

The 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

© Commonwealth of Australia 2012

ISBN 978-1-74229-735-4

This document was prepared by the Senate Standing Committee on Rural and Regional Affairs and Transport and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

Membership of the committee

Members

Senator the Hon. Bill Heffernan, Chair	New South Wales, LP
Senator Glenn Sterle, Deputy Chair	Western Australia, ALP
Senator Sean Edwards	South Australia, LP
Senator Christine Milne (until 11 September 2012)	Tasmania, AG
Senator Fiona Nash	New South Wales, NATS
Senator Anne Urquhart (until 27 June 2012)	Tasmania, ALP
Senator the Hon. Lin Thorp (from 27 June 2012)	Tasmania, ALP
Senator Peter Whish-Wilson (from 11 September 2012)	Tasmania, AG

Substitute members for this inquiry

Senator John Williams	New South Wales, NATS
to replace Senator Fiona Nash on 9 February 2012	
Senator Bridget McKenzie	Victoria, NATS
to replace Senator Fiona Nash on 17 February 2012 (9am to 2pm)	
Senator Gary Humphries	Australian Capital Territory, LP
to replace Senator Fiona Nash on 17 February 2012 (2pm to 5:45pm)	

Participating members participating in this inquiry

Senator Judith Adams	Western Australia, LP
Senator Chris Back	Western Australia, LP
Senator the Hon. Richard Colbeck	Tasmania, LP
Senator David Fawcett	South Australia, LP
Senator Alex Gallacher	South Australia, ALP
Senator Barnaby Joyce	Queensland, NATS
Senator Bridget McKenzie	Victoria, NATS
Senator Matt Thistlethwaite	New South Wales, ALP
Senator John Williams	New South Wales, NATS
Senator Nick Xenophon	South Australia, IND

Secretariat

Mr Stephen Palethorpe, Secretary (from 5 March 2012)
Ms Jeanette Radcliffe, Secretary (until 2 March 2012)
Ms Jackie Morris, Acting Secretary (from 8 to 28 June 2012)
Dr Chris Curran, Principal Research Officer
Ms Trish Carling, Senior Research Officer
Ms Lauren McDougall, Executive Assistant (until 9 March 2012)
Ms Carol Stewart, Administrative Officer (from 13 March to 21 September 2012)
Ms Lauren Carnevale, Administrative Officer (from 24 September 2012)

PO Box 6100
Parliament House
Canberra ACT 2600
Ph: 02 6277 3511
Fax: 02 6277 5811
E-mail: rrat.sen@aph.gov.au
Internet: www.aph.gov.au/senate_rrat

TABLE OF CONTENTS

Membership of committee.....	iii
Abbreviations	vii
Recommendations	ix
Chapter 1.....	1
Introduction	1
Structure of the report.....	2
Global food task	3
Conduct of the inquiry.....	3
Acknowledgements	4
Note on references	4
Chapter 2.....	5
Tax arrangements for foreign investment in Australian agriculture.....	5
Transfer pricing	6
Capital gains tax arrangements.....	12
Passive income	15
Pathways for business – tax on domestic entities versus foreign entities	16
Chapter 3.....	21
Inadequacies of the Foreign Acquisitions and Takeovers Act	21
Additional Comments by Senator Nick Xenophon.....	25
Appendix 1	27
Terms of Reference.....	27
Appendix 2	29
Submissions Received.....	29

Appendix 3.....	33
Public Hearings and Witnesses	33

Abbreviations

AAco	Australian Agricultural Company
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>
FIRB	Foreign Investment Review Board
NTA	Net Tangible Assets

Recommendations

Recommendation 1

2.18 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

2.23 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

2.24 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

2.36 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

2.46 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

3.8 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.

3.9 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.**

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 continues to grapple with one of the most significant contemporary issues in Australia's agricultural industry: that is, how to properly manage and encourage foreign investment for the industry's and the nation's benefit. The committee recognises 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 also unequivocally supports foreign investment in Australia and particularly when it is commercial in nature, improves local and national agricultural markets and competes fairly with domestic businesses.

1.2 However, the committee also notes and shares the significant concerns of many of Australia's rural and regional communities that certain recent trends in foreign investment in Australian agriculture are not necessarily in Australia's national interest.

1.3 Mindful of the extent of evidence already received by the committee and the need to regularly update Parliament on its progress,¹ this interim report has identified two major issues which will be considered: issues with the relevant tax arrangements and the out-dated legislative framework for foreign investment in Australian agriculture.

1.4 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. This appears to be leading to an increasing trend of foreign governments considering investment in Australia for food security purposes. 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 Furthermore, the committee heard evidence during its inquiry that there may be tax incentives or loopholes that benefit foreign investors over Australian investors in the agriculture industry. This was coupled with evidence suggesting there is scope for foreign government entities to avoid fair tax liabilities in Australia. Given that the government lists the impact of foreign investment proposals on Australia's tax revenue as a key part of applying the national interest test,² the committee considers that the evidence received shows the significant limitations of the current foreign investment review process.

1 See Senate Standing Order 25(18).

2 FIRB, *Australia's Foreign Investment Policy*, January 2012, p. 6.

1.6 There are a number of other issues that the committee is continuing to investigate in its inquiry that are not addressed in this report. These issues require further consideration and will be discussed in detail in the committee's final report. The issues include:

- 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 (in greater detail than this report provides);
- major information gaps regarding foreign investment in Australian agriculture;
- the scrutiny and transparency of FIRB in applying the national interest test; and
- the foreign investment review threshold.

Structure of the report

1.7 This interim report is divided into three chapters. Chapter 1 details the conduct of the inquiry and the purpose of the interim report. The chapter also notes the growing challenge of global food security and the need to understand the issues discussed in chapters 2 and 3 in this context.

1.8 Chapter 2 is the key substantive chapter that deals with the concerns the committee has with the current taxation arrangements for foreign investment. In doing so, the chapter discusses:

- the tax arrangements that apply to foreign investment that are potentially different from those that apply to domestic investment, with a particular focus on transfer pricing, capital gains tax and passive income exemptions;
- the possible avoidance of a fair tax share for Australia from foreign government entities investing in Australia for non-commercial food security purposes; and
- the 'pathways' for major domestic investment in long-term Australian agriculture projects and capital that are hindered due to current tax arrangements.

