

11 March 2022

Policy Framework Unit, Foreign Investment Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: FIRBstakeholders@treasury.gov.au

Dear Sir or Madam

ENHANCING AUSTRALIA'S FOREIGN INVESTMENT FRAMEWORK: AUSTRALIAN SUGAR MILLING COUNCIL - RESPONSE TO DISCUSSION PAPER

Introduction

We refer to the Discussion Paper released in February 2022 entitled 'Enhancing Australia's Foreign Investment Framework' and the Government's request for feedback on the questions outlined in that paper.

Specifically, the Paper seeks views from the public on options to improve the overall design and operation of the framework, reduce regulatory burden, refine compliance and enforcement powers and, where appropriate, increase scrutiny of certain types of investments. This follows an evaluation under which the Government sought to assess whether the right balance is struck between welcoming foreign investment and protecting Australia's national interests.

The Australian Sugar Milling Council (ASMC) welcomes the opportunity to provide its comments. Our full submission can be found below.

Summary of our position

Our industry remains highly critical of Australia's foreign investment framework and we support the following changes to achieve a more workable balance between encouraging foreign investment and promoting Australia's broad interests:

- A reduction in FIRB application fees specifically as they relate to acquisitions of interests in agricultural land in Australia;
- A more commercially realistic definition of 'interest in land' for leases such that only the following types of leases over agricultural land are characterised as interest in land:
 - leasehold interests with freehold characteristics (see the definition in footnote 8 in Guidance Note 3); or alternatively
 - leasehold interests with a term likely to exceed 10 years.
- Broaden the moneylending exemption in section 27 of the *Foreign Acquisitions and Takeovers Regulation* to ensure that no FIRB approval would be required when a foreign

ABN: 44 010 779 496 Australian Sugar Milling Council

IBM Building Level 3 / 348 Edward St Brisbane GPO Box 945 Brisbane Qld 4001 Australia

P +61 7 3231 5000 F +61 7 3229 2113 E asmc@asmc.com.au

www.asmc.com.au



acquirer takes a mortgage to a secure lending arrangement that facilitates farmers remaining in the sugar industry to secure supply to sugar mills. Alternatively the fees for FIRB approval for taking a security interest over agricultural land should be nominal (or waived entirely).

- The current requirement for foreign investors to register their ownership of water entitlements on the register of foreign ownership of water entitlements (water register) should be sufficient oversight of foreign investment in rural water, There does not appear to be any additional benefit in the context of Australia's national interest in requiring specific FIRB approval for such acquisitions.
- A base fee be payable for the grant of an exemption certificate (e.g. see the fee payable for exemption certificates prior to the 2021 changes) with a top up of fees payable upon lodgement of the reports under the exemption certificate. At a minimum, the per transaction cap under agricultural land exemption certificates should be increased to \$30 million and the aggregate cap increased to \$200 million.
- The extended timeframes for approving applications are commercially untenable in many transactions adding to the disadvantage faced by foreign investors in competitive bid processes.
- We seek a dialogue with Treasury or how the sugar industry may be excluded from the open and transparent sale processes or the requirement made considerably more workable to take into account the industry's unique operational needs and circumstances.
- An exemption for benign (national security) industry's like sugar from the national security provisions.

We would welcome the opportunity to discuss these matters further at a convenient time. Please don't hesitate to contact David Rynne, Director Policy, Economics & Trade on david.rynn@asmc.com.au or 0431 729 509 for further clarification on the matters raised in this submission.

Yours sincerely

Rachele Sheard

Rachele Sheard

Chief Executive Officer

ASMC SUBMISSION

Background

ASMC is the peak industry organisation for raw sugar manufacturing (the sector). We represent five sugar manufacturing companies which collectively produce 90 percent of Australia's raw sugar at 16 sugar mills in Queensland.

The ownership structure of the sector has changed significantly over the past 14 years with the majority of Australia's 22 sugar mills moving from grower-owned co-operative structures to being independently owned by foreign agribusinesses. The injection of an estimated \$7 billion in foreign capital since 2006 in these sugar mills has benefited both the broader sugar industry and host communities. Expert analysis¹ demonstrates that the Queensland sugar industry supports 23,000 direct and indirect jobs and provides \$4 billion in Gross State Product. Of note is that in the Queensland areas of Bundaberg, Mackay, Cassowary Coast, Hinchinbrook and Burdekin the sugar industry represents anywhere between 10% to 52% of that regions' Gross regional Product.

