Foreign investment in Australian farm land: domestic scrutiny is on the horizon

Partner and head of Piper Alderman's Agribusiness Practice Group, Simon Venus, considers the flow of foreign capital into Australian farm land and agribusinesses and foreshadowed changes to the Foreign Acquisitions and Takeovers Act 1975.

Food security has been driving investment in agricultural land and agribusinesses around the world. Australia is no exception as a destination for foreign capital in the agricultural sector. Indeed, it has been a feature of agricultural production in this country since white settlement.

However, the recent Federal election has cast foreign investment into the spotlight, with foreign acquisitions of Australian farm land becoming an election issue on the back of concerns about domestic food security and sovereignty. There have been calls to increase scrutiny by Australia's foreign investment watchdog, the Foreign Investment Review Board (FIRB), of investment in the agricultural sector, particularly by sovereign wealth funds and foreign state-owned entities.

Those calls have not abated after the drawn-out election result became known and Labor formed government with the support of key independents, importantly several from rural and regional electorates.

While the Government's view to date has appeared to be that there is no special case for regulating agriculture in a foreign investment context, it now seems likely that changes to the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (the Act) will continue to be agitated on the back of food security and sovereignty concerns.

So what has been the impetus for investment in agriculture and why are some seeing it as a concern?

Macro trends underpin investment

Data from the Population Reference Bureau has put a figure of around 80 million new mouths to feed each year around the world. Coupled with that increase is a scarcity of rural land as urbanisation increases. For the first time, the world population is evenly divided between urban and rural areas. By 2050, urban residents are likely to make up 70 percent of the world's population (*UN Population Division, World Urbanization Prospects*).

One of the inevitable consequences of this macro trend in population development is that pressure is being exerted on arable farming land as expanding cities see fertile soils being utilised for construction and housing. Other fundamentals underpinning the flow of capital into agriculture and farm land include:

- the view that if used sustainably, land will have a virtually infinite life
- land can arguably be a recession-proof asset class because there is an underlying retention of capital value despite seasonal events. *The Australian* last year reported that, compared to other investment and property sectors, farm land values remained relatively unscathed by the economic downturn
- the supply of agricultural land is finite while the demand worldwide, but particularly in Asia, for protein and quality food stuffs, is increasing. This will inevitably drive up the value of good agricultural land, and
- bio-fuel production is supplanting food production in some areas.

These now widely reported and well understood fundamentals make agriculture a compelling investment proposition. This has not been lost on astute investors with patient capital and an eye on the macro trends in population growth and food security.

These are key drivers for investment in Australian agriculture as they have been in other places around the world. Australia also has particular attributes that make it stand out as a destination for foreign investment in agriculture, including:

- a safe and stable environment, sophisticated financial systems and low sovereign risk
- acquisitions in Australia represent a geographical hedge for a global operation – cash flows of northern hemisphere operations are smoothed with exposure to production cycles in the south, and
- Australia has access to sophisticated advisers and is a world leader in agronomy and agricultural R&D. Our focus on automation gives economies of scale and our farmers are educated and skilled in sustainability.

How does Australia currently regulate foreign investment of farm land?

The Act includes a requirement to give prior notification to the FIRB of an acquisition by a foreign person. It is an offence under the Act to enter into an acquisition without giving prior notice and obtaining a statement of non-objection. However, the acquisition of "rural land" is not subject to the notification requirement under the Act. Rural land in this context is land that is used wholly and exclusively for carrying on a substantial business of primary production.

What becomes relevant then are the monetary thresholds after which FIRB approval is required. An application does not need to be submitted for approval for acquisitions involving existing Australian corporations or businesses, or proposals to establish new businesses, which are valued below the relevant monetary thresholds. While there is no notification requirement, an acquisition of an interest in rural land and/or a primary production business is still subject to the same monetary thresholds that apply to other acquisitions of Australian companies or business assets.

The relevant threshold for non-US investors is $231 million. For US investors it is $1,004 million. It is also worthy of note that in some circumstances the Act does give the Treasurer powers to make orders in the national interest prohibiting a proposed acquisition, or, if an acquisition has proceeded, requiring the foreign person to dispose of the assets acquired.

What concerns have been raised about foreign investment?