1.9 Chapter 3 provides a discussion of the inadequacies of the FATA to address the contemporary issues regarding foreign investment in Australian agriculture. This stems primarily from the poor and imprecise definition of rural and urban land under the FATA and the failure of the Act to distinguish between agricultural land and agricultural business.

1.10 The committee notes that Government Senators intend to present an additional report to this interim report at a future date.

Global food task

1.11 The future global food task is a fundamental issue for this inquiry. As noted by the Department of Agriculture, Fisheries and Forestry (DAFF) in its national food plan issues paper (which was attached to their submission to the inquiry), 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 2050.³

1.12 This represents a major challenge for global agriculture over the coming decades and Australia will have to make an ongoing and increasing contribution into the future. A large number of submitters and witnesses considered that the implications of foreign investment in Australian agriculture need to be examined in this context.

1.13 Furthermore, the committee received evidence that 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.⁴

1.14 The committee considers future domestic and global food security needs as a fundamental feature of managing foreign investment in Australian agriculture, and therefore, the issues raised in the report regarding tax arrangements for foreign investment are examined in this context.

Conduct of the inquiry

1.15 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. On 22 November 2012, the Senate extended the reporting date for the inquiry to 27 February 2013. The terms of reference are available in Appendix 1.

1.16 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.

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

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

1.17 To date, the committee has received 31 submissions which are published on the committee website (see Appendix 2) and held 8 public hearings in Canberra (see Appendix 3).

Acknowledgements

1.18 The committee acknowledges the contribution of the many individuals and organisations that made contributions to the inquiry through submissions, providing briefings, 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.

Chapter 2

Tax arrangements for foreign investment in Australian agriculture

2.1 Rather than presenting a comprehensive overview of the taxation arrangement for foreign investment, this chapter outlines the main issues raised with the committee regarding taxation arrangements for foreign investment in agriculture. As such, the focus is on areas that are more problematic in terms of tax regulation and special attention is given to the arrangements for foreign government entities. The chapter finishes with evidence the committee received that current tax arrangements are stifling domestic capital investment in agriculture and Australia's ability to develop the industry to meet future global challenges.

2.2 The general principles for foreign investors reducing their tax exposure were clearly outlined by the Australian Taxation Office (ATO):

At a high level, tax planning mechanisms seek to arbitrage between differences in tax that may be available in relation to:

- **who** is taxed (eg an individual, company, trust etc),
- **where** something is taxed (in Australia or in a lower taxing jurisdiction),
- **what** is taxed (eg revenue / capital, dividend / interest, royalty / fee etc),
- **when** something is taxed (bring forward losses, defer income), or
- **how** something is taxed (eg rollover calculations, uplifts, valuations etc).

With their easier access to low tax jurisdictions, foreign owned entities are more able to take advantage of **who**, **where**, **what**, **when** and **how** something is taxed by structuring transactions or the location of their functions, assets and risks so as to 'earn' more in lower taxed jurisdictions.¹

2.3 As a result there are a number of mechanisms that foreign investors can use to minimise the tax payable in Australia. These include 'the substitution or creation of debt to extract additional income out of Australia and into a lower taxed jurisdiction.' In addition, foreign companies can use 'conduit arrangements whereby an overseas asset (say a company) is purchased through Australia by a foreign owned entity using an Australian subsidiary that they control.'²

2.4 There were three aspects of foreign taxation arrangements that the committee found to be of particular concern: transfer pricing; capital gains tax exemptions and passive income.

1 ATO, answer to questions on notice, 9 May 2012, (received 5 June 2012), emphasis in original.

2 ATO, answer to questions on notice, 9 May 2012, (received 5 June 2012).

2.5 As will be shown in the evidence below, there are a number ways that these tax arrangements are vulnerable to loopholes that may:

- result in revenue leakage for the Australian government;
- potentially distort the agricultural market by unduly favouring foreign investment and multinational business structures; and
- cause disincentives for Australian capital investment in agriculture.

Transfer pricing

2.6 One of the key issues raised throughout the hearings was the degree of effectiveness of transfer pricing as a mechanism for taxing the transfer of certain products from Australia to another country. Transfer pricing can be defined as 'the prices charged when one entity of a multinational group buys or sells products or services from another entity of the same group in a different country.'³

2.7 Mr Stuart Hamilton, Assistant Deputy Commissioner, Large Business and International, ATO explained the four main methods of establishing the appropriate tax arrangements for transfer pricing:

...[1.] There is the comparable uncontrolled price, so you look at what product is available in the market at arm's length and the price of that and how it varies over time. [2.] You can do cost plus, so given the costs that have been incurred, what is a reasonable mark-up for the activity undertaken. [3.] You can do resale minus, which is what it was sold at and work back to a cost. [4.] Or you can do what is called the transactional net margin method, which is basically a profit split, so you look at the two enterprises involved and you work out, given the expenses, given the personnel, given the functions, assets and risks involved, what would be a fair and reasonable profit split between the two entities.⁴

2.8 The committee is aware that transfer pricing rules can be difficult to enforce and that there is potential for significant tax revenue to be lost by the Australian Government. For example, the Treasury submitted to the Economics Legislation Committee in August 2012 that there is '\$1.9 billion of tax in dispute related to transfer pricing issues in current audits'.⁵

3 Bernard Pulle, *Tax Laws Amendment (Cross-Border Transfer Pricing) Bill (No. 1) 2012*, Bills Digest No. 160, 2011–12, Parliamentary Library, 19 June 2012, p. 4.

4 Mr Stuart Hamilton, Assistant Deputy Commissioner, Large Business and International, ATO, *Committee Hansard*, 9 May 2012, p 10.

5 The Treasury, Submission 21, p. 5, to the Senate Economics Legislation Committee, *Tax Laws Amendment (Cross-Border Transfer Pricing) Bill (No. 1) 2012 [Provisions]*, 14 August 2012.

