office
- DI GIORGIO, Mr Frank, General Manager, Foreign Investment and Trade Policy Division, The Treasury
- ECCLESTON, Ms Jane, Senior Executive Leader, Australian Securities and Investments Commission
- GRANT, Mr Allen, First Assistant Secretary, Agricultural Productivity Division, Department of Agriculture, Fisheries and Forestry
- HILL, Mr Alan, Director of Policy, Western Australian Farmers Federation Inc.
- HILL, Mr John, Senior Adviser, Foreign Investment and Trade Policy Division, The Treasury
- LINNEGAR, Mr Matthew, Chief Executive Officer, National Farmers' Federation
- MAREK, Ms Aggie, Director, Coordination and Strategy Branch, Mergers and Adjudication Group, Australian Competition and Consumer Commission
- McBRIDE, Mr Peter, Director, Corporate Affairs, Cargill
- McDONNELL, Mr Bill, Chairman, Business Economics and Trade Committee, New South Wales Farmers Association
- McELHONE, Mr Charles, General Manager, Policy, National Farmers' Federation
- McELHONE, Mr Charles, General Manager, Policy, National Farmers' Federation
- MOIR, Mr Brian, Economist, Macroeconomic Research Unit, Australian Bureau of Agricultural and Resource Economics and Sciences
- MORRIS, Mr Paul, Executive Director, Australian Bureau of Agricultural and Resource Economics and Sciences

- NORTON, Mr Mike, President, Western Australian Farmers Federation Inc.
- O'NEILL, Mr Michael, Assistant Deputy Commissioner, International Branch, Australian Taxation Office
- PENM, Mr Jammie, Assistant Secretary, Agricultural Commodities and Trade, Australian Bureau of Agricultural and Resource Economics and Sciences
- REINHARDT, Ms Sam, Principal Adviser, Foreign Investment and Trade Policy Division, The Treasury
- RYAN, Mr Michael, Acting Assistant Secretary, Research and Development and Food Security Branch, Department of Agriculture, Fisheries and Forestry
- WEBB, Ms Rose, Executive General Manager, Mergers and Adjudication Group, Australian Competition and Consumer Commission
- WINTER, Mr Simon, Senior Research Manager, Global Challenges, Rural Industries Research and Development Corporation

9 May 2012, Canberra, ACT

- ADAMS, Ms Jan, First Assistant Secretary, Free Trade Agreement Division, Department of Foreign Affairs and Trade
- CRIBB, Mr Julian Hillary James, Private capacity
- DURMAN, Ms Margaret, Director, Trade Law Section B, Department of Foreign Affairs and Trade
- HAMILTON, Mr Stuart, Assistant Deputy Commissioner, Large Business and International, Australian Taxation Office
- KEWALRAM, Mr Ravi, Assistant Secretary, Trade Law Branch, Department of Foreign Affairs and Trade
- LANGMAN, Mr Christopher John, First Assistant Secretary, Trade and Economic Policy Division, Department of Foreign Affairs and Trade

10 August 2012, Canberra, ACT

- BAIRD, Ms Helen, Director, Rural Environment and Agriculture Statistics, Australian Bureau of Statistics
- BRADBURY, Mr Peter, Acting Assistant Statistician, International and Government Finance Accounts Branch, Macroeconomic Statistics Division, Australian Bureau of Statistics
- COLE, Mr Darren, Chief Executive Officer, Landmark Harcourts Pty Ltd

- FARLEY, Mr David Dickson, Chief Executive Officer and Managing Director, Australian Agricultural Company
- HOCKMAN, Mr Bruce, First Assistant Statistician, Business, Industry and Environment Statistics Division, Australian Bureau of Statistics
- O'CONNOR, Associate Professor Pamela, Private capacity

16 August 2012, Canberra, ACT

- ALLEN, Mr David, Assistant Commissioner, Transparency, Large Business and International, Australian Taxation Office
- BAKER, Ms Kristen, Manager, International Tax Integrity Unit, Treasury
- CLIFTON, Ms Lisa, Manager, International Tax and Treaties Division, Treasury
- GERATHY, Ms Deidre, Chief Adviser, Markets Group, Treasury
- HILL, Mr John, Senior Adviser, Foreign Investment and Trade Policy Division, Treasury
- McDONALD, Mr Tony, General Manager, International Tax and Treaties Division, Treasury
- MURPHY, Mr Jim, Executive Director, Markets Group, Treasury
- O'NEILL, Mr Michael, Assistant Deputy Commissioner, Large Business and International, Australian Taxation Office
- REINHARDT, Ms Sam, General Manager, Foreign Investment and Trade Policy Division, Treasury; Executive Member, Foreign Investment Review Board
- WILSON, Mr Brian, Chairman, Foreign Investment Review Board

