

Business
Council of
Australia



submission

Submission to the Government's
Options Paper: Strengthening
Australia's Foreign Investment
Framework

MARCH 2015

*Working to achieve
economic, social
and environmental
goals that will benefit
Australians now and
into the future*

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The Business Council of Australia (BCA) is a forum for the chief executives of Australia's largest companies to promote economic and social progress in the national interest.

About this submission

This submission provides the Business Council's response to the government's options paper, *Strengthening Australia's Foreign Investment Framework (February 2015)*.

The options paper seeks stakeholder feedback on a range of proposed changes to the foreign investment framework in relation to residential real estate and agriculture. It also seeks feedback on options to simplify the *Foreign Acquisition and Takeovers Act 1975*.

This submission provides the Business Council's views on agriculture only. It does not offer any views on proposed changes to foreign investment in residential real estate.

Summary

Given community concerns regarding foreign direct investment, it is appropriate for the government to develop a methodical, evidence-driven response that addresses these concerns, without compromising investment opportunities on which the Australian economy heavily depends.

To this end, the Business Council supports the government's proposal to establish an agricultural land register provided it does not impose an additional cost on Australian businesses or those seeking to invest. Accordingly, the government should draw on existing processes and databases to establish the register. A targeted measure will help build community confidence and provide policy makers with valuable data to inform future policy decisions.

On other proposals contained in the options paper, we encourage caution.

Foreign investment has played a critical role in developing Australia's most globally competitive industries, including our resources sector. Foreign direct investment is particularly important for promoting innovation and technical advancement.

As we look for the next wave of economic growth in Australia, the agriculture sector has enormous potential.

The government has completed free trade agreements with three of our top four trading partners and has stated publicly that Australia is 'open for business'. We encourage the government not to compromise this stance by imposing measures that will unnecessarily hinder foreign direct investment.

The Business Council urges the government to abandon its proposal to lower Foreign Investment Review Board (FIRB) screening thresholds on agribusiness. Significantly lower thresholds would send the wrong signal, with a chilling effect on much-needed investment and innovation.

In the 2010 Business Council paper *Foreign Attraction: Building on Our Advantages through Foreign Investment*, we recommended the general FIRB free threshold for private enterprise be progressively lifted from its current level of \$252 million to the higher

threshold of \$1.1 billion currently provided to the United States and New Zealand. We continue to support this recommendation.

If the government decides to proceed with the plan to lower the threshold, at a minimum we urge that:

- a full regulatory impact assessment is undertaken to analyse how the changes would affect the economy.
- a precise definition of what constitutes an agribusiness is adopted to prevent unintended wider application to industries such as transport, logistics and packaging. In the Business Council's view, an agribusiness is a business that operates in the agriculture sector as defined by the Australian New Zealand Standard Industrial Classification – i.e. Category A – agriculture, forestry and fishing.
- All FTA partners be extended the same access as the United States, New Zealand and Chile.

The Business Council believes the government should not adopt a fee structure for investment applications for business as additional costs will deter future investment. If a fee for business is adopted, the fee schedule should be applied on a cost recovery basis and be consistent across asset classes. We also recommend amendment to extension rules.

Key recommendations

The Business Council recommends that the government consider adopting the following approaches in reforming the foreign investment regime.

Agricultural land register

- ▶ Information to develop the register should be drawn from existing processes and databases, and should not impose an additional cost on businesses.
- ▶ If implemented, the agricultural land register should be capable of providing information about all businesses operating in the sector, not just foreign-owned companies.

Agribusiness threshold

- ▶ The government should abandon its proposal to lower the screening threshold for agribusiness because it increases costs, brings uncertainty and leads to a chilling effect on investment. Australia is already rated by the OECD as the sixth most restrictive country for attracting foreign direct investment. Lowering the threshold for agribusiness would exacerbate this further.
- ▶ If the proposal is not abandoned, before making any changes to the *Foreign Acquisitions and Takeovers Act 1975* the government should publish a Regulatory Impact Statement that properly assesses the impact of any proposed change and whether the change will address the policy problem it seeks to resolve.

- ▶ If the government implements this policy, it should extend to all FTA partners the same access provided to the United States, New Zealand and Chile.

Definition of agribusiness

- ▶ The government should adopt a definition where agribusiness is a business that operates in the agriculture sector as defined by the Australian New Zealand Standard Industrial Classification – i.e. Category A – agriculture, forestry and fishing.