Furthermore, the sugar industry is likely to remain highly dependent on foreign capital going forward, as certain mills may:

- In an effort to increase cane volumes and improve sustainability, seek to buy farms in mill areas that are declining in cane yield, or being lost to cane; assist new entrants with funding; and assist existing growers to expand their holdings in their mill area by aggregating farms from growers wishing to exit the industry²;
- Require direct injections of equity capital to improve financial viability; and
- Seek to purchase complementary, sugar-related assets.

The Discussion Paper states that the Government is seeking views for further reform options in relation to Australia's foreign investment framework that would clarify, liberalise, simplify and, where required, strengthen parts of the framework. Comments have specifically been sought in the following five areas:

- (1) areas to reduce regulatory burden;
- (2) investments requiring greater scrutiny;
- (3) exemption certificates;
- (4) compliance and enforcement; and
- (5) overall operation of the foreign investment framework.

¹ <https://asmc.com.au/sugars-economic-contribution/economic-contribution-sugar/>

² To address concerns that the older generation of cane farmers do not wish to extend their finances or expend energy pursuing farm scale, and new entrants cannot raise capital to satisfy bank and government loan requirements.



AREAS TO REDUCE REGULATORY BURDEN

Excessive fees

ASMC and its members are strongly of the view that FIRB application fees for acquisitions of interests in agricultural land are excessive.

When fees were introduced for foreign investment applications in 2015, the Explanatory Memorandum to the *Foreign Acquisitions and Takeovers (Fees Imposition) Bill* stated that the imposition of fees helps fund:

- the cost of considering applications;
- the introduction of a specialised investigative and enforcement area within the Australian Taxation Office;
- improvements in collection of data about foreign investment in Australia; and
- an increase in the resources dedicated to the investigation of alleged breaches of the Act.

The introduction of fees was stated to be consistent with the Australian Government's policy that the full cost of regulating a particular sector should generally be recovered from that sector.

When the 2015 fee structure was reviewed by the Australian Government Productivity Commission in 2020³ it was concluded that the fees were out of proportion with the cost of delivering the regulatory regime, and this was even before significant increases to those fees were introduced in 2021. The Productivity Commission found that these were likely to be fairly inefficient taxes. Taxing foreign businesses reduces foreign investment, leading to lower Australian wages and income. The report concluded that much higher fees on (small) agricultural investment applications than other business applications have the potential to detract from growth in regional communities.

Notwithstanding the Productivity Commission Report, FIRB application fees were further increased in 2021, particularly for acquisitions of interests in agricultural land (now capped at \$500,000). At that time the Government dropped all pretence of those fees constituting a cost recovery and acknowledged that all fees imposed are a tax.

The ASMC strongly advocates for a reduction in FIRB application fees specifically as they relate to acquisitions of interests in agricultural land in Australia. The significant quantum of those fees together with other revenue measures such as surcharge land tax on foreign landowners in Queensland (where the majority of the sugar industry is located) is a significant deterrent to foreign investments in the sugar sector in Australia and results in a competitive disadvantage for those participants in the market that are foreign owned.

³ See Foreign Investment in Australia Productivity Commission Research Paper dated June 2020



In addition, the fee structure for exemption certificates is inappropriate and inefficient. Those concerns are raised below in the section relating to exemption certificates.

Leases

A further area in which changes could be made to reduce the excessive regulatory burden in the agricultural land space in particular is the change the definition of 'interest in land' to the extent it relates to leasehold interests in land. Currently, any leasehold interest in land with a term (including any extension or renewal) that is reasonably likely to exceed five years, is an interest in land for which FIRB approval is required (once the aggregate \$15 million threshold is met).

