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Submission on behalf of the Crafar Farms Independent Purchaser Group in relation to the OIO's reconsideration of the application by Milk New Zealand Holdings Limited for consent to acquire the Crafar Farms

1. **Introduction**

- 1.1 As you know, we act for the Crafar Farms Independent Purchaser Group (**CFIPG**), which includes among its members the plaintiffs in the judicial review court proceedings leading to the judgment of Justice Miller dated 15 February 2012.
- 1.2 That judgment confirmed that our clients have a "proper interest" in this matter and that it serves the public interest for our clients to be heard in relation to it.¹ Our clients therefore make this further submission to assist the OIO in its reconsideration of the application by Milk New Zealand Holdings Limited (the **Applicant**). We and our clients are available to provide any further information the OIO may require in relation to the matters covered in this submission.
- 1.3 As the High Court judgment confirms, the assessment of benefits to New Zealand requires a comparison between the benefits likely to accrue under the overseas investment and those benefits which would be likely to accrue if that overseas investment did not occur (the "counterfactual"). The OIO's previous recommendation did not make that comparison, and this submission is therefore focussed on the further evidence and analysis required to assess benefits to New Zealand in accordance with the legal test as set out in the judgment. For that purpose we have set out in section 2 below the legal approach which we believe is required to identify the relevant counterfactual. In section 3 we then explain the steps which our clients will take if they acquire the Farms and the benefits which will arise from that acquisition. In section 4 we analyse the benefits previously identified by the OIO by application of the correct legal test as it has now been determined by the High Court.
- 1.4 On the evidence before the OIO there is no benefit to New Zealand – and certainly no "substantial and identifiable benefit" to New Zealand as required by the Overseas Investment Act 2005 (the **Act**) – arising from the Applicant's proposed overseas investment. Every benefit recognised by the OIO is a benefit which is likely to arise whether or not the Applicant acquires the Farms. In our view, therefore, the OIO is required to recommend to the Ministers that the overseas investment does not satisfy the test in section 16(1)(e) of the Act and that consent should be declined.

¹ At [51].

- 1.5 We have shaded in yellow commercially confidential material and request that those sections of this submission be treated by the OIO as confidential. Appendix 2 is also confidential.

2. The correct legal approach to counterfactual analysis

- 2.1 As the judgment correctly observes, the Crafar Farms will inevitably be sold to someone and the Act requires an assessment which compares the benefits arising from the proposed overseas investment with the position which is likely to arise if the farms are acquired by some other person. In particular, the Court held at [57]:

The error [of approach by the OIA] was not a mere technicality. No one suggested that the farms are likely to remain in their present unsatisfactory state, whoever purchases them. Any solvent purchaser can be expected to bring their production up to its potential. That being so, the economic benefits caused by the overseas investment were materially overstated in the OIO's recommendation.

- 2.2 Identifying the relevant counterfactual requires a fact-based assessment of what is likely to happen absent the acquisition so as to permit a comparison and thus identify those benefits which are truly caused by the overseas investment. This analysis is routinely conducted by the Commerce Commission and the courts in Commerce Act cases and those authorities therefore establish the correct approach to be applied to a benefits analysis under the Act.
- 2.3 In *Commerce Commission v Woolworths Ltd & Ors* (2008) 12 TCLR 194, the Court of Appeal described analysis of the counterfactual as being "elementary" to resolution of the equivalent tests under the Commerce Act.² The *Woolworths* case also highlights the importance of correct counterfactual identification and assessment. The High Court's decision on competitive effects differed from the Court of Appeal's because each court had a different view as to the relevant counterfactual.
- 2.4 The Commerce Commission describes the correct approach in its Mergers and Acquisitions Guidelines:³

In framing a suitable counterfactual, the Commission bases its view on a pragmatic and commercial assessment of what is likely to occur in the absence of the proposed acquisition.