Application fees

- ▶ The government should not adopt fees for investment applications for business as this would deter investment.
- ▶ If the government pursues a fee-for-service model, fees should be levied only on a cost-recovery basis.
- ▶ To the extent that fees are levied, they should be the same for all asset classes.

Amending rules for extension

- ▶ The government should amend the *Foreign Acquisition and Takeovers Act 1975* to allow the FIRB to assess an application beyond 30 days, if an applicant agrees to having its application considered within an additional 15 days.

Investment in Australia

With its relatively small population, Australia relies on foreign capital to supplement domestic savings. Foreign capital has helped Australia become the world's 12th largest economy despite having the world's 53rd largest population.

International capital has enabled Australians to enjoy far higher rates of economic growth, employment and standards of living than many countries with comparable populations.

Since the 1960s, foreign direct investment from the US, the UK, Japan and elsewhere has provided the necessary capital to take maximum advantage of Australia's mineral resources, now Australia's largest export industry.

Foreign investment has also been a major factor in the success of our agriculture sector. Australia's beef industry, for example, benefited from the investment made in the 1970s and 1980s by Japan and the United States in cattle raising and processing. This contributed to a significant expansion of beef exports to Japan and later the United States which lifted our export competitiveness in other markets.

In short, foreign investment:

- helps Australia reach its economic potential by providing additional capital to finance new industries and enhance existing industries, boosting infrastructure, productivity, and employment opportunities in the process.
- creates jobs. More than one in five businesses in Australia with 200 or more employees has greater than 50 per cent foreign ownership.
- stimulates economic activity. Research commissioned by the Business Council found that a 10 per cent increase in foreign investment in Australia could lead to more than one per cent increase in GDP by 2020.

Foreign direct investment brings additional benefits

By exposing local businesses to international standards and best practices, foreign direct investment encourages competition and innovation and drives productivity growth. By bringing in new businesses with connections in different markets, investment opens up additional export opportunities and boosts our overall export performance.

Foreign direct investment is less liquid than foreign debt and foreign portfolio investment. In difficult economic times, these other forms of foreign capital are more able to move overseas. It is more difficult to divest foreign direct investment because companies generally do not wish to discount or abandon physical assets.

The government has recently completed free trade agreements with three of our top four trading partners and has stated publicly that Australia is 'open for business'. The Business Council encourages it not to compromise this stance by imposing measures that would unnecessarily hinder the foreign direct investment flows to Australia from FTA partners and other countries.

Agriculture and investment

Significant investment in the agriculture sector will be required to improve productivity and increase yields to expand our aggregate level of food production. This will require investment in new technology, infrastructure and equipment.

ANZ's Greener Pastures report estimated that by 2050 Australia's food industry could require up to \$1 trillion in additional capital¹. This incorporates an estimated \$600 billion to increase production capacity and \$400 billion to manage the change from smaller to larger more corporatised farms.

The ability of businesses to access finance is critical to their ability to undertake the investment necessary to improve their productive capacity and productivity. Yet access to finance is the most commonly cited barrier to innovating by Australian businesses and the factor which most adversely affects international competitiveness by Australian exporters². A 2013 survey of food and beverage businesses by Grant Thornton found approximately 16 per cent of Australian executives indicate that sourcing capital is a constraint on business growth³.

Access to finance can come from a range of sources, both domestic and foreign. We encourage the government not to make the investment climate more difficult for investors, particularly from overseas.

Providing data on foreign investment would help to alleviate community concerns

The Business Council recognises the concern some sections of the public have about the level of foreign ownership in the agricultural sector. The government has an obligation to examine the basis for these concerns. It needs to do this through an evidence-based approach, and to respond in a way that protects the national interest, particularly where it relates to jobs and economic growth.

The economic and employment impacts of foreign purchases of businesses in Australia is already assessed through existing regulatory processes. These include the FIRB and the Australian Consumer and Competition Commission.

Australian Bureau of Statistics (ABS) data indicate that around 99 per cent of Australian farm businesses are fully Australian owned, of which around 90 per cent of farmland is fully Australian owned⁴. These levels have not changed significantly in recent years.

More readily available information about the actual levels of foreign investment might address some community concerns.

¹ ANZ, *Greener Pastures: The Global Soft Commodity Opportunity for Australia and New Zealand*, 2012.

² Australian Bureau of Statistics, Cat. No. 8158.0, *Innovation in Australian Businesses 2010–11*.

