Business Council of Australia

Submission to Exposure Draft on Implementing Foreign Investment Reforms

JULY 2015

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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

The Business Council welcomes the opportunity to comment on the exposure draft legislation in relation to implementing foreign investment reforms, which will be given effect by the *Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015*, the *Register of Foreign Ownership of Agricultural Land Bill 2015* and the *Foreign Acquisitions and Takeovers Fees Imposition Bill 2015*.

The Business Council recognises there are community concerns regarding foreign direct investment in Australia. It is important that the government develop a methodical, evidence-driven response that addresses these concerns, without compromising investment opportunities on which the Australian economy heavily depends.

It will be important to ensure the new regulation introduced does not add unnecessarily to red tape. The proposed legislation and regulation will dramatically increase administrative complexity by increasing the number of provisions governing foreign direct investment (FDI) in agriculture. The complexity these provisions introduce will have an adverse impact on an industry that urgently needs new investment.

At a time when Australia transitions from the mining boom and is seeking new areas for growth, the Business Council sees the agriculture sector as an extremely promising one.

Investment in the Australian agrifood sector is required to ensure that it has the resources and capabilities necessary to innovate, compete and to grow. Investment is needed to ensure that the value chain is well capitalised.

In addition to domestic sources, foreign investment has been, and will need to continue to be, an important source of funds for the Australian agrifood sector.

Rather than putting up barriers to foreign investment, the government needs to make clear that Australia is open to investment, and put in place policies and actions that support this.

Key recommendations

Recommendation 1

The proposed changes should be subject to an independent cost–benefit analysis in the regulatory impact statement.

Recommendation 2

The Commonwealth Government should work with state and territory land title offices to collect the necessary data to establish the land register.

The government should not proceed with a stocktake of foreign purchases, as this will yield little reliable data when sufficient data on foreign investment is already available from other sources and could be used.

Recommendation 3

The government should provide a clearer definition for agricultural land. The proposed definition of agricultural land, where ‘it could reasonably be used for primary production’ is imprecise and as currently worded, would inadvertently capture land not intended for agricultural use.

Recommendation 4

The government should not expand the definition of agribusiness beyond ANZSIC Code A.

There is no public policy case for expanding beyond ANZSIC code A.

Recommendation 5

In the event the government imposes a lower foreign investment assessment threshold for agribusiness the threshold for agribusiness should be raised from 25 per cent to 50 per cent.

Recommendation 6

If the government decides to impose a lower foreign investment assessment threshold on agribusiness (this is not supported by the Business Council) the government should abolish the concept of 'direct interest' and instead rely on accepted existing definitions of investment, including substantial interest (20 per cent), which applies to all other companies in the Australian economy.

The regulatory impact statement is not comprehensive

The Business Council welcomes the inclusion of a Regulatory Impact Statement (RIS) which accompanies the exposure drafts of the legislation and the Regulations (draft *Foreign Acquisitions and Takeovers Regulations 2015).* A comprehensive RIS is crucial for a clear understanding of whether the cost of additional regulation is outweighed by the benefits.

The RIS provides evidence to support the proposed changes to the administration of existing regulation (option 8) and an information campaign (option 6). Improved administration would lower regulatory costs to government and the community, without reducing the benefits of regulation. An information campaign should be used to publicise the available foreign investment data, as well as the benefits of foreign investment, to help allay community concerns.

However, the Business Council considers that the RIS fails to provide any evidence to support:

- a lower screening threshold for agribusiness (or the lower screening threshold for agricultural land, which was implemented without a published RIS[1])
- the proposed higher foreign investment application fees.

The RIS does not quantify the full costs and benefits of either policy proposal. Only the business and community compliance (red tape reduction) costs are estimated.

No assessment is provided of other costs, in particular impacts on foreign investment, which, if lower, would reduce employment and income growth. Government administration costs are not estimated either. The only assessment of the benefits is a claim that these changes would ease community sensitivity to foreign investment and in the case of higher fees.(Table 1)

Table 1: BCA comments on the RIS

Principle	Status
1. The problem to be solved is well understood Before government seeks to regulate, it must understand the problem or policy priority in depth and test the case for regulation, along with the risks and consequences of not regulating a particular activity.	The RIS has not sufficiently defined the problem. No assessment has been made of the risks and consequences of not changing the Regulations.

