Senate Standing References Committee on Rural Affairs & Transport

Inquiry into an examination of the Foreign Investment Review Board National Interest Test

September 2011

Introduction

Cargill

Cargill is an international producer and marketer of food, agricultural, financial and industrial products and services. Founded in 1865, the privately held company employs 130,000 people in 63 countries. Cargill helps customers succeed through collaboration and innovation, and is committed to applying its global knowledge and experience to help meet economic, environmental and social challenges wherever it does business.

Thousands of customers turn to Cargill for innovative solutions across our four major market segments.

> **Agriculture:** We buy, process and distribute grain, oilseeds and other commodities to makers of food and animal nutrition products. We provide crop and livestock producers with products and services. We also trade and distribute cotton and other non-edible agriculture commodities.
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> **Food:** We provide food and beverage manufacturers, foodservice companies and retailers with high-quality ingredients, meat and poultry products, and health-promoting ingredients and ingredient systems.
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> **Financial:** We provide our agricultural, food, financial and energy customers around the world with risk management and financial solutions.
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> **Industrial:** Cargill serves industrial users of energy, salt, starch and steel products. We provide logistics and shipping of commodities. We also develop and market sustainable products made from agricultural feedstocks.

Cargill in Australia

Cargill Australia is a diverse agribusiness employing more than 2000 workers in Australia, with the majority based in rural Australia. Business operations include oilseed processing and further value adding, flour milling, grain and oilseed merchandising/marketing, bulk handling, cattle feedlotting and beef processing.

Cargill established a presence in Australia in 1967 to service the country's large grain exports and has since extended its involvement into several other agricultural industries including oilseed and beef processing and further value adding, flour milling, as well as grain and cotton trading, and grain storage. Currently Cargill sells protein meals and vegetable oils, beef products and cotton lint as well as exporting food ingredients via the Cargill Japan office. In addition to physical products, Cargill businesses offer their customers innovative customer solutions, and Cargill Risk Management offers a range of risk management products for farmers and consumers of commodities.

In the first half of 2011 Cargill Australia completed the acquisition from Agrium of the AWB Commodity Management business. As a result of combining AWB with Cargill Australia, the company now markets Australian wheat, other grains and agricultural products and services to 70 individual customers in more than 40 countries. Through the AWB acquisition Cargill operates a network of 22 storage centres along the east coast and into South Australia. The focus of these operations has been the efficient and cost effective receival, storage and outturn of large quantities of bulk cereals.

In September 2011 Cargill Beef Australia and Teys Bros Investments formed a joint venture company. The new company is a 50-50 joint venture and trades under the name of Teys Australia.

The joint venture includes the assets of both companies' existing beef processing and cattle feeding businesses as well as Teys' tannery and value adding facilities, and Teys' share of its wholesale divisions. The combination of the two beef businesses will consolidate the joint venture company's position as the second largest beef processor and exporter in Australia. The joint venture has the capacity to process 1.5 million head of cattle per year.

The company continues to create distinctive value that has a positive impact on its employees, customers, beef producers and communities, as well as enhancing our overall business performance.

Terms of Reference

An examination of the Foreign Investment Review Board (FIRB) national interest test (the test), including:

(i) how the test was applied to purchases of Australian agricultural land by foreign companies, foreign sovereign funds and other entities in the past 12 months

NA

(ii) how the test was applied to purchases of Australian agri-businesses by foreign companies, foreign sovereign funds and other entities in the past 12 months

Cargill has had recent experience with the foreign ownership test in the last 12 months through its acquisition of the AWB Commodity Management business from Canadian agribusiness company Agrium and its beef processing 50-50 joint venture with Teys Bros.

On the 4 May 2011 Cargill announced it had been informed by the FIRB that the Federal Government has no objections to the proposed acquisition from Agrium of the AWB Commodity Management business. This followed the ACCC's decision on March 17 2011 not to oppose the acquisition.

On the 16 August 2011 Cargill announced it had been informed by FIRB that the Federal Government has no objections to the joint venture between Cargill Beef Australia and Teys Investments. This follows Australian Competition and Consumer Commission (ACCC) decision on 6 July 2011 not to oppose the joint venture.

In our estimation, what constitutes national interest for Australia is not sufficiently defined in the legislation. Cargill understands this lack of definition may be deliberate in order to preserve flexibility to assess the national interest on a case-by-case basis. However, this has created two problems:

(a) uncertainty for foreign investors; and

(b) lack of transparency and public confidence in the assessment process.

These problems have been compounded over the years by the very limited disclosures made by FIRB regarding individual decisions. The fact that notice of a proposal has been given is generally kept confidential, submissions are also generally kept confidential and announcement of a decision is the exception rather than the rule.

Therefore, it is quite difficult to assess just how the national interest is applied.

The only Government information on the application of national interest that Cargill is aware of is as follows:

(a) The Foreign Investment Policy, first issued in June 2010, which sets out at a very high level factors 'typically' considered by the Government in assessing foreign

investment proposals, namely: national security, competition, other Australian Government policies, impact on the economy and the community, and character of the investor.