³ Grant Thornton, *Hunger for growth: Food and Beverage looks to the future*, Global Food and Beverage Study, 2013.

⁴ Australian Bureau of Statistics, Cat. No. 7127.0, *Agricultural Land and Water Ownership Survey*, June 2013.

Agricultural land register

The government proposes to establish a register of foreign ownership of agricultural assets by 1 July. This register could help address community concerns.

The consistent collection of data is a valuable resource to assist policy makers and the community to understand the make-up of foreign ownership in Australia. We agree that it may be useful to collect data including the location and size of the property, size of the interest acquired, country of origin of the purchaser and their Australian Business Number or Australian Company Number if applicable. A transparent register of land ownership in Australia may assist in providing a reliable source of information that can be used to inform the community and to assist policy makers.

However, in designing the register, the government needs to ensure it does not place additional costs on business. The register should complement existing data collected by the Australian Bureau of Statistics' Agricultural Land and Water Ownership Survey which collects data on the levels of foreign ownership in land, businesses and water.

In establishing the register, the government should work with states and territories to use available data collected as part of the land title transfer process. Information needs to be collected on a consistent basis and we encourage governments to harmonise data collection to eliminate duplication.

Recommendation

Information to develop the register should be drawn from existing processes and databases, and should not impose an additional cost on businesses.

If implemented, the agricultural land register should be capable of providing information about all businesses operating in the sector, not just foreign-owned companies.

FIRB threshold for agribusiness

Under the *Foreign Acquisitions and Takeovers Act 1975*, the Federal Treasurer is empowered to review investment proposals to determine if they are contrary to Australia's national interest. The Treasurer has the power to block proposals which are considered not in Australia's national interest.

The FIRB examines proposals by foreign persons to invest in Australia and makes recommendations to the Treasurer about individual foreign investment proposals.

The FIRB review thresholds for 2015 are:

- \$55 million for developed commercial real estate
- \$252 million for business proposals

- \$1,094 million for Chilean, Chinese, Japanese, Korean, New Zealand and United States non-government investors.

The government proposes to introduce lower screening thresholds for foreign investors (other than, for example, New Zealand, United States and Chile) in Australian agribusinesses worth more than \$55 million and for Australian rural land worth more than \$15 million.

Over 99 per cent of applications to the FIRB are approved. The introduction of new lower thresholds for foreign investors in Australian agribusiness and for Australian rural land introduces an additional hurdle for potential investors. It sends a strong negative message about Australia's attitude towards foreign investors. This risks having a chilling effect on future investment⁵.

Feedback from industry suggests the reduced thresholds – particularly the cumulative \$15 million threshold – will see a major lift in the number of applications to be considered by FIRB. While it is a rare event for a rural property to be valued in excess of the current \$252 million threshold, the cumulative \$15 million threshold will mean significantly more foreign investors will be required to seek approval for proposed acquisitions of agricultural land. It is unclear what public benefits the lower thresholds will deliver.

Foreign investment should be subject to the appropriate review and approvals processes. But to stimulate investment and growth in the agricultural sectors, policies should be designed to encourage investment.

Recommendation

The government should abandon its proposal to lower the screening threshold for agribusiness because it increases costs, brings uncertainty and leads to a chilling effect on investment.

The impact on foreign direct investment

Among the 34 OECD member countries, Australia was assessed in 2012 as being the sixth most restrictive for foreign direct investment and tenth most restrictive in agriculture. Proposed changes to the FIRB thresholds on agricultural land and agribusiness will make us even more restrictive.

While the Business Council recognises the need to treat foreign direct investment differently in prescribed sensitive sectors like media, telecommunications and defence, the government has not mounted a case for why agriculture and agribusiness should be

⁵ "ITS Global estimated in 2008, that up to ten per cent of investment applications are withdrawn. The value of the investment opportunities deterred by the approval process is unknown. It estimates the economic cost to Australia from the foreign investment delayed by the FIRB amounted to at least \$5.5 billion a year, which in 2008 was equivalent to 0.6 per cent of GDP. Report by ITS Global, *Foreign Direct Investment in Australia – the increasing cost of regulation*, (2008), p. 3.

treated differently, or why community concerns cannot be addressed through existing or alternate regulatory mechanisms.

Lower investment thresholds, together with the levying application fees, raises the cost to business and increases delays when investments between \$15 million and \$252 million do not require FIRB screening. It undermines our attractiveness as a destination for foreign capital.