11 October 2012, Canberra, ACT

- EARL, Mr David, Manager, Foreign Investment and Trade Policy Division, Department of the Treasury
- GERATHY, Ms Deidre, Chief Adviser, Foreign Investment and Trade Policy Division, Department of the Treasury
- WILSON, Mr Brian, Chair, Foreign Investment Review Board

24 October 2012, Canberra, ACT

- LEMPRIERE, Mr William Dougall, Managing Director, Lempriere Pty Ltd
- McKENNA, Mr Anthony Fuller, Managing Director, Ceres Capital Management

21 March 2013, Canberra, ACT

- EARL, Mr David, Manager, International Investment and Trade Policy Unit, Foreign Investment and Trade Policy Division, Foreign Investment Review Board
- GERATHY, Ms Deidre, Chief Advisor, Foreign Investment and Trade Policy Division, Foreign Investment Review Board
- HART, Mr Bernard AM, Private capacity
- HILL, Mr John, Senior Advisor, Foreign Investment and Trade Policy Division, Foreign Investment Review Board, The Treasury
- ROLLINGS, Mr Jonathan, General Manager, Foreign Investment and Trade Policy Division, Foreign Investment Review Board
- WILSON, Mr Brian, Chair, Foreign Investment Review Board

9 April 2013, Perth, WA

- CRABB, Mr Deane, Policy Manager, South Australian Farmers Federation
- EVANS, Mr Paul, Chief Executive, Winemakers' Federation of Australia
- FARLEY, Mr Roger, President, South Australian Farmers Federation
- INTROVIGNE, Mr Michael Giovanni, Private capacity
- LOVELLE, Mr Trevor, Director of Policy, Western Australian Farmers Federation
- McKEON, Mr Tom, Chief Executive Officer, Hassad Australia Pty Ltd
- MUMBY, Mr Sheldon, Media and Communications Director, Pastoralists and Graziers Association of Western Australia

- MURRAY, Mr Andrew, Chair,
Western Australian Regional Development Trust
- PARK, Mr Dale, President,
Western Australian Farmers Federation
- REDMOND, Mr Michael, Chief Executive Officer,
Grow SA Ltd
- SEABROOK, Mr Tony, Vice-President,
Pastoralists and Graziers Association of Western Australia
- STEVENS, Mr Richard, Research Development and Extension Manager,
Western Australia Fishing Industry Council

11 April 2013, Kununurra, WA

- BOSHAMMER, Mr Robert John,
Private capacity
- CHAFER, Mr Anthony Richard, Chief Executive Officer,
Cambridge Gulf Limited
- COATES, Mr Murray, Strategic Projects Advisor,
Wunan Foundation
- DESSERT, Mr Raymond Bernard III (Spike),
Private capacity
- ELLISON, The Hon. Chris, Advisory Director,
TFS Corporation
- HIGGINS, Ms Zoe, Operations Manager, Kununurra,
TFS Corporation
- MCKENZIE, Mr Mathew, Operations Financial Controller,
TFS Corporation
- MENZEL, Mr David,
Private capacity
- MOULDEN, Councillor John, Shire President,
Shire of Wyndham and East Kimberley
- WILLIAMS, Mr Bradley John, President,
Kununurra Chamber of Commerce and Industry

9 May 2013, Sydney, NSW

- GERATHY, Ms Deidre, Chief Adviser, Foreign Investment and Trade Policy Division, Foreign Investment Review Board
- ROLLINGS, Mr Jonathan, General Manager, Foreign Investment and Trade Policy Division, Foreign Investment Review Board
- VEDELAGO, Mr Chris, Property Reporter, The Age
- WILSON, Mr Brian, Chairman, Foreign Investment Review Board

Appendix 4

Information about the Significant Investor Visa

Source: Department of Immigration and Citizenship, 'Significant Investor Visa', November 2012, http://www.immi.gov.au/skilled/business/_pdf/significant-investor.pdf



Significant Investor Visa

The Australian Government has announced a new visa pathway for migrant investors coming to Australia. This visa is scheduled to commence on 24 November 2012.