Specifically in the sugar industry, where a five year lease is the absolute minimum (given sugar is generally a five year crop), but even more generally in the agricultural land context, **ASMC submits that it would be appropriate to have a more commercially realistic definition of 'interest in land' for leases. For example, this may adopt a definition of 'interest in land' such that only the following types of leases over agricultural land are characterised as interest in land:**

- **leasehold interests with freehold characteristics (see the definition in footnote 8 in Guidance Note 3); or alternatively**
- **leasehold interests with a term likely to exceed 10 years.**

Mortgages to secure moneylending agreements to support farmers to stay in cane

A number of ASMC members are interested in supporting local farmers retain their farms (or transition to the next generation) to ensure that sufficient land in the areas surrounding the established mills continues to produce sugar cane. This may take the form of loans, but given the current approach by FIRB to treat a mortgage over land as an interest in land with a value equal to the amount secured, the fees for FIRB approval for a foreign miller to take a mortgage over agricultural land as security for these types of loan arrangements are prohibitive. **ASMC submits that it would be appropriate to broaden the moneylending exemption in section 27 of the *Foreign Acquisitions and Takeovers Regulation* to ensure that no FIRB approval would be required when a foreign acquirer takes a mortgage to a secure lending arrangement that facilitates farmers remaining in the sugar industry to secure supply to sugar mills. Alternatively the fees for FIRB approval for taking a security interest over agricultural land should be nominal (or waived entirely).**

INVESTMENTS REQUIRING GREATER SCRUTINY

Water

The discussion paper specifically requests feedback on whether foreign investors should be required to obtain foreign investment approval before acquiring rural water entitlements. **ASMC takes the view that the current requirement for foreign investors to register their ownership of water entitlements on the register of foreign ownership of water entitlements (water register) should be sufficient oversight of foreign investment in rural water and there does not appear to be any additional benefit in the context of Australia's national interest in requiring specific FIRB approval for such acquisitions.**



As set out in the most recently published summary of the water register, as at 30 June 2021, the estimated proportion of water entitlements with the level of foreign ownership is only 11%. It would not appear that this is such a material issue that requires further regulatory intervention and specifically given the fees and efficiency issues raised in this submission, ASMC would have concerns if such costs and inefficiencies were extended to acquisitions of interests in agricultural water entitlements.

EXEMPTION CERTIFICATES

Exemption certificates are intended as a measure to deal with the administrative burden of constantly seeking separate FIRB approvals for individual acquisitions. As stated above, the updated fee structure for exemption certificates (particularly for programs of acquisitions of agricultural land) significantly reduces the benefit of those exemption certificates. The current fee structure does not provide the level of certainty required to make exemption certificates a workable solution for many foreign investors into the agricultural land sector.

The requirement to pay a fee upfront for the entirety of the cap under the exemption certificate (less 25%) is inefficient and, in ASMC's view, unnecessary. Also the guidance from FIRB that any unused part of that fee at the end of the exemption certificate term may be rolled over to a subsequent exemption certificate, does not provide the level of certainty required.

ASMC suggests that a base fee be payable for the grant of an exemption certificate (e.g. see the fee payable for exemption certificates prior to the 2021 changes) with a top up of fees payable upon lodgement of the reports under the exemption certificate. This is similar to the timing of the payment of fees under new (and near new) dwelling exemption certificates and would allow some flexibility for holders of exemption certificates in the agricultural sector.

Exemption certificates in the agricultural land space are also generally subject to a \$100 million aggregate value cap and a cap of \$10 million per transaction. These caps are inappropriately low, particularly in the context of FIRB's approach to valuing leases as the aggregate of all payments payable under a lease (including both rent and premium). Using this valuation approach (which is inconsistent with most other areas of law) many long-term leases may be valued in excess of the freehold value of the leased land.

ASMC suggests that at a minimum, the per transaction cap under agricultural land exemption certificates be increased to \$30 million and the aggregate cap increased to \$200 million.

COMPLIANCE AND ENFORCEMENT

The increased complexity of the foreign investment framework means that there is an increased risk of inadvertent non-compliance. **ASMC suggests that there should be a clearer guidance on remission of penalties in circumstances of genuine oversight and voluntary disclosure to encourage disclose, particularly in circumstances of uncertainty as to the technical application of the law to no-standard circumstances.**



OVERALL OPERATION OF THE FOREIGN INVESTMENT FRAMEWORK

Approval timeframes

The experience of the members of ASMC is that, notwithstanding the exorbitant fees payable for foreign investment applications, the timeframes for responding to FIRB applications continues to be unacceptably long. While the introduction of fees was intended to assist with funding a more efficient administration of the foreign investment framework, there does not appear to have been any improvement in timeframes for FIRB approvals. Of particular frustration are delays that arise when the case officers assigned to the matter appear not to have reviewed the material provided with an application resulting in requests for additional information that have already been provided.