The Business Council is particularly concerned that FTA partners – Korea and Japan – will be treated differently from our other FTA partners such as the United States, New Zealand and Chile. We recommend that to meet our international obligations, Australia should treat all FTA partners equally.

Recommendation

If the government implements this policy, it should extend to all FTA partners the same access provided to the United States, New Zealand and Chile.

Regulation needs to be fit for purpose

Good regulation provides valued protections, such as safe food and transport, and a clean environment. But poorly designed regulation imposes costs on everyone without a clear return.

The options paper only identifies a problem in terms of community concerns around foreign investment in agricultural land and agribusiness, such as impacts on price increases which are ordinarily not a justification for government intervention. It provides no evidence of the extent of price increases or other specific community concerns, nor any assessment of how and to what extent foreign investment might be contributing to this.

Based on community concerns, the options paper proposes additional compliance imposts and potential penalties on certain overseas investors, without examining the effects of these on investment, the economy and the community. The Business Council believes the proposals will result in substantial, unintended and adverse impacts on Australian productivity, income and employment.

Recommendation

If the proposal is not abandoned, before making any changes to the *Foreign Acquisitions and Takeovers Act 1975* the government should publish a Regulatory Impact Statement that properly assesses the impact of any proposed change and whether the change will address the policy problem it seeks to resolve.

Definition of agribusiness

The term agribusiness is not defined in the foreign investment regime. It is important that the government considers this issue carefully to avoid any unintended adverse consequences.

Investors need clarity and predictability, including a clear understanding of what falls within the scope of changes. This is needed to inform investment decisions.

The government should retain existing categories of the Australia New Zealand Standard Industrial Classification (ANZSIC), 2006 division, to derive a definition of agribusiness. The ANZSIC code is the only comprehensive system that clearly distinguishes each activity in the economy. Category A, relates to agriculture, forestry and fishing. Category B is mining, Category C is manufacturing and so on. Other categories are contained in the ANZSIC codes.

The Business Council believes that 'agribusiness' should be defined as businesses that operate in the agriculture sector as defined by ANZSIC Category Code A – agriculture, forestry and fishing. Broadening the definition beyond Category A introduces a subjective element that requires policy makers to exercise judgment to rule in, or rule out, certain activities. Deciding what falls within the definition of agribusiness must be applied on a consistent basis.

Broadening the definition of agribusiness to subcategories other than Category A of the ANZSIC code would inadvertently catch some companies which are not primarily involved in agribusiness production. Expanding the definition to other parts of the value chain like milling flour, packaging food or retailing products would be deeply problematic. Some companies have operations that supply goods and services to the agricultural sector but these operations might only represent a small part of the business. If the government expanded the definition beyond Category A, it would capture a much broader cross-section of the economy, not originally foreshadowed.

To minimise investment confusion, ambiguity and encroachment of policies into non-agricultural industries, the government should adopt a definition where agribusiness is a business that operates in the agriculture sector.

Recommendation

The government should adopt a definition where agribusiness is a business that operates in the agriculture sector as defined by the Australian New Zealand Standard Industrial Classification – i.e. Category A – agriculture, forestry and fishing.

Fees for foreign investment

Currently, no fees or charges apply to foreign investment applications in Australia. This is consistent with the United States, Canada, Japan, Hong Kong and Singapore. New Zealand charges investors an application fee only for sensitive issues.

As the non-statutory advisory body responsible for examining proposals, FIRB advises the Treasurer on the national interest implications of each investment application. Like other regulators, the cost of administering the FIRB is funded from consolidated revenues. The Business Council sees no case for altering this arrangement for investment applications from foreign businesses. An additional fee would simply serve to deter investment.

Current proposals to charge fees for residential investment might be justified given the expected volume of applications. Investment applications for businesses to date have been managed within existing resources.

Recommendation

The government should not adopt fees for investment applications for business as this would deter investment.

Basis of fees

If the government proceeds with plans to levy fees on foreign investment to fund new compliance operations, it should be on a cost-recovery basis.

Foreign investment applications need to be processed by the FIRB within 30 days. The Treasurer has said publicly the FIRB receives on average over 30 applications per year for investment applications over \$1 billion. These applications are complex and require expertise to assess whether they are not in the national interest. If a matter is complex, the FIRB seeks an extension to conduct its assessment. The injection of additional resources would allow the FIRB to process applications faster.