Significant Investor visa

The Significant Investor visa will be introduced as a new stream within the Business Innovation and Investment (Provisional) (Subclass 188) visa and the Business Innovation and Investment (Permanent) (Subclass 888) visa.

Visa applicants must:

- submit an expression of interest in SkillSelect
- be nominated by a State or Territory government
- make investments of at least five million Australian dollars into complying investments.

Visa applicants do not need to satisfy the innovation points test and there are no upper age limits. The visa stream features a residence requirement of 160 days spent in Australia over four years while holding the Business Innovation and Investment (Provisional) (Subclass 188) visa.

Visa holders can extend their visa term if they would like to given that they satisfy the extension requirements. They will be allowed to extend their provisional visa by an additional two years, with a maximum of two extensions permitted.

Complying investments

Complying investments for the Significant Investor visa include:

- Commonwealth, State or Territory government bonds
- Australian Securities and Investment Commission (ASIC) regulated managed funds with a mandate for investing in Australia; and
- direct investment into Australian proprietary companies.

Visa applicants may hold investments in each of the above investment options and may also change between complying investments, provided they meet specified reinvestment requirements.

The investment must be made and held:

- directly by the applicant or together with their spouse or de facto partner; or
- through a company where the total amount of issued shares are owned by the applicant or together with their spouse or de facto partner; or
- through a valid trust where the trustees and beneficiaries include the applicant or their spouse or de facto partner together.

Australian Securities and Investment Commission regulated managed funds

An ASIC regulated managed fund for the purpose of the Significant Investor visa is a managed investment scheme defined in the *Corporations Act 2001* and regulated by the Australian Securities and Investment Commission. Any interests issued in the fund must not be able to be traded on a financial market and must be covered by an Australian Financial Services Licence.

Investments in ASIC regulated managed funds include any investments made through an Investor Directed Portfolio Service.

For an ASIC regulated managed fund to qualify as a complying investment it must be limited to categories of investments specified by the Minister in a legislative instrument in writing.

These categories include:

- infrastructure projects in Australia
- cash held by Australian deposit taking institutions
- bonds issued by the Commonwealth or a State or Territory government
- bonds, equity, hybrids or other corporate debt in companies and trusts listed on an Australian stock exchange
- bonds or term deposits issued by Australian financial institutions
- real estate in Australia; and
- Australian agribusiness.

The managed fund must be open to the general public and the fund manager must provide a compliance declaration on Form 1413 that their services would be limited to the categories of investments in Australia specified by the Minister in the legislative instrument.

Direct investment into Australian proprietary companies

For a direct investment into an Australian proprietary company to qualify as a 'complying investment', the following criteria must be met:

- the company must genuinely operate a qualifying business in Australia
- the applicant must obtain an ownership interest in the company
- the company must be registered with ASIC; and
- the business must have an Australian Business Number.

Qualifying business

The *Migration Regulations 1994* define a qualifying business as an enterprise that:

- (a) is operated for the purpose of making profit through the provision of goods, services or goods and services (other than the provision of rental property) to the public; and
- (b) is not operated primarily or substantially for the purpose of speculative or passive investment.

Ownership interest

The *Migration Act 1958* defines ownership interest:

In relation to a business, means an interest in the business as:

- (a) a shareholder in a company that carries on the business; or
- (b) a partner in a partnership that carries on the business; or
- (c) the sole proprietor of the business.

Including such an interest held indirectly through one or more interposed companies, partnerships or trusts.

Residence Requirement

To be granted a permanent Significant Investor visa, primary visa holder must be resident in Australia for at least 40 days for every year or part year that they have held a provisional Significant Investor visa. The residence period does not need to be met per year but can be met cumulatively over the time the primary visa holder held the provisional visa.

About the program

The Business Innovation and Investment program is for migrants who have demonstrated experience and success in business or investment. The program will attract prominent business people and investors from across the globe and increase economic growth and innovation in Australia.

SkillSelect

SkillSelect is an online service that enables skilled workers, business people and investors interested in migrating to Australia to record their details to be considered for a relevant visa through an Expression of Interest.

Intending applicants for a provisional Business Innovation and Investment visa will record their proposed investment in Australia and once nominated by a State or Territory government will be issued an invitation by the Australian Government to lodge a visa application.

See: www.immi.gov.au/skills/skillselect/

Further information

Information on the Significant Investor visa can be found on the Department of Immigration and Citizenship's website.

