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Submission to the Federal Government's review of the Foreign Investment Framework.

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Dear Manager,

Consolidated Pastoral Company [CPC] welcomes the opportunity to participate in this review of the Government's foreign investment framework.

CPC notes the Secretary to the Treasury undertook an evaluation of the operation of the foreign investment reforms, which came into effect on 1 January 2021, to determine whether the right balance is struck between welcoming foreign investment and protecting Australia's national interests.

CPC notes the evaluation found that the reforms have achieved the Government's stated policy objectives, but that ongoing monitoring of the framework should occur to ensure it keeps pace with developments in the foreign investment landscape.

The evaluation identified several areas where there is scope for further improvements to the framework.

It also noted that the Treasury will seek to develop additional public performance reporting to increase the overall transparency of its operations.

CPC welcomes this approach and notes further refinements are be undertaken in two tranches:

- Tranche 1: an initial package of regulatory amendments to the Foreign Acquisitions and Takeovers Regulation 2015 (the FATR) to support reducing the regulatory burden on investors; and
- Tranche 2: developing a broader package of legislative and regulatory reforms for implementation in the second half of 2022.

We have lodged a submission in relation to tranche one.

The following is our submission in response to tranche two.

Yours sincerely,

Troy Setter

CEO, Consolidated Pastoral Company

Tranche 2 Reforms

Broader legislative and regulatory reforms

The discussion paper advises that a further package of reforms to be pursued in the second half of 2022 will focus on ensuring "Australia's foreign investment framework continues to strike a balance between facilitating investment and protecting the national interest (including national security)."

It states:

"To achieve this, the Government is seeking views for further reform options that would clarify, liberalise, simplify and where required strengthen parts of the framework."

CPC welcomes this commitment to ongoing reform and offers the following comments.

Areas to reduce regulatory burden.

The consultation Paper refers to finding six of the Evaluation noting the importance of continuing to explore options to refine the foreign investment framework to better facilitate foreign investment while safeguarding the national interest and national security.

It notes stakeholders suggested further changes to clarify, liberalise and simplify the framework.

For example:

- expanding the types of transactions that can be voluntarily notified (like the treatment of reviewable national security actions) or allowing some investments to be notified but not approved (like a notifiable action that is not a significant action);
- exempting subdivisions and amalgamations of land where investors already hold an interest in the land that is being subdivided or amalgamated, and their overall interest would not change.

CPC wishes to respond to consultation question 1.3 on page 5 of the Consultation paper:

- Other opportunities to simplify the foreign investment framework or reduce the regulatory burden while maintain safeguards.

CPC is of the view these FIRB application fees are excessive.

We note from the evaluation report some stakeholders considered the fee revenue collected was not proportionate to the cost incurred by foreign investment regulating agencies in administering the regime.

We note this point was also made by the Government's key independent economic advisory agency - the Productivity Commission [PC].

The PC report "Foreign Investment in Australia" dated June 2020 states:

"Application fees … rose much more rapidly for investments in agricultural land and agribusiness than for general business investment applications. and

"High barriers to foreign investment in agriculture increase investor costs and are likely to reduce economic activity, jobs and growth prospects in regional communities."

It was for this reason that, in 2016, the Commission recommended that the Government should align fees with administrative costs.

We also note the Government's own cost recovery guidelines which state:

"The Australian Government's overarching cost recovery policy is that, where appropriate, non-government recipients of specific government activities should be charged some or all the costs of those activities."

The cost recovery policy promotes consistent, transparent and accountable charging for government activities and supports the proper use of public resources.

In CPC's view the current system does not pass any of those tests.

Further, in our direct experience foreign capital plays a critical role in addressing a shortfall in domestic capital.

Excessive fees discourage potential foreign buyers, decrease competition in the rural property market and drive down the capital wealth values of Australian farming family farms, their borrowing capacity and their prosperity.

<u>Investments requiring greater scrutiny</u>

Rural Water entitlements

The consultation paper identifies one issue that it states warrants consideration for greater scrutiny – the foreign acquisition of rural water entitlements.

These acquisitions are generally not subject to foreign investment screening, unless tied to a land or business transaction that requires foreign investment approval.

These acquisitions do however need to be reported to the Government's Register of Foreign Ownership of Water Entitlements (the Water Register).

The paper says as other regulatory regimes update their treatment of assets like water entitlements accordingly, it is timely to consider whether acquisitions of rural water entitlements or other areas should be subject to greater scrutiny under the foreign investment framework.

For example, the Australian Taxation Office is investigating whether water entitlements are taxable Australian real property under Division 855 of the Income Tax Assessment Act 1997, and therefore whether they are subject to Australia's capital gains tax regime

In response to question 2.1- whether foreign investors should be required to obtain foreign investor approval before acquiring rural water entitlements and, if so, how this new policy should be designed CPC notes:

- there is very limited reference to water and foreign ownership in the Evaluation report.
- the Register of Foreign Ownership of Water Entitlements (Water Register) was established to provide greater transparency around foreign ownership of Australia's water entitlements.
- The Register appears to be meeting the Government's policy objectives around transparency of water rights ownership.