- 2.5 This assessment and definition of the counterfactual is not an intuitive judgement⁴, but rather a commercial and pragmatic assessment based on the evidence. This was reinforced by the Court of Appeal in *Woolworths*:⁵

We take the view that what constitutes a substantial lessening competition must in the end be a matter of judgment, although we accept, of course, that such a judgment must be informed by as much practical evidence as possible.

- 2.6 What is abundantly clear from these authorities is that the Act requires a careful and thorough analysis based on evidence. It is not sufficient to simply identify a counterfactual at some aggregate level (for example, a New Zealand purchaser) and then proceed based on


² At [4].

³ Commerce Commission *Mergers and Acquisitions Guidelines*, p 21.

⁴ See *Commerce Commission v Woolworths* at [101]: "The decision to grant or refuse a clearance is necessarily to be made on the basis of all the evidence". In Commerce Act cases the Court of Appeal has said that decision makers need to draw on a careful examination of the available evidence rather than to speculate and rely on intuition. See the discussion in *Godfrey Hirst* at [96]-[97].

⁵ At [191].

intuition as to what might happen in that counterfactual. Rather, the OIO must assess the evidence available to it and look at each of the particular benefits claimed and inquire as to whether that benefit would arise absent the overseas investment.⁶ A failure to undertake that factual inquiry and analysis is a failure to apply the statutory test and therefore an error of law.

3. **The relevant counterfactual in this case is an acquisition of the Crafar Farms by the CFIPG or some equivalent New Zealand purchaser**
- 3.1 The relevant comparison in this case involves an acquisition of the farms by the CFIPG, or by some equivalent New Zealand purchaser. The offers made by the CFIPG are:
 - (a) On 20 September 2011, the CFIPG offered to acquire the Crafar Farms for a purchase price of \$171,500,000.00 subject to normal due diligence conditions. A copy of that offer is annexed as **Appendix 1**.
 - (b) 
- 3.2 These are serious offers by credible parties. As far as our clients are aware, their offer to acquire the Crafar Farms is the highest offer made by any New Zealand buyer. Certainly they are not aware of any higher offer and no evidence has been produced by the receivers to suggest that there has been a higher offer.
- 3.3 Upon acquisition of the Farms, the CFIPG members intend to own and operate the Farms as follows:
 - (a) The CFIPG is a consortium of experienced New Zealand farmers. They will invest in the farms with the intention of operating the farms to the highest standards, both in terms of productivity and environmental sustainability. The consortium members will individually own separate farms (i.e. they will not be owned jointly by the consortium members).
 - (b) The CFIPG's budgeted capital expenditure over the first three years of operation of \$18 million. This is in addition to any further shares in Fonterra which would be acquired as a consequence of increased production.
 - (c) The capital expenditure and resulting increased production will result in an increase in employment levels (both by permanent staff and contractors) by 13 to 14 additional employees. This increase is assessed by comparing the current staffing ratio of the farms to the average levels for fully productive farms and by applying the industry standard staffing ratio of one full time equivalent employee per 250 dairy cows. In addition, there will be significant short term employment created through the initial period of capital expenditure.
 - (d) The CFIPG members forecast increased productivity and performance in the range of 25-30%. This forecast is based on the CFIPG members' direct experience and the analysis they conducted for the purposes of making their offers to acquire the Farms.

⁶ An example of the analysis required arose in the recent High Court decision in *Godfrey Hirst v Commerce Commission* (High Court Wellington, CIV-2011-485-001257 per Mallon J and Ms Vautier). See in particular [123], [125] and [313].

- (e) In all likelihood, the CFIPG will also operate the Farms through the continuation of sharemilking arrangements rather than by the employment of farm managers. This provides sharemilkers with the opportunity to develop their own dairy farming and business skills and resources as a pathway to dairy farm ownership. This model has for several generations been the basis for the success of the New Zealand dairy industry, as is exemplified by the dairy farming history of the majority of members of the CFIPG.
- (f) The CFIPG are committed to environmentally responsible and sustainable farming practices and to the protection and enhancement of historic heritage. While these are values shared by all members of the consortium, for the iwi entities within the consortium they are matters of particular significance. As Parliament has recognised in the preamble to the Te Ture Whenua Maori Act 1993:

... it is desirable to recognise that land is a taonga tuku iho of special significance to Maori people and, for that reason, to promote the retention of that land in the hands of its owners, their whanau, and their hapu, and to protect wahi tapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whanau, and their hapu ...