See: www.immi.gov.au/skilled/business/whats-new.htm

Email: business.innovation@immi.gov.au

Appendix 5

AACo's Proposed Terms of Reference for an Independent Commission of Audit into Agribusiness

Source: AACo, *Submission 8 (supplementary)*, pp 3–11.

Appendix one – suggested terms of reference for an Independent Commission of Audit into Agribusiness

BACKGROUND

This document outlines suggested terms of reference for an Independent Commission of Audit into Agribusiness, as well as outlining existing policy proposals that address part of these terms of reference.

TERMS OF REFERENCE

The Independent Commission of Agribusiness Audit to be asked to review and report on:

TERMS OF REFERENCE	National Food Plan	Queensland's Agricultural Strategy
1. Resource Availability		
1.1 Capital Resources a) Historical returns to agricultural investment and agricultural role within investment portfolios b) Current views of Australian and foreign institutions on Australian agricultural investment; c) The Australian taxation treatment for overseas investors and for Australian investors; d) Profile of the institutional capital available globally and in Australia to invest in Australian agriculture e) Names of the various funds that have a mandate that would allow them to invest in Australia, the size of the funds, and the amount of uninvested funds; f) Global trends in institutional investment in agriculture		

<p>g) Australia's competitive position in attracting international institutions to invest in Australian agriculture</p>		
<p>1.2 Labour Resource</p>		
<p>Strategies to attract some of our brightest minds to the industry</p>	<ul style="list-style-type: none"> Invest \$9billion over 5 years from 2012-13 for the National Vocational Education and training system Commission workforce assessments through the National Rural Advisory Council and Australian Workforce and Productivity Agency \$1.5 million for the inclusion of food and agriculture in the National Curriculum 	<ul style="list-style-type: none"> Improve agricultural skills and career pathways by developing workforce plans, and use the Agriculture, Fisheries and Forestry Skills Advisory Group to provide leadership and direction for future strategies
<p>1.3 Land Resources</p>		
<p>Improve our soils Use of land resources wisely and protect Australia from introduced pests and diseases</p>		<ul style="list-style-type: none"> Implement the government's response to the Land Access Independent Panel Review Improve the security and certainty of land tenure to support increased investment Represent agriculture as a state interest in

		<p>statutory regional plans and local government planning schemes</p> <ul style="list-style-type: none"> • Local government planning provisions to protect and develop agricultural land • Prepare and capitalise on large strategic investments in critical resources from external sources which will increase connectivity in rural areas and support technology development? • Work with research agencies and industry to identify new opportunities for agricultural areas (including the North Queensland Irrigated Agriculture Strategy) and release unallocated water in Baffle Creek, the Finders and Gilbert river catchments, and the General Reserve for the Great Artesian Basin
<p>1.4 Water Resources</p> <p>Use of water resources (including marine waters) wisely</p>		<ul style="list-style-type: none"> • Liaise with local service providers to develop and implement regional water supply strategies • Ensure defined water entitlements, water trading markets available, and release unallocated sustainable water • Ensure sustainable management of surface water and groundwater • Develop strategies to extend water supply through local innovative, cost effective water-

		<p>use efficiency, recycling and re-use solutions</p> <ul style="list-style-type: none"> Investigate options for increasing availability of water for agricultural users, such as raising the Burdekin Falls Dam
1.5 Infrastructure Resources	<ul style="list-style-type: none"> Investing \$60 billion towards transport infrastructure through National Building Program since 2008 Investing \$5.8 billion in the Sustainable Rural Water Use and Infrastructure Program Investing up to \$30.4 billion in the National Broadband Network Building a more viable, cost-effective and sustainable biosecurity system 	<ul style="list-style-type: none"> Invest up to \$50m in additional rail passing loops across the Toowoomba range Develop and implement a Queensland ports strategy
2. Productivity		
a) World-leading research capability		<ul style="list-style-type: none"> Implement a research, development and