In the lead up to the recent federal election, calls came from several quarters to reform Australia's regulation of foreign investment in the agricultural sector. For example, independent Senator Nick Xenophon has been agitating for legislative reform to the foreign investment regime to provide for a national interest test for foreign investment in Australian farm land. The premise has been that Australia should be "selling the food and not the farm".

Most of the concern appears to have been centred around foreign state-owned entities, such as sovereign wealth funds buying up rural properties. The well reported acquisitions by Qatar-based Hassad Food, as well as Chinese interest in Queensland sugar assets are cases in point. Though, foreign investment has not been restricted to foreign state-owned entities. The range of buyers has included pension and other funds, private individuals and families and investment consortia.

Senator Xenophon has called for a Senate enquiry into the issue. He is not alone in his stance on foreign investment and its implications for Australia's food security. Liberal Senator Bill Heffernan has also been vocal in his call for scrutiny of acquisitions of farm land. Citing maintenance of competitive trade and strategic sovereignty, Senator Heffernan has also called for amendments to the Act to provide for mandatory reporting of land acquisitions.

The shift of power in Australia's Federal Parliament, which is now largely in the hands of a few independents representing rural and regional constituencies, combined with the increasingly vocal calls for scrutiny of foreign investment has sent signals of a more protectionist stance for Australian agriculture.

In that context, the debate over food security and the implications for Australia as a destination for foreign capital shows no sign of going away. The Australian Food and Grocery Council, in its recently released state of the industry report, asserted that Australia is now a net importer of food and grocery products. While that conclusion was described as 'alarmist' by the Federal Government Industry Minister, it shows that the issue very much remains live.

Whether the foreshadowed changes to Australia's foreign investment regime will see the light of day in view of the current Government's ambitious legislative agenda remains to be seen. Issues such as the National Broadband Network and resources tax are likely to occupy much of the parliamentary agenda in the short-term. In any event, as a part of any prudent assessment of an investment in Australian agriculture and agribusiness, foreign investors should remain cognisant of the prospect of legislative change to Australia's foreign investment regime as it relates to agriculture.

Some balance is also needed in the sometimes heated debate over foreign investment in Australian farm land. Foreign investment in Australian agriculture has been a key feature of the sector since its inception. If capital does not flow from domestic sources, be they private or institutional, then it seems inevitable that the need will be met by foreign capital. Foreign capital flowing into agriculture has in the past, and will into the future, bring appreciable benefits in the form of jobs and investment in rural and regional economies, as well as innovation and intellectual property, which are keys to increasing productivity and sustainable agricultural production and the imperative of feeding a growing world population.

Australian European Community Agreement on Trade in Wine

Australian wine producers are set to benefit from improved access to Australia's largest wine export market, Europe, with the Australian Wine and Brandy Corporation Amendment Act 2010 having commenced full operation on 1 September 2010. Corporate lawyer, Bianca Battistella examines the reforms.

The primary purpose of the *Australian Wine and Brandy Corporation Amendment Act 2010* (Cth) (Amendment Act) was to bring into force the Australian European Community Agreement on Trade in Wine, which was signed on 1 December 2008 in Brussels, by Australia and the European Community. The Community Agreement replaced an earlier agreement signed in 1994, and represented the finalisation of negotiations on outstanding issues, particularly in relation to:

- Geographical Indications (GIs), which are signs used on wines that have a specific geographical origin and possess qualities or a reputation due to that place, and
- Technical Expressions (TEs), which are expressions used in the description and presentation of wine to refer to the method of production, quality, colour or type of the wine.

The Amendment Act implements changes to both the *Australian Wine and Brandy Corporation Act 1980* (Cth) (AWBC Act) and the *Trade Marks Act 1995* (Cth). These changes will deliver many significant benefits to Australian wine producers, including:

- European recognition of 16 Australian winemaking techniques, in addition to the 28 techniques approved in the 1994 Agreement, including the use of oak chips, spinning cone technology and reverse osmosis
- simpler arrangements for approving winemaking techniques that may be developed in the future, namely an automatic provisional approval mechanism, which is subject to a six month objection period
- simplified labelling requirements for Australian wine sold in European markets. Australian wine labels will be able to include optional information, such as the number of standard drinks
- protection within Europe for Australia's 112 registered GIs, including Barossa Valley, Bendigo and Margaret River, and
- defined use of a number of TEs, including restrictions on registration of a business name containing a TE.