2.9 When asked for a perspective of the issue of possible revenue leakage due to difficulties in enforcing transfer pricing rules, Mr Brian Wilson, Chair, Foreign Investment Review Board (FIRB) conceded that from his experience, tax was a major issue for companies when considering investments and therefore it is an issue FIRB consults with the ATO on:

...I might say that one of the factors that [is] involved in large-scale investment banking transactions is that tax is usually a major part of the transaction. So the two of us on the board who do have an investment banking background have probably spent many years dealing with tax lawyers and tax barristers on domestic and cross-border tax issues.

...one of the components of the national interest test is compliance with Australian laws and protecting Australia's revenue. It is the role of the Foreign Investment Review Board in making its recommendations to the Treasurer and in consulting the other parts of government, as we do, to be aware where there may be, as a consequence of the transaction structure or restructuring of the business, the potential for revenue leakage. We can and we do consult with the tax office on those matters.⁶

2.10 However, the ATO acknowledged that when issues arose in terms of prosecuting breaches of transfer pricing rules, the process was time consuming and often difficult. As Mr Hamilton told the committee:

Our transfer pricing cases tend to take a long time. If you are aware of the SNF case, you would be aware that we are not always successful in raising the issue of comparability.⁷

Tax on not-for-profit agricultural production

2.11 In examining the issue of transfer pricing, the committee looked into the possible tax arrangements for the international transfer of not-for-profit agricultural production. To this end the committee received evidence from the ATO which stated that, in general, tax would not be paid in the case where:

The investment was not in relation to a business venture. For example if the investment was in relation to a farm and there was no ultimate sale of the goods produced in Australia and the goods were distributed to needy persons. If there is genuinely no sale of product or profitable purpose at any stage, an arm's length amount of the value of product leaving Australia [an

6 Mr Brian Wilson, Chair, FIRB, *Committee Hansard*, 16 October 2012, p. 13.

7 Mr Stuart Hamilton, Assistant Deputy Commissioner, Large Business and International, ATO, *Committee Hansard*, 9 May 2012, p 10. The Tax Commissioner versus SNF Australia Pty Ltd 'case concerned whether the taxpayer paid more than the arm's length price for products acquired from overseas related parties so that the Commissioner could apply the transfer pricing rules to adjust the purchase price for income tax purposes.' For more information see: <http://law.ato.gov.au/atolaw/view.htm?DocID=LIT/ICD/VID731of2010/00001> (accessed 22 November 2012).

amount imputed through the transfer pricing mechanism] would not be 'income' for the sovereign state or foreign company.⁸

2.12 The evidence from the ATO indicates that when no income is generated (such as not-for-profit agricultural production for foreign food security, especially by foreign government entities), no tax is payable by the relevant entity. The committee examined this issue further through a specific hypothetical scenario:

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

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

Because of the deemed arms-length price, there is an apportionment of that profit to the Australian enterprise. So if the arms-length price is \$100, having regard to the business model and the functions, assets and risk in Australia as part of that business model, some part of that arms-length price of \$100 will be attributed to the Australian entity as profit, whether or not there was a sale at any time.⁹

2.13 Mr O'Neill's response above appears to be inconsistent with the evidence quoted in paragraph 2.11 and with additional evidence received in an answer to a question on notice. This evidence also indicated that in general terms, it was possible in the scenario above that tax may not be payable. The ATO stated:

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

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

8 Tabled document, 16 August 2012, correspondence from the ATO to Senator Heffernan dated 22 June 2012. See: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=rrat_ctte/firb_2011/submissions.htm. In following up with an answer to a question on notice, the ATO also stated that it 'has never seen a sovereign entity, with Australian farm assets, seeking to avoid Australia's tax system by purporting to export its produce for non commercial purposes.' ATO, answer to question on notice, 16 August 2012, (received 6 September 2012).

9 Mr Michael O'Neill, Assistant Deputy Commissioner, Large Business and International, ATO, *Committee Hansard*, 16 August 2012, p. 6.

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

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

Where a sovereign entity invests directly (that is, not through an Australian company) in an Australian farm, carries on business in Australia and derives income, Australia's international tax rules can apply to tax that income. The indicators of whether or not someone is carrying a business of primary production are discussed in detail in Taxation Ruling TR97/11, which is available on the ATO website at www.ato.gov.au.¹⁰

2.14 The Taxation Ruling TR97/11 states that:

Subject to all the circumstances of a case, **where an overall profit motive appears absent and the activity does not look like it will ever produce a profit, it is unlikely that the activity will amount to a business.** [bold in original]¹¹

2.15 This also appears to be consistent with evidence taken at a previous hearing with the ATO:

Senator FAWCETT: The end point that the chair is probably coming to is that if country X has a sovereign holding in Australia, grows wheat—and let us assume they do not claim anything; they just self-fund the whole operation and they grow however many tonnes of wheat—

Mr Hamilton: And they export it. Would they be taxable? No.

CHAIR: That is the answer.

Senator NASH: So that is the answer. I am just checking it. So there is no tax payable if they do not claim anything and then they export the grain.

Mr Hamilton: If they are not there to make a profit then they would not be in the income tax system, because they are not earning income.¹²

2.16 On a related topic, the committee heard evidence that if properly developed by the Australian agricultural sector, contributing to the global food task on a not-for-profit basis could be both more beneficial for those requiring humanitarian assistance and for Australian business than some existing overseas aid programs. As Mr David Farley, Chief Executive Officer and Managing Director, Australian Agricultural Company (AAco), told the committee:

10 ATO, answer to question on notice, 16 August 2012, (received 6 September 2012).

11 ATO, *Tax Ruling TR 97/11*, p. 5.
<http://law.ato.gov.au/atolaw/view.htm?docid=TXR/TR9711/nat/ato/00001> (accessed 15 November 2012).

12 Mr Stuart Hamilton, Assistant Deputy Commissioner, Large Business and International, ATO, *Committee Hansard*, 9 May 2012, p. 12.

