9 November 2020

Senate Standing Committees on Economics
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Parliament House
Canberra ACT 2600

Sent via email economics.sen@aph.gov.au

RE: Inquiry into *Foreign Investment Reform (Protecting Australia's National Security) Bill 2020* and the *Foreign Acquisitions and Takeovers Fees Imposition Amendment Bill 2020*

The Australian Sugar Milling Council (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 17 sugar mills in Queensland.

The ownership structure of the sector has changed significantly over the past 14 years with the majority of Australia's 23 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.

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

- Certain mills are likely to require direct injections of equity capital to improve financial viability.
- To ensure viability of supply to mills, the milling sector will look favourably to land being purchased and preserved for sugarcane production, including by domestic and foreign investors.
- Certain foreign-owned sugar milling companies may seek to purchase complementary, sugar-related assets including, transport infrastructure or mills.

Due to their 10% or more interest in critical infrastructure assets, a number of foreign-owned, Australian sugar milling companies are considered a 'national security business' and thereby subject to the national security measures contained in the Bill including the 'call in' and 'last resort' powers. Therefore all may be impacted by the changes in fees and penalties that are proposed in the regulations.

Our concerns

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

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

- Sufficient operating capital to undertake $200 million in essential annual mill maintenance, thereby promoting confidence to growers in the capacity of the factories they supply.
- Continued diversification and regional development opportunities (principally co-generation and ethanol).
- Significant socio-economic benefits. An independent analysis commissioned by ASMC in early 2019 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 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 (i.e. FIRB fees) based on cost recovery (especially for benign acquisitions in non-sensitive sectors where the national security risks are low).
(4) Has a penalties regime commensurate to the risks.

In relation to (1), a review of the Law Council's submission to the Treasury consultation process on the draft legislation states that the "regulations are complex and difficult pieces of legislation", there is "confusion across investors, advisers and bureaucrats", and "the proposed legislation continues and expands upon the complexity".[1]

In relation to (2), of particular concern is that under the proposed rules, the Treasurer can call-in and review proposed transactions that are not reviewable or notifiable under current and proposed measures, and furthermore, can review a previously approved action where circumstances have materially changed and seek divestments or other arrangements (i.e. last resort). Whilst it is apparent that these powers are targeted to address national security risks, they will also capture milling companies because of the new national security business rules and - despite being low risk transactions - will create investment uncertainty and indecision.

In relation to (3), a review of the proposed fees finds that the increases are material, for example the maximum fee amount moving from $107,100 to a new upper limit of $500,000 and potentially $1,000,000 (to be confirmed). The change to the calculation of agricultural land from highest value title to the consideration of the proposal (based on a proposed new $2 million fee constant) is of particular concern and would see costs

[1] https://www.lawcouncil.asn.au/resources/submissions/major-reform-of-the-foreign-investment-review-framework (page 6)

increase from around $2,000 to $118,800 for a $20 million land acquisition[2]. It is difficult to ascertain how even with the most diligent checks and reviews than an application would be this costly to administer. To this end, ASMC does not support using the fee structure as a policy tool – rather these charges should be based on cost recovery.

In relation to (4), the proposed Reforms will significantly increase the penalties for non-compliance across fines (for example, with some increasing from $277,500 to the greater of $11,100,000 or 75% of the investment capped at $555,000,000) and criminal penalties increasing from a maximum three years imprisonment to 10 years imprisonment. We do however note the inclusion of some provisions to provide FIRB with greater flexibility so that the penalties can be commensurate with the offences.

Sought changes

The ambiguity and complexity in the drafting of key terms coupled with the higher penalties could result in investors having little choice but to lodge FIRB applications for most, if not all transactions. Of greater concern is that any delay in processing applications coupled with the significant fee increases and uncertainty associated with the call-in and last resort powers may dissuade applications being made in the first place.

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.
- Clearer drafting to remove ambiguity with key concepts such as national security and what is a national security business.
- Changes to the proposed fees structure such that the proposed $2 million fee constant is increased to $50 million to bring it in line with commercial land.
- Penalties are commensurate to the risk to the national interest and offence.

In summary, it is crucial in the face of 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; is streamlined with low transaction costs; and that penalties are commensurate to the risk to the national interest and offence.

Please don't hesitate to contact David Rynne, Director Policy, Economics & Trade on [redacted] or [redacted] for further clarification on the issues raised in the attached submission.

Yours sincerely

[redacted]

David Pietsch
Chief Executive Officer

[2] https://treasury.gov.au/sites/default/files/2020-09/c2020-113460-Fee_Regs_Explanatory_material.pdf (page 10)