The Amendment Act also affords protection to more than 2,500 registered European GIs and 12 sensitive European GIs that have previously been used to describe Australian wines, including Burgundy, Champagne, Port, Sherry and White Burgundy. This protection came into force upon the commencement of the Amendment Act, with the exception of the sensitive GIs, which will be protected one year after commencement. Moreover, the use of the term "Tokay" to describe Australian fortified wines must be phased out within ten years. Wholesalers in Australia have five years to sell stock labelled with a European GI and retailers are entitled to sell all their stock.

Australian producers will also be prevented from using a range of European TEs, one year after the commencement of the Amendment Act. However, the prohibition does not extend to translations of such expressions.

Amendments to the *Trade Marks Act 1995* (Cth) were also necessary to implement the Agreement and to ensure that its application is consistent with that of the AWBC Act. Whilst restrictions on the registration of trade marks containing GIs already exist, the amendments clarify that trade marks that include a common English word that coincides with a GI can be registered.

The Amendment Act also introduces more severe penalties for offences relating to inadequate record keeping, that are in line with those for more serious offences. This is intended to remove the incentive for a person to falsify, destroy or create inadequate records so as to avoid being prosecuted for offences carrying higher penalties, such as the sale, export or import of wine with a false or misleading description and presentation.

The Australian Wine and Brandy Corporation will continue to be the statutory body that is responsible for investigating and prosecuting breaches of the AWBC Act, whilst supporting Australian wine producers in promoting the export of, and maintaining the integrity of, their wine goods.

Non-Resident – No Formal Trust Deed – Liable for Income Tax as a Trustee

In the recent case of Leighton v Federal Commissioner of Taxation [2010] FCA 1086, the Federal Court of Australia had to consider whether a non-resident individual was the trustee of a trust estate and therefore liable for income tax on the net income of the trust estate which had an Australian source in circumstances where there was no formal trust deed. Corporate and Tax Partner, Alan Jessup explains the case.

In this case a non-resident individual had been engaged by two non-resident corporations to engage in share trading in Australia. The non-resident individual did this by using share trading accounts in the names of the two non-resident corporations with moneys funnelled through a custodian arrangement with an Australian bank held in that non-resident's individual's own name. Presumably it was done this way to avoid the non-resident corporations having to register as foreign companies in Australia if they conducted the share trading directly.

The income tax legislation in general terms provides that where there is a non-resident beneficiary of a trust estate who is presently entitled to a share of the income of the trust estate, the trustee of the trust estate is liable to pay tax in respect of so much of that share of the net income of the trust estate as is attributable to sources in Australia.

Therefore, if the non-resident individual was a trustee of a trust estate, then the Commissioner was entitled to assess the non-resident individual on the profits made from the share trading.

The Court looked at the definition of "trustee" in the legislation and noted that the definition went beyond the meaning of "trustee" in the conventional sense. The definition is not confined to circumstances where a person is appointed or constituted trustee by the act of parties (e.g. a formal trust deed or by operation of law (e.g. a resulting, constructive or implied trust)). The definition also includes a person having or taking upon himself the administration or control of income affected by any express or implied trust, or a person acting in any fiduciary capacity, or having the possession, control or management of the income of a person under any legal or other disability.

The Court noted that although "trust estate" was not defined from the case law it was synonymous with "trust property" and in the context of the income tax legislation was a reference to the trust property which gives rise to the income derived by the trustee.

The Court found that in this case the non-resident individual satisfied the definition of "trustee". Firstly non-resident individual had contracted to administer and control the purchase, sale, settlement and safekeeping of securities and therefore he controlled the income, the shares and the settlement of the share trades through the custodian bank account. Secondly the moneys of the non-resident companies that were to be used for the share trading and received by the non-resident individual into the custodian account in that non-resident individual's name were to be kept separate from the non-resident individual's personal moneys and were to be accounted for separately consistent with a fiduciary obligation. Therefore the non-resident individual had the administration and control of income from the share trading affected by a trust in favour, of the two non-resident companies.

The Court also found that the non-resident trustee was a trustee of the trust estate from which the income derived. In this case the trust estate included the shares held and the income earned from the share trading. The income of that trust estate was, for the above reasons, affected by an express or implied trust in favour of the two non-resident companies. The non-resident individual was not administering or controlling the shares and the income derived from the share trading for his own benefit but was doing so for the benefit of the two non-resident companies.