Australia has been great at distributing dollars to humanitarian crises around the world. Yet the smarter developed countries meet those crises with generally finished food products. They will add value to rice, to wheat, to meat and to peaches, plums et cetera and ensure that there are warehouses of revolving stock. So Australia could capture the value add. More importantly, it is very difficult to corrupt food, as opposed to dollars, once it hits. Also, food being delivered in containers is more effective than a pipeline of cash, which can take a month to get there. We are fortunate to know how long we can live without water and food, and most of the time we are fortunate enough to live under the pretext that even though the operation has been successful the patient died. Australia should be addressing Australia's humanitarian crisis response, and it is not dollars that answer that question; it is adding value to revolving stocks of agricultural product within the country.¹³

Committee view

2.17 The committee strongly supports fair and commercially orientated foreign investment that creates wealth and jobs in the Australian agricultural sector. However it is clear from the evidence presented above and throughout the remainder of this report, that there are some apparent deficiencies in the current tax arrangements for foreign investment in Australian agriculture which require much closer examination. Accordingly, the committee is of the view that the government should review the tax arrangements for foreign investment to ensure Australians continue to benefit from the further development of Australia's agricultural sector.

Recommendation 1

2.18 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.

2.19 The committee considers that although the evidence given by the ATO regarding transfer pricing was at times inconsistent, based on the evidence received it is reasonable to conclude that a sovereign entity investing directly in Australia and exporting for non-commercial purposes (such as for humanitarian reasons) could avoid paying tax in Australia. From the ATO's answer to a question on notice, the Tax Ruling TR97/11 and oral evidence presented to this committee, it is reasonable to conclude that in such a scenario there is no business undertaken and no income generated and therefore there is no tax liability for the investor.

2.20 The committee considers that either the government should unambiguously rule out such a possibility, or if it is unable to, it should explain why tax revenue leakage from foreign investment in these circumstances is warranted. The government

13 Mr David Farley, Chief Executive Officer and Managing Director, AAco, *Committee Hansard*, 10 August 2012, pp 18–19.

should also estimate the future extent to which any such leakage may occur over a five, ten, twenty and fifty year period.

2.21 The committee was concerned with how this tax arrangement could be used by foreign governments seeking to improve their food security. Given the future population projection in the region and the ever increasing global food task, the committee considers that it is a realistic possibility and that such arrangements could significantly distort future Australia's agricultural markets. The committee considers that tax exemptions for not-for-profit purposes arising from agricultural production from foreign government entities have the potential to undermine Australian tax revenues and are not an appropriate substitute for the Australian Government's foreign aid program. As such, the committee considers that not-for-profit investment by foreign government entities for humanitarian purposes should only be conducted when it is explicitly part of the Australian Government's foreign aid program.

2.22 The committee is of the view that as a general principle, foreign government entities should invest in Australian agricultural land and businesses on a commercial basis and not for food security purposes.

2.23 The committee considers that the erosion of the tax base from multinational companies reducing their tax liabilities is a direct threat to Australia's sovereignty. Without strong protections against tax revenue leakage, the Australian government's ability to provide Australians with the public services and infrastructure that are essential for the country's future is diminished.

2.24 The committee is aware that tax revenue leakage is a major problem well beyond the agriculture industry. As indicated in recent press reports, companies such as Google, Apple and eBay are using complex international arrangements in order to pay minimal tax in Australia. In another high profile case of tax minimisation, the ATO made an 'unsuccessful attempt to stop the \$1.4 billion reaped by the private equity group TPG from the float of Myer leaving the country without being taxed.'¹⁴

2.25 The committee notes the government's current review of tax arrangements for transfer pricing and is pleased by the Assistant Treasurer's recent announcement that the proposed reforms 'will help Australia protect its tax base.'¹⁵ The committee urges the government to ensure the protection of tax revenue remains a key principle of any proposed amendments to Australia's tax laws that are presented to parliament.

14 For example see Ben Butler and Georgia Wilkins, "How savvy multinational curb their tax bills", *Sydney Morning Herald*, 17 November 2012, (online version accessed 26 November 2012).

15 The Hon David Bradbury MP, Assistant Treasurer and Minister Assisting for Deregulation, "Progressing Reforms to Australia's Transfer Pricing Rules", Media Release No 144, 22 November 2012.

Recommendation 2

2.26 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

2.27 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.

Capital gains tax arrangements

2.28 At a general level, the committee heard evidence that capital gains tax exemptions were one of the key ways that foreign companies may be able to reduce their tax liability in Australia. Two examples of this tax minimisation arrangement were given by the ATO. The first was:

...a foreign resident can disregard a capital gain or loss unless the relevant capital gains tax asset is a direct or indirect interest in Australian real property, or relates to a business carried on by the foreign resident through a permanent establishment in Australia. The definition of real property includes a lease of Australian land and mining, quarrying or prospecting rights where the materials are situated in Australia.¹⁶

2.29 A second example was:

...concessions are available for certain foreign venture capital investments which are designed to encourage foreign investment into the Australian venture capital market and to promote the development of the Australian venture capital industry. The measures involve the taxation of certain venture capital institutions as "flow-through" vehicles and a capital gains tax exemption for certain gains made by foreign residents on venture capital investments (as well as a corresponding exemption for gains or profits that are on revenue account) in certain cases.¹⁷

2.30 The ATO also informed the committee of the possible capital gains tax arrangements available to foreign investors regarding non-commercial loans. It also

16 ATO, answer to question on notice, 9 May 2012, (received 5 June 2012).

17 ATO, answer to question on notice, 9 May 2012, (received 5 June 2012).

acknowledged that such circumstances may be used to avoid tax scrutiny, as indicted in the following exchange:

CHAIR: I want to ask a question about non-commercial loans. ...I can set up an entity in Australia and give them an interest free facility for 30 years, with that entity having an Australian entity... But for the purposes of foreign investment introspection they are an Australian company. They fly under the radar. ...If I have a non-commercial arrangement that includes a contractual agreement to revert the asset to the supplier of the loan—who happens to be a sovereign state—what are the capital gains tax implications of that?...