1. A short-form RIS has been completed for this regulatory change. Short-form RISs are not published. See: **http://ris.dpmc.gov.au/2015/02/19/changes-to-foreign-investment-screening-arrangements-stakeholder-request-department-of-the-treasury/**, accessed 8 July 2015.

Principle	Status
2. New regulation is subject to cost–benefit analysis The costs of new regulation are thoroughly assessed and tested with the community through cost–benefit analysis, which includes an explicit understanding of the costs to the community, including business.	No evidence of benefits (e.g. greater community confidence in foreign investment) for the options has been provided, and only business and community compliance (red tape reduction) costs of the options are estimated. There is no quantification of other costs, such as the impacts on foreign investment, which may lower employment and income growth. There is also no estimation of higher government administration costs.
3. Regulation achieves its objectives at least cost Regulation is carefully targeted to achieve its stated objectives and minimise the cost impacts on the community, including business.	No evidence is provided that the proposed regulations would be the least cost way of addressing community sensitivity to foreign investment. Given the estimated and likely costs of regulation, coupled with uncertain benefits, the non-regulatory options of improving the administration of existing regulation (option 8) and an information campaign (option 6) are preferred, rather than the options of lowering foreign investment screening thresholds (option 3) and substantially increasing foreign investment application fees (option 4).

Recommendation 1

The proposed changes should be subject to an independent cost–benefit analysis in the regulatory impact statement.

A low-cost agricultural register could provide useful data

The Business Council supports in principle 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.

The Business Council recognises that there is no definitive data source showing who exactly owns Australian land, the corporate structure, and the nature of its use, so it is difficult to have a well-informed debate on the issues of foreign ownership.

According to the government’s Regulatory Impact Statement, until 1 March 2015, non-government business proposals were screened only if they were over the relevant threshold (252 million for most countries). This meant that only a small number of exceptionally large agricultural transactions that were above the $252 million threshold were screened in Australia.

Nevertheless, the Australian Bureau of Statistics Agricultural Land and Water Ownership Survey found that, as at 30 June 2013:

- 87.5 per cent of agricultural land was entirely Australian owned (compared with 88.6 per cent in 2010)
- 98.9 per cent of agricultural businesses in Australia were entirely Australian owned (compared with 98.5 per cent at 31 December 2010)
- 85.8 per cent of water entitlements for agricultural purposes were entirely Australian owned (compared with 90.8 per cent in 2010).

These results indicate that in spite of the threshold not capturing many transactions below the $252 million, only a very small proportion of agricultural businesses (1.1 per cent) and a small proportion of agricultural land (12.5 per cent) were in fact foreign owned.

The government's proposed agricultural register would be helpful in easing community concerns around foreign ownership and could be a useful public policy tool.

As we have done in previous submissions, we call on the government to draw on existing processes and databases to establish the register. A targeted measure helps build community confidence and provides policymakers with valuable data to inform future policy decisions.

We encourage the Commonwealth to work with state and territory land title offices to collect the necessary data to establish the land register.

Current efforts to undertake a stocktake of foreign persons are likely to be a waste of investors' time and government resources. An interim measure like a stocktake will not be as comprehensive as a system that takes into account existing land and titles data.

To that end, we urge the government to focus its efforts on comprehensively linking all state and territory data with the Australian Taxation Office (ATO).

Recommendation 2

The Commonwealth Government should work with state and territory land title offices to collect the necessary data to establish the land register.

The government should not proceed with a stocktake of foreign purchases, as this will yield little reliable data when sufficient data on foreign investment is already available from other sources and could be used.

Definitions need to be tightened

The Business Council notes the government has made various policy commitments to lower the FIRB thresholds for agricultural land and agribusiness. The Business Council has argued strongly against these changes and urged the government to proceed cautiously and not undermine the benefits of free trade agreements.