This meant the above provisions were satisfied for the non-resident individual to be liable for the tax on the profits from the share trading as the two non-resident companies were presently entitled to those profits and the non-resident individual was the trustee of that trust estate from which the profits derived.

No doubt in structuring the transaction, no thought was given by the parties that the non-resident individual might be a trustee of a trust estate and therefore be liable for tax on the profits to which the non-resident companies were entitled. Care always needs to be taken when structuring transactions to ensure that the income tax consequences are considered.

Class Action Reforms – Wooing Classes to the NSW Supreme Court?

The NSW Attorney-General has released a consultation draft Bill to introduce what he calls "a comprehensive representative proceedings regime". Dispute Resolution Partner, Anne Freeman, examines the draft.

The draft Bill, which will amend the *Civil Procedure Act 2005* (NSW), is modelled on Part IVA of the *Federal Court of Australia Act 1976* (Cth) (Part IVA), but with some noteworthy differences.

First, proposed section 158(2) enables representative proceedings to be taken against a number of defendants even if not all group members have a claim against all defendants. This proposal has been suggested in order to overcome the interpretation of Part IVA in the Full Federal Court decision of *Phillip Morris (Australia) Limited v Nixon*, which was to the effect that all members of the class must have claims against each of the defendants.

Second, proposed section 166(2) clarifies that it is not inappropriate for representative proceedings to be brought on behalf of a limited group of identified individuals. This is consistent with the Full Court of the Federal Court's decision *in Multiplex Funds Management Limited v P Dawson Nominees Pty Limited*, which reversed the earlier view in *Dorajay Pty Limited v Aristocrat Leisure Limited*.

The Court is to be given power to establish a fund consisting of the money to be distributed as damages to members of the group. The costs of administering such a fund are to be borne by the fund or by the defendant(s). It is proposed that if any money remains in the fund that cannot be practicably distributed to group members, the Court may order that the money be distributed "cy-pres". Literally meaning "as near as possible", this mechanism has been adopted in class actions in the United States where settlements resulted in left-over money in funds and the Courts have distributed that money to third parties, often charities.

The cy-pres remedy was suggested in the Commonwealth Attorney General Department's 2009 Justice Report and also in The Victorian Law Commission's Civil Justice Review in 2008, which also recommended the other differences in the Bill to Part IVA. In doing so, the Commonwealth report noted that such a remedy may be appropriate given that one of the aims of allowing class actions is "behaviour modification", that is, that defendants should be punished for wrongs, and any left over settlement money should therefore not be returned to them if it is unable to be fully distributed to class members.

The Victorian Civil Justice Review noted, however, that punishment and deterrence has not traditionally been the aim of Australian class action, with the focus to date being on compensating those who can prove their loss.

Allowing a cy-pres remedy represents a policy decision that defendants should not be permitted to retain any of the damages, even where such damages are "unclaimed" by a class member or members.

The power contained in section 178(5) of the Bill is unfettered. This contrasts with the position in a number of Canadian jurisdictions, where the Court must be satisfied that the distribution of funds by cy-pres may be reasonably expected to benefit class or subclass members, and the Court must consider whether the distribution would result in unreasonable benefits to persons who are not members of the class or subclass.

The Victorian Civil Justice Review recommended that the Court have a general discretion as to whether a cy-pres remedy should be ordered and how the remedy should be implemented. It rejected the Canadian idea that the funds should be only directed for the benefit of those in the class or subclass. It pointed, in this regard, to the tobacco excise litigation in the NSW Supreme Court which involved a fight between tobacco retailers and wholesalers as to who should be entitled to retain money after it had been held that collection of the excise by state revenue authorities was constitutionally invalid. The excise had, in fact, been collected from consumers of tobacco products, who could not relevantly be identified in order to satisfy a class action. The Victorian Review suggested that in such circumstances it may not be considered appropriate to apply the funds to bring about a reduction in the price of tobacco products, but rather assist anti-smoking groups and campaigns.

As currently proposed, the Courts will be able to take any manner of factors into account in deciding whether to order a cy-pres remedy and the manner of distribution.

Submissions on the draft Bill were received until 10 November 2010. It is expected that the remedy will be the subject of debate in these submissions.

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