Mr O'Neill: ... I will go through some of the tax implications prior to that 30-year point. If we are aware of the loan and the loan was interest free then we would run two tests to rule first on whether the company breaches the thin capitalisation ratios. ...In addition to whether the company is too heavily debt laden, there is a question about whether the zero pricing on the loan facility would be an arm's length price. We could impute an interest rate to even up that situation. A third element would be whether the transaction is in fact a loan. In some circumstances, because of either the general anti-avoidance rules and the general doctrine of sham, the real intent of the parties is that that is an acquisition arrangement. In using our general anti-avoidance rule or the sham doctrine, the commissioner can look through to the underlying reality of the transaction and that might alter the capital gains tax consequences, for example, because there would not be a transfer in 30 years because the ownership has been there from the start.

CHAIR: ...If you [are] a country that is trying to avoid scrutiny of sovereign funds, this sounds like a good scheme.

Mr O'Neill: It may be an attempt to fly under the radar...¹⁸

2.31 The issue of minimising capital gains tax was also explored in situations involving takeovers of Australian firms without an exchange of money. As the evidence from the ATO showed, although in most cases the appropriate tax would be paid, the regulation was not watertight:

CHAIR: ...I wonder about the tax implications of...capital gains exchange. Is it possible for an Australian company to be taken over without any money changing hands?

Mr O'Neill: It could be that money does not change hands, but there would have to be some value shift. If there was a swap of the share ownership, there would have to be something in return. Often there is a share swap. If the company was sold without anything in return, that would breach the Corporations Law and the tax law.

CHAIR: So it would not be possible—

Mr O'Neill: Very difficult.

18 Mr Michael O'Neill, Assistant Deputy Commissioner, International Branch, ATO, *Committee Hansard*, 17 February 2012, pp 56–57.

CHAIR: to enact in year 1, instead of year 30, a legal transaction that was going to occur in year 30 so that it was an automatic transfer.

Mr O'Neill: I guess smart lawyers can think of all sorts of things; it is possible.

CHAIR: That is what is worrying me.

Mr O'Neill: But that is not our experience.¹⁹

2.32 The scenario of a 30-year interest free loan was later discussed in a question on notice. The committee asked the ATO to consider a potential case where a provincial government lent a facility to a person (who may be a government official) as a 30-year interest free loan that would revert back to the provincial government at the end of the lease. In such a case, the ATO was asked: 'when the asset reverts to the government, how would [the ATO] treat that for capital gains tax purposes?' The ATO's response was:

The focus of the scenario is where the asset reverts from the "person" to the provincial government. This is a capital gains tax event as the asset's ownership or at least the ability to use and enjoy that asset has passed from the "person" to the provincial government.

There are 3 possible outcomes:

- 1) if the "person" (a real person or a company) is a resident of Australia, the capital gain would be taxable;
- 2) if the "person" is a non-resident of Australia, they would be taxed on any capital gains where the asset is Australian real property; or
- 3) if the "person" was acting as agent for the foreign Government then the person would not have use and enjoyment in their own right so any gain would not be taxable.²⁰

Committee view

2.33 The committee is reassured by outcomes 1 and 2 listed above as these outcomes indicate that commercial arrangements would fall properly under the tax system. However, outcome 3 remains of concern as foreign governments and their agencies may pursue ways of avoiding tax liabilities that would otherwise be payable by private companies. Food security is already a key motive for foreign investment by some countries (for example, the initial investments of the Qatari government owned company Hassad Australia) and this will only increase over time as the global food task increases. Therefore, the committee is of the view that there is the potential for cases such as those outlined above to become more prevalent and for the Australian public not receive to the tax revenue from Australian produce and land that is warranted.

19 Mr Michael O'Neill, Assistant Deputy Commissioner, International Branch, ATO, *Committee Hansard*, 17 February 2012, pp 57–58.

20 ATO, answer to question on notice, 9 May 2012, (received 5 June 2012).

2.34 As recommend below, this issue should be considered as part of a broader review of tax arrangements for foreign investment in Australian agriculture.

Passive income

2.35 The ATO also indicated to the committee that passive income was a further avenue for foreign investors to avoid tax liabilities in Australia. According to evidence received from the ATO, income tax would generally not need to be paid if:

The income was 'passive' income, for example interest, earned by a sovereign state from investments in Australia would be exempt from tax under the doctrine of sovereign immunity. Similarly for income from dividends where its investment was of a non commercial nature (for example under 10% holding) and falls within the sovereign immunity exemption.²¹

2.36 The same evidence noted that 'running a farm for profit is not passive income and would be taxable'.²² However, the committee later heard evidence from the ATO that there were instances where the passive income exemptions for sovereigns investing in Australia could apply to the agricultural industry:

CHAIR: ... On the passive income for a sovereign tax exemption ...if I am a sovereignty and I finance Senator Nash in Australia into a means of production, do I pay tax on the interest that Senator Nash pays me?

Mr O'Neill: It depends really on the form of the finance. If a sovereign is lending into Australia, interest returned to the sovereign is typically exempt.²³

Committee view

2.37 The committee is of the view that aspects of both capital gains and passive income tax arrangements for foreign investment are potential loopholes that unfairly favour foreign investors, particularly foreign government owned entities. This gives rise to possible market distortions that can result in disincentives for domestic capital investment (as will be shown in more detail below) and, in particular, foreign government owned entities avoiding full tax liabilities in Australia.

21 Tabled document, 16 August 2012, correspondence from the ATO to Senator Heffernan dated 22 June 2012. See: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=rrat_ctte/firb_2011/submissions.htm.

22 Tabled document, 16 August 2012, correspondence from the ATO to Senator Heffernan dated 22 June 2012. See: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=rrat_ctte/firb_2011/submissions.htm.

23 ATO, *Committee Hansard Proof*, 16 August 2012, p. 7.

Recommendation 4

2.38 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.