A fee collected on a cost-recovery basis would be more appropriate than the schedule of fees currently proposed. The current proposed schedule of fees exceeds the resources required to undertake the task.

The Treasurer has publicly stated that the new fee structure would raise approximately \$200 million per year of revenue. He has also said funds raised would be directed at bolstering compliance functions. Assuming a public official at the Treasury earns on average \$100,000 a year plus additional operational costs. Total fees of \$200 million could fund as many as an additional 2000 bureaucrats. This would be unprecedented.

Recommendation

If the government pursues a fee-for-service model, fees should be levied only on a cost-recovery basis.

Quantum of fees

In the past, 99 per cent of all applications reviewed by the FIRB have been assessed as being in the national interest. This trend should continue. Only a handful of applications have been rejected over the decades and only some have conditions attached to the investment.

The government proposes to charge a range of fees depending on the type of investments a foreigner seeks to purchase. The cost impacts on several examples of business investments, should the proposed fee regime be implemented, are outlined below:

Type of investment	Value of investment triggering FIRB review	Proposed levy	% of purchase price
Agricultural land	\$15 million	\$150,000	1 per cent
Agribusiness	\$55 million	\$25,000	0.045 per cent
Large agribusiness	\$1 billion	\$100,000	0.01 per cent
Non-agricultural business	\$253 million	\$25,000	0.01 per cent
Large non-agricultural business	\$1 billion	\$100,000	0.01 per cent

The financial burden on different investment asset classes is inconsistent and, as designed, would disadvantage some investments more than others.

If the government imposes fees for foreign investment, it should be applied on a consistent basis across asset classes.

Other considerations include the need for the new fee regime to be consistent with our international obligations, including free trade agreements and investment treaties.

Recommendation

To the extent that fees are levied, they should be the same for all asset classes.

Modernising and simplifying the foreign investment framework

Amending rules for extension

The rules on time limits for announcing a FIRB decision require the Treasurer to provide a determination within 30 days. If a decision is not able to be made within 30 days, the applicant generally withdraws their application and resubmits. Resubmitting an application under current arrangements is routine and comes at no charge. The government's proposal to introduce an application fee raises the prospect of an investor paying the fee multiple times. If the investment is over \$1 billion, each fee would be \$100,000. This significant impost might be a disincentive to withdraw an application.

However, if an applicant does not withdraw its application, the Treasurer is compelled to publish a publicly gazetted interim order, outlining the investment application and the delay. This has the effect of naming the investor and investment interest, which is often commercially sensitive information. It is not in the investor's interest.

To address this unintended consequence, the government could consider amending the *Foreign Acquisition and Takeovers Act 1975* to allow the FIRB to assess an application beyond 30 days, if an applicant agrees to having its application considered within an additional 15 days. This extension period would ensure the FIRB continues to process applications in a timely manner, while also ensuring the identity of the investor is protected.

Recommendation

The government should amend the *Foreign Acquisition and Takeovers Act 1975* to allow the FIRB to assess an application beyond 30 days, if an applicant agrees to having its application considered within an additional 15 days.

FIRB threshold for private enterprises

Australia should aim to improve its standing as a destination for foreign investment.

Australia's historic reliance on significant levels of foreign investment to supplement domestic savings has been fundamental in meeting investment needs, facilitating greater income and creating jobs. The need for additional investment remains.

Like many other countries, Australia reviews foreign investment proposals on a case-by-case basis to assess their impact on the national interest. The Business Council believes that FIRB's current investment screening should provide the Australian people with the assurance that foreign investments are in the national interest.

As we argued in the 2010 Business Council paper *Foreign Attraction: Building on Our Advantages through Foreign Investment*, there would be merit in Australia (over a period of time such as five years) gradually lifting the general threshold to private investors from the current level of \$252 million to \$1,078 million currently enjoyed by only New Zealand

and the United States. This would be similar to Canada's decision to gradually raise its screening threshold from \$1 billion to \$2 billion over a similar time frame.

The need to raise the private threshold reflects Australia's need to access more capital. It also recognises the commercial reality that many Australian companies are larger than \$252 million. These changes would help our businesses maintain their international competitiveness.

It is important to recognise the existing public interest protections available through other existing laws, such as the Competition and Consumer Act 2010.

An increase in the general threshold would send a clear signal of Australia's openness to foreign investment.

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