



31 August 2021

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

Sent via email FIRBStakeholders@treasury.gov.au

Dear Manager

RE: Evaluation of the 2021 foreign investment reforms

Introduction

The Australian Sugar Milling Council (ASMC) appreciates the opportunity to comment on the FIRB framework following the implementation of the 2021 reforms¹.

Workable FIRB rules are critical to maintaining and increasing cane supply to achieve mill viability and prosperous regions. These reforms have made the FIRB regime increasingly unworkable and will continue to have a significant dampening impact on replenishing this cane supply. As such, the ASMC remains concerned that Government has not achieved the right balance between encouraging much needed foreign investment and protection of the national interest.

In this submission we offer a number of suggested changes to the framework for Government's consideration. These changes would foster changes in land ownership, improve the productive and economic efficiency of cane growing and raw sugar manufacturing in Australia, and encourage employment growth and regional development.

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.

¹ *Foreign Investment Reform (Protecting Australia's National Security) Act 2020* and the *Foreign Acquisitions and Takeovers Fees Imposition Amendment Act 2020* (the 'reform Acts').

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

- 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.

Our concerns

Attractive investment conditions (policy stability, rule of law etc.) and workable FIRB rules were a feature of the Australian landscape for decades and the subsequent injection of foreign capital helped underpin Australia's economic prosperity.

Specifically in relation to Australia's sugar production regions, this foreign investment ensured:

- Sufficient operating capital to undertake \$200 million in essential mill maintenance per annum, thereby promoting confidence to growers in the capacity of the factories they supply;
- Revenue diversification (away from raw sugar manufacturing) and regional development opportunities (principally co-generation and ethanol); and
- Significant socio-economic benefits. An independent analysis commissioned by ASMC in 2019³ identified the total contribution to the economy from the raw sugar manufacturing sector to be in excess of \$4 billion in 2017/18, underpinning almost 23,000 jobs.

Any changes to the FIRB rules that govern the flow of foreign capital must reach a workable balance between protecting Australia's national interests (and national security) and ensuring there are no unnecessary impediments to highly mobile capital continuing to flow to Australia. In this respect Government should attempt to design a FIRB regime that:

- (1) Is clear and unambiguous and supports decision certainty;
- (2) Is flexible such that the higher (national security) risk transactions are targeted through careful policy and legislative design;
- (3) Is streamlined with low transaction costs and unintended consequences are avoided; and
- (4) Has a penalties regime commensurate to the risks.

In relation to (1), we note that the terms 'national interest' and 'national security' are not defined and this leads to uncertainty as to what test proposed foreign investment will

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.

³ <https://asmc.com.au/policy-advocacy/sugar-industry-overview/economic-contribution-sugar/>

be measured against. In addition, the extreme complexity of the FIRB legislation itself gives rise to uncertainty and discourages investment.

In relation to (2), and of particular concern is that whilst it is apparent that the national security powers are targeted to address national security risks, they will also capture foreign investment into and from milling companies because of the extremely broad definition of 'national security business' (NSB) through the cross-reference to the *Security of Critical Infrastructure Act 2018 (SCI Act)*.

Specifically, our interpretation is that those milling companies who hold a 10% or greater interest in Sugar Terminals Limited (STL) will be considered a NSB. STL is a company which holds interests in assets at the ports of Cairns, Mourilyan, Lucinda, Townsville, Mackay and Bundaberg. The Ports of Townsville and Cairns are both designated critical ports under the SCI Act. Any milling company that holds an interest of 10% or more in STL will be deemed to be a 'direct interest holder' (as that term is defined in the SCI Act) in a critical infrastructure asset, and as such those milling companies (as well as STL) will be deemed to be NSBs under the new FIRB rules.

In an environment where foreign investment into Australian milling businesses is necessary for the success of industry, this would appear to be an unnecessary additional administrative burden with no apparent risk to Australia's national security.

In relation to (3), the fees for acquisitions of interests in agricultural land now represent an approximate 0.6% tax on foreign investment. To this end, ASMC does not support using the fee structure as a policy tool. Rather these charges should be based on cost recovery and a maximum fee of \$500,000 cannot reasonably be considered cost recovery.

Furthermore, the requirement to capture the value of all farm assets when calculating the final value of the acquisition (associated with the requirement for example to count tractors through to irrigation pipes and buildings) regardless of whether these ancillary assets are wanted, are usable, will be retained, or will be replaced is considered anomalous.

The strict requirement for acquisitions to be subject of an 'open and transparent' sale advertising process, with the asset of interest advertised prominently for a full month to allow interested Australian entities an option to acquire ahead of the foreign entity is also problematic and creating the following unintended consequences:

- Inflating asset prices at times beyond commercially reasonable levels once the market becomes aware of the identity of the foreign investor and interest in the acquisition; and
- Foregone economic development in regional Queensland because buyers and sellers are withdrawing (i.e sellers become frustrated with the delayed time frame and withdraw from the process thereby preventing a higher economic utilisation of that land).

The exemption certificate regime is also unhelpful for the following reasons:

- A chicken-and-egg situation is arising where application for an exemption and up-front payment of fees is difficult without the prior identification of a potential acquisition and conduct of some level of due diligence. However, and as above, interest from large multinational millers tends to inflate the sale price of the asset meaning the potential benefits of the acquisition soon dissipate; and
- The requirement for lodgement in advance of 100% of the potential fees (acknowledging the 25% discount as against standard fees) applying to a nominated value of investment under an exemption certificate, regardless of what value of asset is eventually acquired (if any) and with no possibility of recovering any fee overpayment and only a discretion (not an obligation) for FIRB to roll that fee over to subsequent exemption certificates.

Sought changes

To address these concerns we call for the following changes:

- Benign acquisitions in non-sensitive sectors such as sugar are exempted from all of the proposed national security provisions;
- The requirement for an 'open and transparent' sale advertising process be removed;
- Legislated definitions of 'national interest' and 'national security' against which proposed investments are to be measured are provided;
- The fees should not be a tax on investment and should be based on cost recovery; and
- The fees associated with any exemption certificates should be payable retrospectively, or if paid up front, refundable if investments up to the stated limit are not completed under the exemption within a certain time period.

In summary, it is crucial in the face of mill viability concerns and regional economic development and increasing competition for mobile global capital that Australia implements a FIRB regime that is clear and supports decision certainty; is flexible so that higher risk transactions are targeted through careful policy and legislative design; and is streamlined with significantly lower transaction costs.

It should be recognised also that the Queensland Government imposes a 2% annual land tax foreign surcharge which in conjunction with the FIRB charges represents a high and unnecessarily discriminate cumulative cost burden on foreign investors.

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 issues raised in the attached submission.

Yours sincerely

Rachele Sheard

Rachele Sheard
Chief Executive Officer