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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, last year's 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.

A Senate inquiry has now been announced into the *Foreign Acquisitions Amendment (Agricultural land) Bill 2010*, which if passed, would amend the Act to make specific provision for the acquisition of agricultural land by foreigners.

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 inquiry 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 farmland. 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.

What are the proposed reforms?

The *Foreign Acquisitions Amendment (Agricultural land) Bill 2010* is a private member's Bill sponsored by Senators Nick Xenophon and Christine Milne. It was introduced into the Senate on 24 November 2010. On 10 February 2011, the Senate referred the Bill to the Economics Legislation Committee for inquiry and report.

The Bill would amend the *Foreign Acquisitions and Takeovers Act 1975* to:

- implement a national interest test to be applied against proposed foreign acquisitions of agricultural land
- require any interest in agricultural land greater than five hectares to be notified to the Treasurer
- require online publication of information about foreign acquisitions of interest in agricultural land, and
- impose penalties for not notifying the Treasurer of a proposed acquisition.

Invitations to make submissions have be sent by the Senate Economics Legislation Committee. Submissions are due by Friday 25 February 2011. The Committee is due to report the Senate by 15 June 2011.

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. But the impetus for reform is building, and the legislative amendment process is now underway.

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.

Piper Alderman have been invited to make a submission by the Senate Economics Legislation Committee on the proposed reforms. Further information about making public submissions is available at: http://www.aph.gov.au/Senate/committee/economics_ctte/foreign_acquisition_farmland_2011/index.htm

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