

Via email: ForeignInvestmentConsultation@treasury.gov.au

Manager  
International Investment & Trading Unit  
Foreign Investment & Trade Policy Division Markets Group  
The Treasury  
Langton Crescent  
PARKES ACT 2600

20 March 2015

Dear Sir/Madam

**Submission in response to the Strengthening Australia's Foreign Investment Framework options paper issued February 2015**

BDO welcomes the opportunity to comment on the proposed changes to Australia's Foreign Investment Framework.

BDO's submission is primarily in respect of foreign investment in Australia's agricultural industry.

BDO has acted for and continues to act for a number of foreign parties that have invested in Australia or are looking to invest in Australia. The foreign parties include both government and non-government enterprises and their investments include:

- Direct investment in rural property in Australia - with the foreign party either carrying on the farming operations or leasing the land to an unrelated Australian farm operator.
- Equity investment in an Australian farming corporation - contributing additional equity capital to an existing farming enterprise to fund the further development of that enterprise.
- Investment in widely-held property trusts with significant commercial property in Australia.

Australian agriculture has long been a beneficiary of foreign capital. The benefits to Australia are well documented and, from our experience, foreign capital has benefited Australian farming and the farming communities in many ways, including:

- Job creation.
- Attracting skilled management and owner-operators to Australia.
- Generation of economic activity in rural communities.
- Significant flow-on benefits for Australian service providers and financiers.

- Introduction of new and innovative technologies that enhance Australia’s competitiveness in the global market for agricultural products, with benefits for domestic consumers.
- The transfer of knowledge to Australian farmers.
- Introduction of development capital to fund the development of rural properties and agricultural infrastructure.
- Improved access to global supply chains and markets, enhancing Australia’s position in the global market for agricultural products.
- Allowing Australian farmers to expand their operations by leasing additional farmland, rather than taking on more debt to buy the additional farmland, or entering into joint ventures with foreign investors to provide additional equity capital to fund the expansion.
- Financing the inter-generational transfer of family farming properties.
- Allowing Australian farmers to maximise the economic returns on the realisation of their farming assets, a particularly relevant consideration for retiring farmers over the next decade given the relatively high average age of Australian farmers.

#### **Introducing fees for foreign investment applications**

The proposed application fee is misleadingly described as ‘modest’ in nature. The proposed fees are, with all due respect, excessive and could present a real obstacle to foreign investment in Australia, ultimately to the detriment of Australian farming and contrary to Australia’s national interest.


Australian farmers and farming communities, and the many Australians employed, working in or connected with Australia’s farming industry, are beneficiaries of foreign investment in the Australian economy.

An application for approval to acquire rural land with a value of \$50,000,000, which is not uncommon in the industry, will be subjected to an application fee of \$500,000, with no guarantee of a successful purchase.

Furthermore, Canada, which is often compared to Australia, does not charge an application fee in respect of foreign investment. The same is also true for the United States and Japan.

Whilst Hong Kong and Singapore both charge an application fee, neither of these countries has a significant agricultural industry and the land area in both countries is substantially less than Australia’s. Additionally, neither country is as heavily reliant on agriculture as Australia.

The following table clearly illustrates the differences in land area, and delineates that neither Hong Kong nor Singapore provides a useful comparison to Australia.

	Australia	7,741,220 km <sup>2</sup>
	Hong Kong	1,104 km <sup>2</sup>
	Singapore	697 km <sup>2</sup>

We submit that it is not in Australia’s national interest and, in particular is contrary to Australia’s position as a developed and progressive farming nation, to levy an administration fee on foreign investors looking to invest in Australia. With all due respect, it is to Australia’s advantage to encourage, rather than discourage, foreign investment in Australian agriculture. Any application fee is arguably contrary to Australia’s national interest.

Foreign investors already incur a considerable cost when investing in Australia, including, but not limited to, applying to the Foreign Investment Review Board for approval to acquire Australian rural land under the existing regime, as well as stamp duty when acquiring Australian rural property and capital gains tax when selling Australian rural property.

Australia’s agricultural industry has to compete against other countries for investment capital and any additional costs risk making Australia a less competitive investment option compared to, for example, New Zealand or South America. Foreign investors already face not insignificant business risk and farming risks such as lower fertility soils, droughts and pests when investing in Australia. Any additional barriers, or perceived barriers, add to the existing disadvantages of investing in Australian agriculture and makes Australian farming less competitive in the global markets for capital and farm produce.

The Foreign Investment Review Board undertakes a function of Government, for the benefit of all Australians, in the same way that the Australian Taxation Office and other Government departments and instrumentalities do. Furthermore, Australia has not adopted a broad ‘user pays’ approach to the provision of Government services. A user pays system would transfer the cost of regulation from Australian taxpayers to foreign investors, notwithstanding that foreign investment in Australia, and regulation generally, provides significant benefits to all Australians.