Pathways for business – tax on domestic entities versus foreign entities

2.39 In addition to concerns about tax loopholes leading to possible revenue leakage, the committee heard evidence that the current tax arrangements are more favourable for foreign investors than domestic investors. Furthermore, not only were Australian companies said to be disadvantaged, but the current tax arrangements could also significantly undermine Australia's ability to contribute to the global food task in the coming decades. The evidence provided by Mr Farley was compelling and accordingly it is reproduced below quite extensively:

...if we look at the debate about where the money comes from, one thing that is very clear in Australian agriculture is that we are not attractive markets to invest in our own land. We have heard this morning about the opportunities... and why we are attractive to foreign capital, because of the taxation advantages both on capital and working capital conditions. They can bring capital into the country. Yet we export our capital because the taxation is more attractive offshore than onshore. If we could finally get to this point then of working out where taxation is, and then ultimately to the point of where do the ASIC [Australian Securities and Investments Commission] rules, especially whether it is under trust arrangements or under public listed or private listed, play themselves in here, then we need to make sure we can conduct ourselves as a country properly on top of it.²⁴

2.40 The evidence from Mr Farley put foreign capital investment and Australia's tax arrangements into an historical perspective as he noted AAco's origins as a foreign investor in Australian agriculture. At the same time, he argued that there were significant future opportunities in the industry, if arrangements to encourage capital investment could be developed:

Mr Farley: ...why do people come to Australia to invest? Because the taxation haven they allow themselves to be in in Australia in agricultural land has an appeal to it. I am fortunate that I am probably representing the original foreign investor in Australian agriculture. We started in 1824 and at the time we arrived with £1 million and a number of sheep and were given

24 Mr David Farley, Chief Executive Officer and Managing Director, AAco, *Committee Hansard*, 10 August 2012, p. 11.

a million acres of land in what was called the wastelands of New South Wales. Today we would describe that wasteland as the Hunter Valley. We were successful in developing towns, Maitland, Tamworth and others, which were all part of the station complexes. Agriculture takes time but the more interesting thing about agriculture today with our demographers and financial analysts is that we have much more ability with the technical tools we have got and the intellect we have got to predict the future. It is happening now at a lot faster rate and with a lot smarter capital...

Senator GALLACHER: So what you are saying is that the people with the deeper pockets and the longer vision are not the Australian investors.

Mr Farley: Correct. I am also saying that the Australian investor has not got the opportunity to enjoy the taxation breaks that the foreign investor has.²⁵

2.41 The committee heard evidence that it is potentially more attractive to invest in one of the AAco's foreign shareholders than to invest direct in AAco in Australia due to tax arrangements:

Senator BACK: ...It almost is the case that Australian shareholders would be wise to invest their funds offshore through one of your foreign investors and invest back in AAco through that foreign instrumentality to enjoy the taxation benefits—perversely, that is the case.

Mr Farley: Unfortunately, you are correct, and it does seem perverse in the world we live in today. The unfortunate part for agribusiness enlisted investors in Australia is that, if we could share with our institutional funds and our self-regulated funds for our retirees the same taxation benefits that are available to our offshore shareholders, I am sure my share price and that of the other listed agricultural entities would not be trading at a 50 per cent discount to NTA [Net Tangible Assets] today.²⁶

2.42 Mr Farley also detailed the prospects for developing large-scale agricultural projects in Australia if the domestic taxation arrangements were reformed. In this regard, Mr Farley compared Australia's opportunities to some of the world's major agricultural regions:

...We do have the potential for large-scale projects, don't get me wrong there, but first of all I do think the financial and economic playing field or pathway needs to be equalled and levelled for Australians to participate. Secondly, the projects are definitely there. We have the soil types and especially the soil types that have the ability to have good water holding characteristics. We operate uniquely in the north in what is called a dry tropic as opposed to a wet tropic, so we have a defined period of production. We are unique in the extent that we are a young country but we

25 Mr David Farley, Chief Executive Officer and Managing Director, AAco, *Committee Hansard*, 10 August 2012, pp 12–13

26 Mr David Farley, Chief Executive Officer and Managing Director, AAco, *Committee Hansard*, 10 August 2012, p. 20.

can travel the world, whether in the [Mato Grosso] or the plains of Bahia in Brazil or alternatively in the floodplains of Louisiana and Alabama, there are plenty of examples around the world in the northern hemisphere geographically soil type wise of how quickly we could put production together. Whether it is the Kimberley region of Western Australia or whether it is the Katherine region on the Uluru aquifer around Katherine itself in the Northern Territory or cross into the Gulf or down onto the rolling plains in central Queensland, we have the opportunity for large projects again.²⁷

2.43 Aside from the benefits that could result in the development of large-scale agricultural projects, Mr Farley indicated that coordinated tax and industry reform could have significant benefits for Australia's tax revenue. To achieve this, Mr Farley highlighted the 'gateways' that agricultural produce passes through:

All agricultural produce in Australia has to pass through a gateway. If it is cotton it passes through a cotton gin, a warehouse and a port. If it is sugar it passes through a sugar mill to refine it, a warehouse and then a port. If it is wheat it is passed through a silo complex and across to a port. In the case of meats, whether it is chicken, pork, cattle or lamb, it passes through an abattoir where it is broken down to its various cuts, a distribution chain and to the market. All of those add value to it because generally in agriculture the parts are worth more than the whole. If Australia is only realising its income tax potential on the whole, in other words the live cattle weight or the hot standing carcass weight in cattle, or in cotton the module weight or module advance, we will be passing offshore a powerful amount of revenue that has the ability to generate a tax base to further develop and underwrite all of our society.²⁸

2.44 Furthermore, Mr Farley pointed to the need to examine the role of foreign investors who hold influential commercial positions in relation to the gateways for Australia's agricultural produce:

I am sure that if we look at it now, considering that our agricultural gateways in particular have been sold off to foreign investment—our meat industry is run by a duopoly, as well as our grain and sugar industries—and determine who is the pure price maker to Australian producers, it is the gateway assets themselves. They are the ones who are reporting price, making price and taking positions. Then ultimately, when those products go out of the country and are traded two or three times, are we realising the full opportunity to grow our nation off the toils of our resources? We need to be aware and have a greater intimate knowledge of how the pricing structures