<p>b) Adoption of new technology</p>		<p>extension plan that sets clear targets for transformational research, capability, industry development, sustainability, industry development, sustainability and improved international linkages</p> <ul style="list-style-type: none"> • Increase the uptake of best practice, including measures such as conservation cropping techniques, irrigation efficiency, machinery adoption and sustainable grazing land use • Improve preparedness and response mechanisms to enhance resilience to national disasters and biosecurity threats • Increase funding for sugar research • Focus on research projects through the Northern Beef Research Alliance • Enhance science and technology capability, including partnerships with universities and industry • Continue the Queensland Alliance for Agriculture and Food Innovation • Invest in industries that have potential for growth e.g. tropical pulses • Provide assistance and facilitation for value-add operations to establish, expand and relocate to Queensland through inward investment activities and programs • Deliver an updated Queensland climate adaption strategy • Support capability-building and productivity
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		<p>improvement in industry in collaboration with Enterprise Connect's food network</p> <ul style="list-style-type: none"> • Work with regional bodies, funding providers and landholders to leverage resources to expand and increase uptake of best management practice • Collaborate with producer groups, industry and scientists from around the world to develop solutions and opportunities • Provide growers and industry stakeholders with immediate access to cutting-edge research and industry information through best-practice principles and guidelines, and industry and extension staff • Work with producers, local governments and communities to continue to fight against weeds • Hold a feral animal summit • Provide additional frontline officers to deliver on-ground solutions and outcomes • Continue to improve biosecurity systems, surveillance and detection
3. Markets		
<p>Grow our markets for our expertise in agricultural innovation and research, water and land management - help people in developing nations increase their capacity to grow food</p>	<ul style="list-style-type: none"> • Global, regional and bilateral trade agreements • Work with Australian businesses to seize opportunities 	<ul style="list-style-type: none"> • Streamline the regulatory environment whilst protecting and enhancing Queensland's biosecurity status and high-level food safety and animal welfare standards

<p>Form partnerships across the region All Australians to be food secure and food savvy</p>	<ul style="list-style-type: none"> • Help small to medium businesses sell products overseas • Promote Australia's food safety management and biosecurity systems • \$28.5 million in the Asian Food Markets Research Fund • \$5.6million to build relationships with trading partners • \$2million to develop brand identify 	<ul style="list-style-type: none"> • Implement policies that support financial payments for environmental services • Realign the Global Markets Initiative within Trade and Investment Queensland to ensure the program has greater emphasis on trade outcomes • Enhance trade development services for food and agribusiness clients • Help Queensland companies capitalise on our international reputation as a supplier of high-quality food and ingredients • Work with industry partners to identify new market opportunities and the capability to process/refine raw produce to a stage suitable for medical treatments • Facilitate the development and location of agriculture-based secondary industries • Promote healthy eating • Support health promotion campaigns and consumer education strategies
<p>4. Production Costs</p>		
		<ul style="list-style-type: none"> • Develop 30 year strategies for both electricity and water supply • Provide a robust water trading framework • Undertake a rigorous review of Queensland's electricity sector • Local management of Sunwater's channel irrigation schemes

		<ul style="list-style-type: none"> • Support integrated planning and investment decisions for airports • Reduce red tape including workplace health and safety and development approval processes • Develop heavy vehicle access options for agriculture • Continue to preserve rail access for agriculture • Work with industry to identify and develop supply-chain opportunities to enhance the efficiency, timing and economies of scale of agricultural commodity movement • Develop customer-focused service delivery systems that enable 24/7 online transactions and information • Continue to be responsive in supporting and promoting agricultural industry and its supply chain e.g. improved access to rail services
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GOVERNANCE ARRANGEMENTS

The Independent Commission of Agribusiness Audit to consist of three independent Commissions appointed by the Prime Minister and the Minister for Agriculture, Fisheries and Forestry. The Commissions are to be agribusiness leaders with a global perspective and expertise in investment, research and development, and policy.

The Commission will be supported by a secretariat consisting of a small group (16-18 people) of State and Federal public service officials seconded to the Commission.

The Commission will be authorised to access such personnel, documents, information and financial records in respect of the Federal departments and agencies as it deems appropriate to complete the audit including Department of Agriculture, Fisheries and Forestry; Australian Bureau of Agricultural Resource Economics and Sciences; Australian Council of Food. The Commission may request those bodies and State government departments and agencies to prepare reports.

The Commission will seek external advice and support where required from various industry stakeholders including Australian Farm Institute, Cotton Australia, Meat and Livestock Australia, and others as necessary.

Interested parties outside the public service will be asked to make submissions.