(b) Press releases which are sometimes issued following a decision (to Cargill's knowledge there has been one press release issued this year and there were three issued last year), typically where conditions are imposed or a proposal is blocked.

(c) *Ad hoc* speeches and other announcements.

The only other information sources are public statements by applicants and the knowledge of legal and other advisors. However, advisors will generally be bound by obligations of confidentiality which limits how much they can tell a client about work previously undertaken for other clients.

Cargill's proposed acquisition of AWB Limited's commodity management business, one of two principal businesses owned by AWB, was announced on 15 December 2011 and formal notice was given to FIRB on 23 December 2010. Earlier, on 3 December 2010, AWB had been acquired by Agrium Inc., a Canadian company, via a scheme of arrangement. Agrium's proposed acquisition was first announced on 24 August 2010 and foreign investment approval was obtained in early October 2010.

We have the following concerns with the process.

Timing – Regarding Cargill's acquisition of the AWB commodity management business it took nearly four and half months to obtain FIRB clearance. We do not believe it should have taken this much time, particularly given that FIRB does not hold public hearings and had only recently approved the Agrium acquisition of AWB. In contrast, the ACCC was able to assess national competition issues and grant informal clearance nearly seven weeks earlier. Cargill is of the view that the current deadlines regarding FIRB applications are sufficient and FIRB should endeavor to meet their current deadlines when assessing applications.

Overlap in competition issues - Many of the issues that FIRB raised regarding the AWB acquisition involved national competition concerns that had already been considered by the ACCC. The ACCC had concluded that Cargill's proposed acquisition would be unlikely to substantially lessen competition and, in doing so, said: "In forming its view the ACCC conducted an extensive public review process which involved consultation with grain growers, competitors, customers and industry groups such as the various farmers' federations and associations."

While FIRB did consult with some industry participants, unlike the ACCC, it did not issue an open invitation for public submissions. We are concerned that FIRB may have given greater credence to a single unsolicited negative submission than would have been the case if FIRB followed a more transparent review process. No undertakings were required by the ACCC, notwithstanding that some market participants raised the same issues that were later raised by FIRB.

The Government has established a comprehensive regulatory framework for national competition issues and invested the ACCC with significant powers and resources with which to consider national competition issues. The ACCC supplements its own internal expertise with information obtained through the open consultation processes

that it typically runs when considering whether a proposed merger may substantially lessen competition.

Consideration of national interest issues would greatly benefit from a more transparent assessment process. A transparent process can still accommodate confidentiality concerns. Foreign investors should be encouraged to engage with FIRB in confidence concerning investment proposals with any open process only initiated after the investor is ready to make a public announcement about the proposal. Mechanisms should exist for applicants and third parties to provide sensitive information in confidence.

Cargill does not believe that prescription by the legislature of what constitutes the national interest is warranted. However, some clarity around the national interest test would provide more transparency and assist foreign investors in making their applications. Cargill accepts that national interest issues will change over time. However, change should occur through a transparent process.

(iii) **the role of the Government, regulators and receivers, including their obligations under the Corporations Act 2001 and/or the Foreign Acquisitions and Takeovers Act 1975, including the role of the Australian Securities and Investments Commission, in upholding the test**

We believe that the role of Government is to promote informed, open discussion of what constitutes the national interest and, ultimately, to determine whether a particular investment proposal is contrary to the national interest. This is best done by the executive arm of Government.

Prescription by the legislature of what constitutes the national interest would be unwieldy and the judiciary is not equipped to make judgments of this nature (although they may have a role in ensuring a fair and open consideration of national interest issues).

It is unclear to us the extent to which FIRB undertakes follow up reviews to ensure that foreign investors act in accordance with the representations they make to FIRB in relation to their intentions. There is a role for FIRB to do this.

We do not see a role for ASIC in upholding the national interest test.

We do not see a role for receivers in upholding the national interest test. The role of a receiver should be to maximise creditor repayments through an orderly realisation of assets. If that may result in a sale of assets to a foreign investor that is contrary to the national interest, it is for the Government to determine what the national interest is and then act to ensure it is not contravened.

(iv) the global food task and Australia's food security in the context of sovereignty

Cargill is committed to advancing food security – it's what we work at every day around the world. Food security exists when all people, at all times, have physical and economic access to sufficient amounts of safe, nutritious and affordable food that meets their daily caloric and nutritional needs and provides the foundation for an active and healthy life.

Food security affects human health and welfare, and economic and political stability around the world. The commodity price spikes of 2008 brought renewed attention to the issue and were a stark reminder that the world can't take food security for granted. The United Nations estimates that more than one billion people suffer from a lack of access to sufficient food today. Every day, almost 16,000 children die from hunger-related causes. Global food production, already under strain from the credit crunch, must double by 2050 to head off mass hunger.