27 Mr David Farley, Chief Executive Officer and Managing Director, AAco, *Committee Hansard*, 10 August 2012, p. 14.

28 Mr David Farley, Chief Executive Officer and Managing Director, AAco, *Committee Hansard*, 10 August 2012, p. 15.

work and how our current taxation systems work over the ownership of the asset, the commodity and the commodity flow.²⁹

2.45 Specifically, Mr Farley suggested two key changes to assist in the establishment of taxation arrangements that are more encouraging of Australian investment and to 'make the playing field level' with foreign investment. The first change relates to capital gains tax and making long-term investment by Australian companies in Australian agriculture more attractive:

If you want to make the playing field level, you will level it out to what the foreign investment capital can have now. I sense that that is probably inappropriate and it is just an accident of time that those pathways are there. I do think the most attractive point will be to ensure that the investment exit when it happens at a point in time is treated away from the current capital gains tax that the investment would have to pay. If it was made more attractive that the funds as they were being realised over the life of the horizon once the investment was complete with a little bit more appealing on exit, I am sure it would be a lot more appealing on the entry.³⁰

2.46 The second change also related to long-term investment incentives for Australian companies (and in particular superannuation funds) by providing broader arrangements for such companies that invested in projects that demonstrated improvements to Australian agriculture:

...it is whether we can be balancing out the taxation of the overall fund if a percentage of its funds over a 20- or 30-year period were designed at developing Australia's capacity and competency and technology within agriculture that if a fund was demonstrating to Australia that it was putting money, that that demonstration could give them tax credits on the performance of all their funds. I am sure there are smarter, wiser men than me who could address the issue, but the reality is that we have one of the world's best harvesting nets of superannuation dollars for long-term horizons, in other words the horizons of the working life of men and women, and we should be able to make Australian agriculture and the demand for Australian agriculture attractive for Australians to invest in.³¹

Committee view

2.47 Although the committee has not fully examined Mr Farley's two specific suggestions, the committee supports his general argument about the need to improve tax incentives for domestic capital investment in Australian agriculture. Therefore, the

29 Mr David Farley, Chief Executive Officer and Managing Director, AAco, *Committee Hansard*, 10 August 2012, p. 15.

30 Mr David Farley, Chief Executive Officer and Managing Director, AAco, *Committee Hansard*, 10 August 2012, pp 13–14.

31 Mr David Farley, Chief Executive Officer and Managing Director, AAco, *Committee Hansard*, 10 August 2012, p. 14.

committee urges the Government to consider the evidence received by the committee in order to improve Australia's long-term agricultural development.

Recommendation 5

2.48 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.

Chapter 3

Inadequacies of the Foreign Acquisitions and Takeovers Act

3.1 The committee heard evidence of the inadequacy of the *Foreign Acquisitions and Takeovers Act 1975* (FATA) to appropriately regulate some of the key issues regarding foreign investment in agriculture. In particular, the committee heard evidence from the then Chair of the Foreign Investment Review Board (FIRB), Mr John Phillips, which gave the committee the impression that the FATA was out-dated and dealt with agricultural issues in a peculiar way. A number of the issues covered below will be dealt with in more detail in the final report.

3.2 The committee heard evidence that in the late 1980s the FATA was amended to deal with foreign investment in urban land and that foreign investment in agricultural (rural) land was not a major consideration at the time. As a result, the legislation treats rural properties as ordinary businesses for the purpose of the FIRB review threshold, whereas there are special arrangements for the foreign purchase of urban land. As Mr Phillips explained in response to a question about the FIRB review threshold:

Senator XENOPHON: ... Do you think some of the criticisms in respect of transparency relate to thresholds—in other words, thresholds that are matters of government policy by which you determine applications? There is no role for the Foreign Investment Review Board in agricultural land transactions below [\$244] million, which is a matter you do not determine.

Mr Phillips: Unless they are from a sovereign—

Senator XENOPHON: That is right.

Mr Phillips: That is a problem. I was almost going to make a mistake then and say regrettably. We have to stay within the legislation that the legislators, yourselves, have passed. 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.¹

1 Mr John Phillips, Chair, FIRB, *Committee Hansard*, 9 February 2012, p. 2. Note: the FIRB review threshold is indexed annually. In 2011 (when the inquiry began) the figure was \$231 million and in 2012 the figure is \$244 million. For consistency in this report, whenever the figure of \$231 million was used in evidence it has been replaced with the \$244 million figure.

3.3 The requirement for FIRB to examine only cases above the \$244 million threshold also led to the problem of examining cumulative purchases, which in total could exceed the review threshold amount. Mr Phillips conceded in the following exchange that this was an 'anomaly':

CHAIR: ...If a foreign investor acquired 10 farms in a single year for \$30 million each, which is beginning to happen, would it have to obtain foreign investment approval given the overall value of the purchase exceeded \$244 million?

Mr Phillips: At the moment, no.

CHAIR: Isn't that perhaps not bizarre but inadequate?

Mr Phillips: I think it is an anomaly.²

3.4 The limits on FIRB's ability to examine certain cases of foreign investment is also related to one of the key issues noted in the inquiry – that there has been a significant lack of information on foreign investment in Australian agriculture despite increasing anecdotal evidence of significant foreign purchasing. The dearth of information also appears to stem from how the FATA operates. As Mr Phillips noted:

The movements in rural land I think came to the notice of the board a bit before they came to the notice of the press in large amounts. We were trying to get some idea of how this was working out and how much there was, looking at what other countries had done and whether there were things that we ought to be doing. It became very clear to us and, I think, also to the Treasurer very early in the piece that we did not know as much as we ought to know, and that was partly because of the nature of the legislation and partly for other reasons.³

3.5 The other aspect of the FATA treatment of rural land is that while it is defined as land 'that is used wholly and exclusively for carrying on a business of primary production', urban land is simply defined as land 'that is not Australian rural land.'⁴ As the committee heard, this has led to unusual classifications of rural and urban land. An exchange between the committee and the FIRB Chair and an official demonstrates this point:

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: I will try to clarify it for you, Mr Chairman. Given what you have just said, 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.