Therefore, there does not appear to be a problem identified through this review process that needs to be to be addressed.

However, if the government proposes to require foreign investors to obtain FIRB approval for acquiring rural water entitlements it should ensure the assessment process is both administratively simple and transparent.

That is, not to simply migrate the problems with the existing FIRB processes around to water.

Exemption certificates

Exemption certificates are intended to reduce regulatory burden by enabling foreign investors to obtain up-front approval for a program of lower-risk investments over a specified period, rather than seeking separate approval for each investment.

There are five types of exemption certificates available:

(1) business and entities certificates;

(2) Australian land certificates;

(3) exploration tenements and interests in mining, production and exploration entities certificates;

(4) national security-related certificates; and

(5) passive foreign government investor certificates.

Exemption certificates provide efficiency benefits for investors as well as the Government. However, in recognition that the Government cannot scrutinise the circumstances of each investment made under them, exemption certificates are typically granted subject to defined timeframes, transaction limits and conditions.

Finding five of the evaluation noted that investors would like to maximise the benefits that all types of exemption certificates under the framework can provide.

The Treasury is aware of some investors seeking to expand the terms under which exemption certificates are approved.

For example, some investors have sought:

- larger financial limits;
- greater flexibility, including in scope and permitted purpose;
- longer acquisition periods to execute investments; and
- lower average screening times for exemption certificates.

The Summary Booklet that accompanied the announcement of the recent reforms signalled the introduction of an investor-specific exemption certificate.

Considering the above, there may be opportunities to consider further refinements, including expanding the exemption certificate framework to provide for a more nuanced treatment of investors, such as to specifically exclude certain legislative provisions from applying to a particular investor.

In response to the question as to whether exemption certificates are striking an appropriate balance between facilitating investment and protecting the national interest; including whether the scope, timeframes and financial limits for exemption certificates are appropriately targeted, CPC notes:

- the fees for exemption certificates are based on the fee that would be payable on individual acquisitions of land of that value, less 25% however, the fee is calculated on the maximum value covered by the exemption certificate and does not allow for any refund or adjustment where the full cap it not utilised.

There is instead a note in Guidance Note 10 that 'the Treasurer may consider allowing the remaining amount to be 'rolled over' to a future exemption certificate.

CPC considers this uncertain treatment of fees is inappropriate.

For example, if the exemption certificate covers transactions in aggregate up to $100 million but only $10 million is utilised, there is no opportunity for a refund to reflect the lower transaction value.

This administrative flaw needs to be addressed.

Compliance and enforcement

CPC notes the consultation paper states maintaining strong compliance with Australia's foreign investment framework is a priority for the Government.

It states foreign investors are expected to be aware of, always understand and comply with their obligations under Australia's foreign investment laws.

The evaluation report noted that the Treasury has established new processes and procedures to support the enhanced compliance and enforcement powers provided in the most recent reforms, supported by additional resourcing and staff for its compliance arm of the regime.

Finding four of the evaluation noted that there are opportunities to further refine these compliance and enforcement measures to ensure proportionate and scalable responses are available for any contraventions of the framework.

The consultation paper notes some contraventions – such as failing to comply with record keeping obligations or not providing information when required – can only be responded to administratively or through criminal proceedings, and not via infringement notices and civil penalty provisions.

The consultation paper asks:

- whether the new compliance and enforcement powers ensure proportionate and scalable responses are available for any contravention; and
- whether notification obligations under sections 98C, 98D and 98E are clear and reasonable.

CPC understands that FIRB is in fact using its greater range of penalties to seek to ensure that 'the punishment fits the crime' including remission of penalties in the case of voluntary disclosure of inadvertent non-compliance.

This is particularly important where the complexity of the foreign investment rules result in the most compliant foreign investors encountering areas of uncertainty.

We are advised that it is inappropriate that the notice requirements (positive obligations imposed on investors – see sections 98C(2), 98D(2) and 98(E)(3) are contained in the Civil penalties division and this is likely the cause of the confusion that we understand has been experienced.

We are advised that there should be a specific section imposing those notification requirements (possibly under a heading – “Notification Requirements”) and then the penalty provisions should set out the implications arising from breach of those rules.

In any event, we are advised that it would be appropriate that these notification requirements be highlighted in the body of any no-objection notification (as we understand they generally now are).

<u>Conclusion</u>

CPC thanks the Government, Treasury and FIRB for engaging stakeholders and for responding to problems with the foreign investment framework.

Obviously, the best outcome is the get it right the first time; that saves everyone time and money and we get the desired policy outcome.

But CPC accepts that is not always possible.