However, if the government proceeds with its plan to lower the threshold, at a minimum, we urge it to develop precise definitions of what constitutes an agribusiness and agricultural land.

Ambiguous definition of agricultural land

The definition of ‘agricultural land’ in the *Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015*, requires greater clarity.

The proposed definition for ‘agricultural land’ is ‘land in Australia that is used, or that could reasonably be used for primary production’. This definition should be tightened given its potential to affect a wide range of decisions. For example, at what point does land transform from a vacant block to land that could ‘reasonably be used for primary production?’

This proposed definition creates ambiguity for businesses and creates additional red tape and complexity.

Recommendation 3

The government should provide a clearer definition for agricultural land. The proposed definition of agricultural land, where 'it could reasonably be used for primary production' is imprecise and as currently worded, would inadvertently capture land not intended for agricultural use.

Limit the definition of agribusiness

The Business Council has argued in previous submissions that only businesses operating primarily in sectors directly related to agricultural business should be captured under the term ‘agribusiness’.

It is the Business Council’s view that an agribusiness is a business that operates in the agriculture sector as defined by the Australian New Zealand Standard Industrial Classification – Category A – agriculture, forestry and fishing.

However, the government proposes to broaden the definition to categories beyond ANZSIC A, and uses a negative list approach to state that any class in subdivision 11 of Division C, other than the following, will be captured within the meaning of agribusiness.

Exemptions

1. Class 113 (cured meat and small goods manufacturing)

2. Class 1132 (ice cream manufacturing)

3. Class 1162 (cereal, pasta and baking mix manufacturing)

4. Class 117 (bakery product manufacturing)

5. Class 1182 (confectionery manufacturing)

6. A class in group 119 (other food product).

Through a lengthy process of cross-checking the draft *Foreign Acquisitions and Takeovers Regulations 2015* (the Regulations) with ANZSIC's industrial codes, the Business Council was able to determine the following industries were captured as an agribusinesses under the Regulations.

- 1111 Meat Processing
- 1112 Poultry Processing
- 1120 Seafood Processing
- 1131 Milk and Cream Processing
- 1133 Cheese and Other Dairy Product Manufacturing
- 1140 Fruit and Vegetable Processing
- 1150 Oil and Fat Manufacturing
- 1161 Grain Mill Product Manufacturing
- 1181 Sugar Manufacturing

The inclusion of these specific categories appears arbitrary. There is no evidence to suggest these food manufacturing sectors require any more regulatory scrutiny than other food manufacturing sectors excluded from the definition of agribusiness. The addition of these nine sub-categories beyond ANZSIC Code A captures half of the food processing and manufacturing sector and almost all dairy companies in Australia.

To promote transparency and to promote greater understanding of which food manufacturing sectors are captured, we suggest the definition of agribusiness should specifically state each individual sector. The current approach adopts a negative list approach: that is, all is included, except for the manufacturing sectors listed in the legislation.

A clearer way for industry to understand the sectors included would be to list the sectors the government wishes to define as agribusinesses.

Recommendation 4

The government should not expand the definition of agribusiness beyond ANZSIC Code A.

There is no public policy case for expanding beyond ANZSIC code A.

Raise the threshold for diversified businesses

The legislation's definition of 'agribusiness' captures relevant businesses by ANZSIC codes and then applies a percentage test.

Subsection 8(2) and paragraphs 8(3)(a) and (b) of the Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015 provide that if 25 per cent (outlined in the Regulations) or more of the business is 'agribusiness', then the whole business is an 'agribusiness.

We are encouraged the government acknowledges that not all businesses with operations in the sectors covered by the definition of agribusiness automatically qualify as agribusinesses under the legislation.

To this end, the introduction of a threshold to decide whether a diversified business is an agricultural business helps target the government's policy. But, as currently drafted, the changes would affect investment in manufacturing as well as a range of other sectors.

The Business Council believes the proposed threshold of 25 per cent of profits or revenue, or 25 per cent or more of its total assets from the above sectors is too expansive. The government's introduction of special treatment for agribusiness has led to complexity.