- (g) The reliability of the productivity and employment forecasts discussed above is illustrated by the prior acquisition by Baytown Investments Limited of the Broadlands Farm, which is a 550 hectare dairy farm in Reporoa. This farm was acquired from receivers in June 2011. Over \$2 million has been spent on capital expenditure and productivity and performance are on-track to improve by 85% in the first year. Staff numbers have increased from three full time equivalent positions to five full time equivalent positions, and there is likely to be a further increase to six full time equivalent positions in the 2012-2013 season.
- 3.4 This therefore provides the basis for the relevant counterfactual.⁷ It should be noted however that substantially the same position is likely to arise under a sale to any other likely New Zealand purchasers.
- 3.5 If the OIO requires any further evidence of our clients' commitment and ability to carry out any of those steps, or requires any further information about their intended management and operation of the Farms, we are happy to arrange for that to be provided to you.
- 3.6 Indeed, we consider that further inquiry will be necessary to ensure that the assessment is properly informed by available evidence as the Court of Appeal emphasised in the *Woolworths* case. This is particularly so given that the OIO's initial inquiry into this matter was based on an incorrect appreciation of the legal test and did not therefore involve inquiry into the counterfactual, including any exercise in gathering or assessing evidence as to the relevant counterfactual.

4. **Analysis of benefits**

- 4.1 Section 16(1)(e)(iii) of the Act requires that the benefit to New Zealand must be "substantial and identifiable". It follows that benefits which do not meet that threshold – because the degree of benefit is not "substantial" or because the nature or certainty of the benefit means it is not "identifiable" – should be disregarded for the purposes of the analysis.
- 4.2 Section 34(3)(a) of the Act provides for the OIO to be directed by the Minister as to the "relative importance of different criteria or factors" in the Act. Paragraph 8 of the Ministerial

⁷ Some further specific information about the counterfactual position is included in section 4 below in the course of addressing specific benefit categories.

directive letter dated 8 December 2010 directs that the factors identified in sections 17(2)(a)(i)-(vi) and regulations 28(i) and (j) are of "high relative importance".

- 4.3 We set out below a counterfactual analysis of each of the relevant factors for which the OIO identified a benefit to New Zealand in its recommendation and identify those factors which, as a consequence of the Ministerial directive letter, are of high relative importance. We have omitted from this analysis those factors in respect of which the OIO has already found there to be no relevant benefit.

s17(2)(a)(i)

Will the overseas investment result in, or is it likely to result in, the creation of new job opportunities in New Zealand or the retention of existing jobs in New Zealand that would or might otherwise be lost?

This factor is of high relative importance

The benefit claimed

- 4.4 The OIO identified two new jobs associated with an on-farm training facility, a small number of new jobs resulting from an increase in productivity of the farms, and an unquantifiable number of short term employment opportunities arising from investment in new housing, fencing, fertilising and other farm infrastructure. The OIO was also satisfied that existing jobs would be retained.

The relevant counterfactual

- 4.5 With the possible exception of the two jobs associated with the on-farm training facility, all of the new and retained jobs would arise as a direct consequence of increasing the farms' productivity.
- 4.6 A rational New Zealand purchaser will have the same incentive as the Applicant to make the farms productive. There is no evidence to suggest that the Applicant would be more successful at this than a domestic purchaser. Accordingly, the benefits arising from increased productivity will arise whether or not the Overseas Investment proceeds.
- 4.7 A New Zealand purchaser will also have to provide on-farm training for its employees. This is a normal function of farm management and the training of junior employees is part of the job responsibility of more senior employees.