Six dimensions must work together to achieve food security

- **Sustainable production.** For the food system to become more productive, sustainable and reliable, agricultural raw materials need to be grown where resources provide the greatest production efficiency and can be renewed so that production can continue for many years – and then traded to the benefit of all parties.
- **Efficient use of markets.** Markets facilitate price discovery by matching supply and demand. Cargill believes governments should not implement policies that distort markets, and accordingly, harm developing country farmers as well as consumers.
- **Open trade.** For food to move from surplus to deficit areas it needs to be traded, often across international boundaries. Trade helps create jobs, supports local economies, helps raise living standards in all countries and contributes to a more food secure global population.
- **Food safety.** To move food efficiently across borders, standards for food safety need to be consistent and grounded in sound science; international food safety standards should be globally adopted. Transparent and consistent safety risk management systems are needed throughout the supply chain to provide accountability.
- **Investment in agricultural research and education.** Governments should support private sector investment in agricultural technology, increase their own commitment to research and development, and encourage investment in physical infrastructure.
- **Cooperation between the public and private sectors.** Both sectors have roles to play in food security and can achieve more by working together to deal with food security on a long-term basis.

Promoting open trade

Cargill works with governments worldwide to promote the importance of open trade and investment policies to achieve food security goals. We encourage governments to remove harmful barriers to trade and investment such as prohibitively high import taxes, customs and regulatory bottlenecks, application of non-science based standards to imported food and feed, and imposition of equity caps on foreign investment in agriculture. Cargill advocates openly with governments for the removal of trade-distorting production and export subsidies as well.

Public/private partners in food security

Cargill believes that both the public and private sectors have appropriate roles to play in food security and can achieve more by working together. The private sector can be a strong partner with governments and communities to improve food and agricultural systems. Through corporate responsibility and in partnership with other stakeholders,

companies can help governments and communities deal with food security on a long-term basis.

Cargill works with a diverse group of global, national and local organizations to support food security. Some examples include:

- We have a five-year, $10 million partnership with CARE to improve food security for more than 100,000 people.
- We have partnered with the World Food Programme for more than a decade to improve access to food and education for children in South East Asia, Central America and Africa. We have contributed more than $5 million to these programs.
- We have partnered with TechnoServe for more than a decade to help entrepreneurial men and women in poor areas of the developing world build businesses that create income, opportunity and economic growth for their families, their communities and their countries.
- We work with a number of organizations, including the Bill & Melinda Gates Foundation, UTZ Certified and others to improve the lives and increase the incomes of cocoa farmers and their communities in West Africa.
- Cargill employees at locations around the world provide hands-on support to local organizations by making contributions and volunteering in activities that address both immediate needs and long-term solutions to end hunger.

Encouraging government policy that promotes food security

Cargill encourages governments to advance policies that will help the world meet its growing food needs. Specifically, we believe governments must:

- Encourage free market development so that food produced is priced to markets and not set by government. However, governments must still recognize their role in providing safety nets to those unable to buy food in the event of emergencies.
- Encourage open trade in a fair, transparent, rule-based, rigorously enforced system so that food surpluses can reach deficit areas, because self-sufficiency is not the answer to food security.
- Encourage private sector investment in the agricultural and food chain and support clarifying property rights, so that farmers and others in the supply chain have a real stake in improving their longer term situation.
- Champion international food safety standards and their application throughout the supply chain.
- Invest in agricultural research and development and core infrastructure.
- Invest in extension services and farmer training programs.
- Encourage sustainable production by pricing resources properly, including environmental resources like water.
- Allow the quick adoption of new agriculture and food technologies to be used once they meet international standards,

- Support women farmers in rural areas. According to the United Nations Food and Agriculture Organization, rural women produce half of the world's food, and in developing countries, 60 to 80 percent of the food crop is produced by women. Focus on women as farmers is key to achieving food security goals.

(v) the role of the foreign sovereign funds in acquiring Australian sovereign Assets

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(vi) how similar national interest tests are applied to the purchase of agricultural land and agri-businesses in countries comparable to Australia

A key feature of Australia's foreign investment laws is that they apply a negative test - an investment proposal can only be rejected if it is found to be contrary to the national interest. This compares with New Zealand's foreign investment laws which require a foreign investor to establish a benefit to New Zealand (and, in some cases, a substantial and identifiable benefit).

Australia's negative test demonstrates that Australia welcomes foreign investment with foreign investors treated equally with domestic investors. A positive test suggests that foreign investment is not as welcome, that domestic investors are preferred.

The principal focus of assessment by FIRB should be whether a foreign investment proposal is contrary to the national interest. However, where FIRB is concerned that aspects of a proposal may be contrary to the national interest, it should be encouraged to consider other aspects of the proposal that may promote the national interest in order to determine whether the benefits of the proposal may cancel out the disadvantages.

(vii) any other related matters – In conducting this inquiry, the committee should examine ways of improving the transparency of decisions made by the FIRB under the test and all other rules which govern its operation.

Cargill supports transparency regarding the purchase of Australian agribusiness. Cargill is of the opinion that the FIRB decision making process must be timely, transparent and predictable as possible.

Cargill is of the opinion that the Australian Federal Government must continue to consider foreign investment more broadly than just within its borders, since Australian-based companies have desire for an open investment climate overseas. Continued consideration for fairness and providing foreign investors transparent national interest treatment such that capital can flow across borders in a non-discriminatory fashion is welcome.