The introduction of a threshold test to determine whether a business is an agribusiness creates perverse market incentives. Diversified companies with interests in agribusiness sectors that generate less than 25 per cent of their revenues, assets or profits will need to closely monitor their balance sheets to ensure they do not fall foul of the rules.

We would urge that any investment in 'non-agribusiness' should be quarantined from FIRB screening changes to avoid policy spillover into broader sectors of the economy. For example, if a beverage company also had an interest in an agribusiness (as defined in the above nine categories) but that interest represented 30 per cent of its profits, 10 per cent of its assets, and 20 per cent of its revenues, does the FIRB need to review the proposed acquisition transaction?

The complexity and associated administrative costs (to government and business) introduced by these changes is considerable and unnecessary. The threshold should be raised to a level that better captures genuine agribusinesses, rather than those businesses with only a minor interest in agribusiness.

If the government decides to impose a lower foreign investment assessment threshold to agribusiness (which as noted above is not supported by the Business Council) the Business Council would argue that the proposed threshold should be increased to 50 per cent so that agribusiness would comprise a significant portion or majority portion of the business.

The rationale for raising the threshold to 50 per cent is consistent with the arguments the Business Council raised in its submission to the government's consultation on *Modernising Australia's Foreign Investment Framework.*

Our submission argued that the threshold for 'aggregate interest' (if two or more foreign companies were aggregated together) should be raised from 40 per cent to 50 per cent. It was argued that leaving the aggregate interest threshold at 40 per cent threshold would inadvertently create 'accidental foreigners'.

The Business Council believes that the threshold for agribusiness similarly should be raised to 50 per cent to limit the possibility that companies become 'accidental agribusiness'.

Recommendation 5

In the event the government imposes a lower foreign investment assessment threshold for agribusiness the threshold for agribusiness should be raised from 25 per cent to 50 per cent.

Retain the substantial interest test

When the Coalition government went to the election promising to lower the FIRB screening thresholds for agricultural land from $255 million to $15 million and agribusiness from $255 million to $53 million, the public understanding was that these changes would apply to investments that represented a 'substantial interest'.

But under the proposed legislation and the Regulations, an individual foreign person must now notify the FIRB and seek pre-approval if it seeks to acquire a 'direct interest' in an agribusiness. Section 11 of the Regulations defines a 'direct interest' as being an investment greater than 10 per cent.

The introduction of a direct interest in the proposed exposure draft is a retrograde step for agribusiness, and would further tighten investment rules in an industry in desperate need of investment capital, as well as unnecessarily increasing government and business administrative costs.

In particular, 11(c) of the Regulations implies that if a foreign investor has a stake of five per cent and adds to it by even one per cent, then this would trigger the need for FIRB approval.

At a time when a range of Australian businesses, both listed and unlisted, are seeking additional capital, these retrograde steps are particularly onerous and risk Australia's future income and employment growth. If this provision is designed to respond to 'creeping acquisitions', the thresholds are excessively low.

The government should instead apply the existing definition of 'substantial interest' to agribusinesses.

In the Business Council's submission to the *Modernising Australia's Foreign Investment Framework, we* strongly supported the government's proposal to harmonise the *Foreign Acquisitions and Takeovers Act* 1975 (Cth) ('FATA') with other legislation. To that end, we recommend that the government should increase the 'substantial interest' threshold for a single foreign person investor from 15 to 20 per cent ownership.

This would reduce administrative and compliance costs for all parties and make foreign investment notification requirements consistent with Australia's takeover rules in the *Corporations Act*.

The current exposure draft legislation accepts this argument and will increase the threshold for 'substantial interests' from 15 per cent to 20 per cent.

Recommendation 6

If the government decides to impose a lower foreign investment assessment threshold on agribusiness (this is not supported by the Business Council) the government should abolish the concept of 'direct interest' and instead rely on accepted existing definitions of investment, including substantial interest (20 per cent), which applies to all other companies in the Australian economy.

BUSINESS COUNCIL OF AUSTRALIA
42/120 Collins Street Melbourne 3000 T 03 8664 2664 F 03 8664 2666 **www.bca.com.au**