TIMETABLE

After 3 months **Interim report covering the situation analysis**

After 8 months **Interim recommendations**

After 11 months **Final Report**

Appendix 6

Map of the Ord Irrigation Expansion Project, including current and future developments

Source: Australian Government and Government of Western Australia, *Ord-East Kimberley Development Plan*, 3 December 2009, p. 19,
www.rdl.wa.gov.au/publications/Documents/Ord-East-Kimberley-Development-Plan.pdf

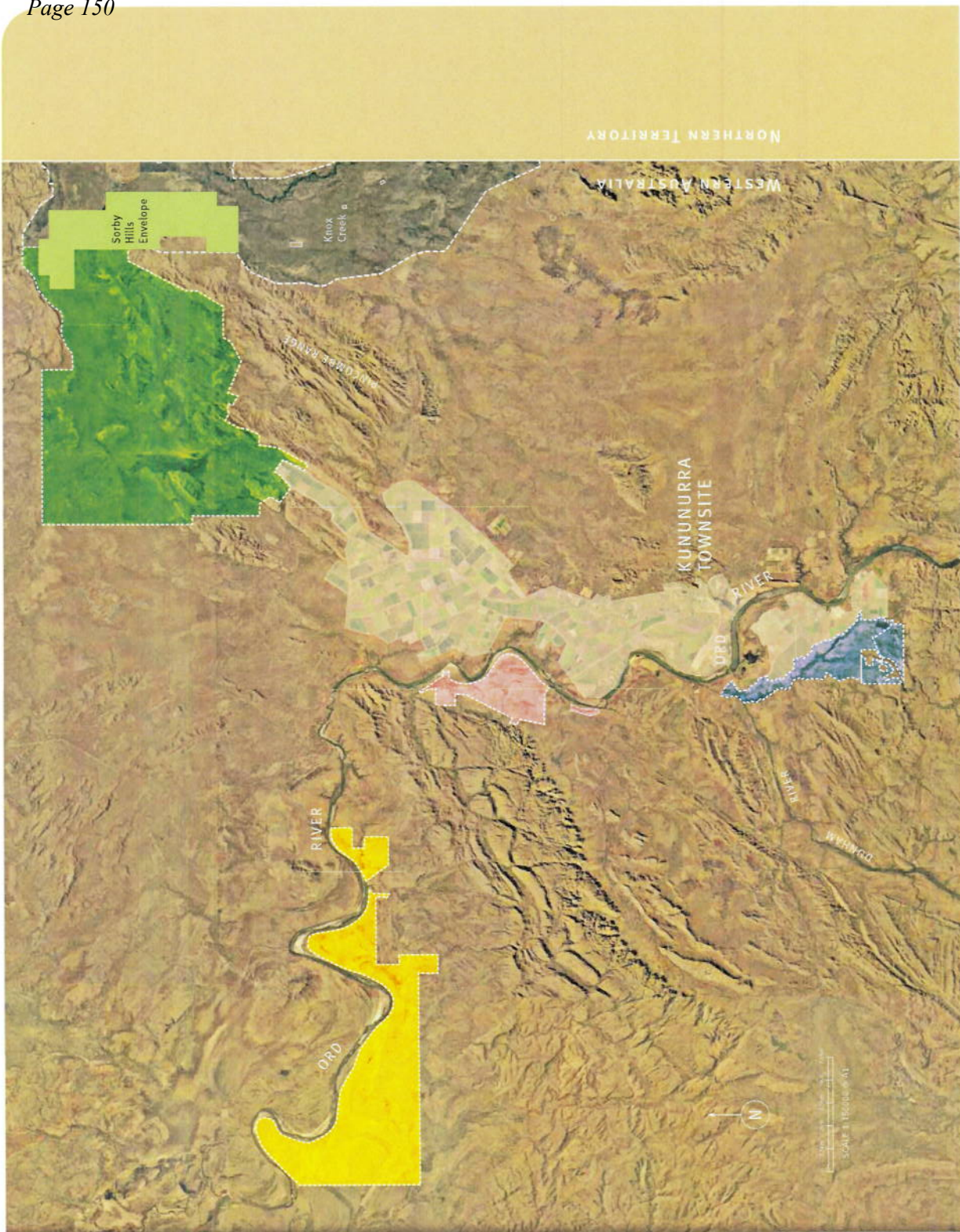


Figure 4: The Ord-East Kimberley Development Plan.

ORD IRRIGATION EXPANSION PROJECT

Current development area



Weaber Plains

Potential development areas



Mantina



Ord West Bank



Packsaddle



KUNUNURRA

PERTH