The changes to the framework introduced on 1 January 2021 included the ability of the treasurer (via the Foreign Investment Review Board) to unilaterally extend the time frame for considering an application for FIRB approval. While in practice this does not appear to have changed FIRB's approach to requesting extensions of time (usually FIRB starts by asking the applicant to request an extension), it seems to be consistent with an expectation on the part of FIRB that the 40 day statutory time frame may well not be met in many circumstances. **These extended timeframes are commercially unacceptable in many transactions adding to the disadvantage faced by foreign investors in competitive bid processes.**

Open and transparent sales process

In addition the requirement that a property be advertised for at least 30 days prior to the entry into a binding agreement also extends the time frame in which a foreign investor is able to acquire agricultural land in Australia.

ASMC's member's requirement to participate in an open and transparent sales process before they can obtain FIRB approval for the acquisition of agricultural land in Australia results in what appears to be some unintended consequences that are specific to the sugar industry.

It is clear that the sugar industry provides significant value to those communities in which it constitutes a significant portion of the local economy, and ASMC's members are integral in ensuring the ongoing viability of the industry and those communities. Where the members seek to acquire agricultural land it is generally for the purposes of ensuring that sufficient land is dedicated to the production of sugar cane in the areas around the mills to ensure the ongoing supply to those mills and the prosperity of the communities they support.

These mills require a significant upfront capital investment and require consistent and reliable local supply. Sugar is a commodity that is high volume and low value as well as being perishable which means that the ongoing viability of the sugar industry is dependent upon sufficient land within the geographic vicinity of the mills remaining dedicated to sugar production.

This is further exacerbated by the fact that only a limited number of geographic locations in Australia are ideally suited for the production of sugar which means that Australia's sugar industry is dependent on retaining a minimum amount of productive land for the growing of sugar cane in those areas. In this context, it is essential for investors looking to support the sugar industry to have flexibility to undertake commercial negotiations with vendors without unnecessary additional



regulation from government.

ASMC seeks a dialogue with treasury or how the sugar industry may be excluded from this requirement or the requirement made considerably more workable.

National security

One of the key changes to the foreign investment regime introduced in 2021 was the broadening scope of FIRB approval requirements in sectors that are critical to Australia's national security. ASMC is fully supportive of measures that are appropriately targeted to ensure the protection of Australia's national security. However, we note that the broad definitions in the *Foreign Acquisitions and Takeovers Act*, the *Foreign Acquisitions and Takeovers Regulations* and the *Security of Critical Infrastructure Act*, and the interaction between those different rules, result in what appear to be some unintendedly broad applications of these new rules.

The example that the members of the ASMC are most impacted by is the fact that any area of land within a critical port (including for example a leasehold shed or loading facility for sugar) is an interest in a critical infrastructure asset. It would appear unnecessarily broad that such a small and limited interest in the port land would bring those entities within the national security rules, bringing with it the associated FIRB approval requirements if a foreign investor were to seek to acquire an interest in an entity that held such an interest in a designated port.

It has also been noted by a number of ASMC members that the call in power and the last resort power introduced in 2021 both represent a level of sovereign risk that is undesirable in any kind of regulatory regime. While we acknowledge that there is a voluntary notification process for reviewable national security actions which is designed to mitigate the risk associated with the call in power, given the fees referred to above and the timeframes for obtaining approval, the usefulness of these voluntary notification requirements are marginal.

We also note the inability to protect against the last resort power by any mechanism at all and the fact that this represents a significant sovereign risk. While the members of ASMC are fully aware that the last resort power would only be exercised in the circumstances of direct impact on national security that could not be managed through any other regulatory means, and that this is very unlikely to apply in their circumstances, 'very unlikely' is an inappropriate basis on which to make significant investment decisions. It simply highlights the increasing uncertainty, complexity and cost of foreign investors investing in the Australian agricultural sector.

ASMC would favour an exemption for the sugar industry, as a benign industry, from the national security provisions.