2 Mr John Phillips, Chair, FIRB, *Committee Hansard*, 9 February 2012, p. 18.

3 Mr John Phillips, Chair, FIRB, *Committee Hansard*, 9 February 2012, p. 5.

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

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?

Ms Reinhardt: It depends.

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

CHAIR: How about that.

Mr Phillips: As I say, I blame you legislators for this.⁵

3.6 This artificial definition of urban land results in foreign purchases of agricultural properties worth up to \$244 million not being scrutinised under the FIRB national interest test (unless purchased by a sovereign entity), which is in stark contrast to foreign purchases of vacant land⁶ in rural and remote areas of any value which must undergo such a review:

CHAIR: But, for the purposes of the act, it seems strange to me that the purchase of what some people would see as wasteland—though there is no such thing; all land is valuable—or arid land is subject to tighter scrutiny than farmland. Isn't that bizarre?

Mr Phillips: I think it has possibly become out of date. To call it bizarre is making a very strong statement.⁷

3.7 The FATA is the legislative foundation for the review of foreign investment in Australia. Many of the concerns noted above were confirmed and elaborated on by other submitters and witnesses throughout the inquiry. This will be discussed in more detail in the final report where appropriate recommendations will be made. However, given the evidence that the committee received from the then Chair of FIRB about the shortcomings of the FATA and the issues that arise from it, the committee considered it necessary to highlight these in this interim report. As a result, the committee is of the view that the FATA needs to be extensively reviewed and updated so that it can properly manage the contemporary issues of foreign investment in Australian agriculture.

5 Mr John Phillips, Chair, FIRB, *Committee Hansard*, 9 February 2012, p. 16.

6 See also, FIRB, *Australia's Foreign Investment Policy*, January 2012, p. 10. The vacant land referred to here is vacant land for the purposes of future commercial development. Some exemptions to FIRB review apply and are listed on p. 11.

7 Mr John Phillips, Chair, FIRB, *Committee Hansard*, 9 February 2012, p. 18.

Recommendation 6

3.8 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.

3.9 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.

Senator the Hon. Bill Heffernan

Chair

Additional Comments by Senator Nick Xenophon

1.1 Foreign investment in Australian agricultural land can provide a range of benefits to the Australian economy, particularly in terms of the development of our agricultural sector and job creation. However under our current foreign investment rules rural land purchases under \$244 million do not attract the attention or scrutiny of the Foreign Investment Review Board (except in the case of foreign government owned entities which face review for all direct investment). This is a very high threshold and there are concerns that significant purchases may be made below this, without the Government being made aware.

1.2 Further, there are concerns of potential piecemeal purchases by foreign investors which, by not exceeding this current threshold, may be able to acquire large areas of land over a period of time. The issue was addressed by Mr John Phillips, former Chair of the Foreign Investment Review Board (FIRB):

CHAIR:...If a foreign investor acquired 10 farms in a single year for \$30 million each, which is beginning to happen, would it have to obtain foreign investment approval given the overall value of the purchase exceeded \$244 million?

Mr Phillips: At the moment, no.

CHAIR: Isn't that perhaps not bizarre but inadequate?

Mr Phillips: I think it is an anomaly.¹

1.3 It is clear such creeping acquisitions of land must be examined by the FIRB in order for accurate information regarding the level of foreign investment in Australian agricultural land to be maintained.

1.4 In its interim report the committee has identified a number of tax incentives and loopholes that benefit overseas investors over Australian investors. During the public hearing Mr David Farley, Chief Executive Officer of AACo gave comprehensive evidence on this issue and undertook to provide recommendations in terms of specific legislative amendments that need to take place in order to level the playing field for Australian investors.² The Committee and I look forward to receiving his recommendations.

1.5 Of particular concern is the *Foreign Acquisitions and Takeovers Act 1975* ('the Act') which is out dated and ill-suited to regulate the contemporary practices of foreign investment.

1.6 In an attempt to address a number of the Act's shortcomings I introduced the Foreign Acquisitions Amendment (Agricultural Land) Bill 2010 ('the Bill') together

1 Mr John Phillips, Chair, FIRB, *Committee Hansard*, 9 February 2012, p. 18.

2 Mr David Farley, Chief Executive Officer and Managing Director, Australian Agricultural Company, *Committee Hansard*, 10 August 2012, p. 14.

with Senator Christine Milne in 2010, which sought to make three key changes to 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.

1.7 The Bill also sought to establish a definition of 'Australian agricultural land' to address the need for such land to be treated differently from urban and rural land. The current Act treats rural land as a business and as a result some unusual classifications of urban and rural land take place:

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: I will try to clarify it for you, Mr Chairman. Given what you have just said, 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.³

1.8 These anomalies need to be rectified as a matter of urgency by way of introducing contemporary and relevant definitions of urban, rural and particularly agricultural land.

1.9 I strongly encourage the Federal Government to undertake the wide-ranging review of tax arrangements applying to foreign investments and acquisitions in the agricultural sector as recommended by the Committee.

Senator Nick Xenophon

3 Mr John Phillips, Chair, FIRB, Committee Hansard, 9 February 2012, p. 16.

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	Department of Agriculture, Fisheries and Forestry
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

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.

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.
 - o Copy of the Victorian Funds Management Corporation – Government's strategic direction for VFMC, October 2011 report;
 - o Copy of an article, Dairy farmers' bush clearing boost, 12 September 2011, The Mercury;
 - o 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;
 - o Two photos showing examples of contractor preparing land after trees are harvested;
 - o Plantable land per shire spreadsheet data;
 - o 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.

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
- 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
- DURNAN, 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,

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, Chairman, Foreign Investment Review Board

23 October 2012, Canberra, ACT

- LEMPRIERE, Mr William Dougall, Managing Director,
Lempriere Pty Ltd
- McKENNA, Mr Anthony Fuller, Managing Director,
Ceres Capital Management