Is there a substantial and identifiable benefit arising as a consequence of the overseas investment?

- 4.8 The only possible benefit attributable to the Applicant's proposed overseas investment is the portion (if any) of the employment of the two on-farm trainers that would not otherwise be required as part of the training of employees on the farms. There is no reason to believe (and none has been given to the OIO) that the allocation of training to dedicated trainers will increase the overall employment on the farms. The more likely consequence is that it will reduce the training responsibilities of other employees and therefore reduce the required number of other employees by an equal number.
- 4.9 All of the other benefits flow axiomatically from the increased productivity of the farms, which would also occur under the counterfactual and which are not therefore a benefit attributable to the overseas investment.

s17(2)(a)(iii) Overseas Investment Act 2005

Will the overseas investment result in, or is it likely to result in, increased export receipts for New Zealand exporters?

This factor is of high importance

The benefit claimed

- 4.10 The only relevant benefit identified by the OIO was the "increased export receipts for New Zealand exporters through the increased production of milk products".

The relevant counterfactual

- 4.11 For the reasons set out above in relation to s 17(2)(a)(i), the productivity of the farms will be increased to at least the same extent whether or not the Applicant's proposed overseas acquisition proceeds. This is also the point made at paragraph 57 of the High Court's judgment (quoted above at paragraph 2.1.)

Is there a substantial and identifiable benefit arising as a consequence of the overseas investment?

- 4.12 The Overseas Investment does not cause any substantial or identifiable benefit because increased production will arise equally in the counterfactual.

s17(2)(a)(iv) Overseas Investment Act 2005

Will the overseas investment result in, or is it likely to result in, added market competition, greater efficiency or productivity, or enhanced domestic services, in New Zealand?

This factor is of high relative importance

The benefit claimed

- 4.13 The only relevant benefit identified by the OIO was that "overseas investment is likely to result in greater efficiency or productivity ... which will result in an improved use of the farms when compared against the current receivership position."

The relevant counterfactual

- 4.14 The OIO notes in its recommendation that the Applicant's partnership with Landcorp makes it more likely the claimed increases in productivity will occur. We understand this to mean that the Applicant would be less likely to make the farms productive without Landcorp's involvement. This may be correct, but it is irrelevant to a proper counterfactual analysis. In the counterfactual, any rational New Zealand purchaser is also likely to have the skills necessary to manage the farms successfully. Accordingly, for the reasons set out above in relation to s 17(2)(a)(i), the productivity of the farms will be increased in the same way whether or not the Applicant's proposed overseas investment proceeds.

Is there a substantial and identifiable benefit arising as a consequence of the overseas investment?

- 4.15 The Overseas Investment does not cause any substantial or identifiable benefit because increased production will arise equally in the counterfactual.

s17(2)(a)(v) Overseas Investment Act 2005

Will the overseas investment result in, or is it likely to result in, the introduction into New Zealand of additional investment for development purposes?

This factor is of high relative importance

The benefit claimed

- 4.16 This factor is concerned with the introduction into New Zealand of additional investment for development. The OIO has treated as such a benefit the Applicant's proposed capital expenditure (beyond the initial purchase price).

The relevant counterfactual

- 4.17 A rational operator will commit more capital where there is a benefit from doing so, i.e., where the buyer expects to earn a return in the form of profits.
- 4.18 The relevant counterfactual here is an acquisition by a New Zealand buyer (or buyers) who will have the same economic incentive to invest capital as the Applicant or any other overseas buyer. It can therefore be assumed that the same level (or a higher level) of additional investment will occur in the counterfactual.

Is there a substantial and identifiable benefit arising as a consequence of the overseas investment?