While foreign investors will initially appear to bear the burden of the proposed application fee, and will certainly bear the cashflow burden, some part of the real economic burden may in fact fall on the sellers of rural land, thereby disadvantaging Australian farmers. It is safe to assume that an interested party’s offer price for a rural property is based on a financial analysis of the economic return on investment, amongst other things. It follows that any transaction costs reduce that return, and the buyer can be expected to seek to pass on the additional costs to the seller. As such, it could be the Australian rural land owners who ultimately bear the burden, in part at least, of the proposed application fee.

In the event that Government does implement the proposed application fee, we submit that a 1% fee is inconsistent with a ‘user pays’ system for foreign investment in rural land. Buyers of higher value properties would pay a larger fee than buyers of lesser value properties and would, therefore, pay more for the same service, all things being equal. As such, the buyers of higher value properties would effectively subsidise the fee paid by buyers of lesser value properties, whereas all parties should pay the same amount for the same service under a true user pays system.

We also submit that the proposed fee would appear, without the opportunity to undertake the detailed analysis to confirm it, to not be directly connected to the actual cost to Government of processing a foreign investment application. The structure of the proposed fee, at 1%, or \$10,000 for each \$1 million in property value and a lesser fee of \$5,000 for properties valued under \$1 million, indicates that the proposed fee is not based on the actual cost of an application for approval to acquire rural land. It would, presumably, be safe to assume that the cost to administer an application to acquire rural land valued at, say, \$15 million would be the same as the cost to administer an application to acquire rural land valued at \$14 million, again all things being equal. That being the case, the proposed fee structure is more in the nature of a tax or duty on rural land.

The foreign investment approval process in New Zealand provides a useful comparison to the regime proposed for Australia. The Overseas Investment Office in New Zealand charges foreign parties who wish to invest in New Zealand farmland no more than \$22,489 to apply for approval to acquire rural property, which is substantially less than the fee proposed for investment in Australian rural property with a value of \$2.5 million or more.

### **Transitional provisions**

Commercial transactions often can, and do, take many months and sometimes more than a year to complete. The proposed changes to the foreign investment rules in Australia may disadvantage transactions that commenced before the announced changes, but were not completed by the date they are to be, or became, effective. The parties would likely have incurred considerable costs before the proposed changes to Australia's foreign investment framework were announced.

We submit that further consideration should be given to enacting appropriate transitional provisions whereby the existing rules continue to apply to transactions, including trade sales and private or public capital raisings that commenced before 11 February 2015 but were not completed before 1 March 2015, for a period of not less than 12 months.

### **Substantial interest test**

The substantial interest test currently applies a 15% and a 40% interest test. A person, or two or more persons, who hold a substantial interest must apply for prior approval for an acquisition. They are taken to hold a controlling interest in a corporation unless the Treasurer is satisfied that, having regard to all the circumstances, that person together with the associate or associates (if any) of that person is not, or those persons together with the associate or associates (if any) of each of them, are not in a position to determine the policy of the corporation.

A single foreign investor will be required to apply to the FIRB for prior approval for the acquisition of an interest of 15% or more in an Australian business or corporation with a value of, for an agribusiness, \$55 million or more. An application fee of between \$10,000 and \$100,000 will be payable. Prior approval is also required for a single foreign investor holding rural land valued at \$15 million or more except that the application fee is 1% of the rural land value for new acquisitions of \$1 million or more, and \$5,000 for new acquisitions of rural land valued under \$1 million.

Should the Government decide to proceed with the introduction of a fee paying regime, consideration should be given to:

- Increasing the 15% threshold.

- The introduction of a higher threshold for publicly listed companies given they are already subject to the additional disclosure requirements and greater transparency prescribed by the *Corporations Act (Cth) 2001* and the listing rules of the Australian Stock Exchange.
- The introduction of a 'safe harbour' regime for foreign investors with the effect that an investor who falls within the safe harbour parameters is not required to apply for prior approval, but may choose to do so if they want the added certainty of the FIRB's confirmation.
- The introduction of a pre-approval process.

#### A pre-approval process

Foreign investors could be required to seek approval a number of times before successfully completing the acquisition of a rural property in Australia, a costly and time-consuming process. We welcome Government's commitment to consider options to minimise the impact of such applications.

We respectfully suggest that consideration could be given to adopting a pre-approval regime whereby foreign investors can apply for approval to buy rural land within agreed parameters before entering into negotiations, or bidding at auction for a specific property. That would allow foreign investors to enter into negotiations to acquire rural land and bid at auction for rural land within the parameters previously agreed during the pre-approval process. Foreign investors would then not be required to obtain approval for each unsuccessful attempt to acquire rural land, at considerable expense.

The contact for this submission is John Kelly, a Partner at BDO. He can be contacted on 03 9603 1700.

Yours sincerely

A handwritten signature in black ink, appearing to read 'J Kelly'.

John Kelly  
Partner