- 4.19 The only capital which could truly be said to be "introduced into New Zealand" as a consequence of the overseas investment would be that amount (if any) which genuinely represents money moved from overseas to New Zealand for the purpose of investment. If the capital expenditure is funded by profits generated from the Farm operations (and/or by borrowings in New Zealand) then it does not involve the *introduction into New Zealand* of additional investment. Rather, that is simply retaining in New Zealand operating profits of the farms and reinvesting those as capital expenditure, which will occur equally in the counterfactual.
- 4.20 A similar issue was considered by the Commerce Commission in the *Air New Zealand/Qantas* authorisation case. In that case Qantas proposed to invest \$550 million in buying 22.5% of Air New Zealand. In its draft assessment of benefits and detriments, the Commission treated the profits Qantas would earn from Air New Zealand and repatriate as a detriment to New Zealand, and therefore as a sum to be deducted from the benefits. The Applicants in that case argued it was inconsistent for the Commission to count Qantas's profits as a detriment to New Zealand given that Qantas had bought the holding, which one could assume would reflect the future flow of discounted profits.⁸ The Commission agreed that it is inconsistent to treat the profits as a detriment and yet to ignore the initial capital injection as a benefit and in its final determination it therefore ignored both as they were

⁸ Commerce Commission Decision 511: *Air New Zealand and Qantas Airways* at [1030].

neutral – i.e., the capital injection reflected an expectation as to future capital flows.⁹ The High court accepted this approach.¹⁰

- 4.21 This approach is also consistent with the OIO's original decision which ignored as a benefit the price paid to the vendor.¹¹
- 4.22 It is therefore necessary under this category for the OIO to analyse and determine whether the budget forecasts provided by the Applicant show that over the medium term there is a net introduction of investment into New Zealand. This should be assessed over a reasonable period – say, the first five years of overseas ownership – by comparing the total capital investment proposed by the Applicant to the total profits to be generated by the Farms.
- 4.23 There is no benefit in this category if the capital expenditure is itself funded (or exceeded) by operating profits from the farms (to be assessed over the medium term) because there is then no "introduction into New Zealand" of additional investment.

s17(2)(a)(vi) Overseas Investment Act 2005

Will the overseas investment result in, or is it likely to result in, increased processing in New Zealand of New Zealand's primary products?

This factor is of high relative importance

The benefit claimed

- 4.24 The only benefit identified by the OIO was that "an increase in production will result in increased processing of primary product in New Zealand as the extra milk produced cannot practically be exported in an unprocessed state."

The relevant counterfactual

- 4.25 The increased processing of primary products flows directly from the increased production of those primary products. For the reasons set out above in relation to s 17(2)(a)(i), the farms are likely to be made more productive whether or not they are sold to the Applicant.

Is there a substantial and identifiable benefit arising as a consequence of the overseas investment?

- 4.26 The Overseas Investment does not cause any substantial or identifiable benefit, because the only identifiable benefit would accrue whether or not the Overseas Investment took place.

⁹ Decision 511 at [1055]

¹⁰ *Air New Zealand v Commerce Commission* (2004) 11 TCLR 347 at [316].

¹¹ The correctness of that approach was confirmed in the High Court judgment at [20].

s17(2)(b)-(c) Overseas Investment Act 2005

Are there, or will there be, adequate mechanisms in place for protecting or enhancing existing areas of significant indigenous vegetation and significant habitats of indigenous fauna?

Are there, or will there be, adequate mechanisms in place for protecting or enhancing existing areas of significant habitats of trout, salmon, protected wildlife and game, and providing, protecting or improving walking access to those habitats?

The benefit claimed

4.27 The Applicant commissioned ecological reports from Wildland Consultants for four of the 16 farms. Those reports recommended certain protective and enhancement measures for those farms. The Applicant discussed these with the Department of Conservation and agreed to implement some of those recommendations. These are the benefits the OIO has identified under these sections. Those agreements were:

- (a) Taharua Farm: An agreed plan to protect riparian stream margins through stock proof fencing.
- (b) Ferry View Farm: The agreed plan includes stock exclusion fencing, restoration of a wetland area, and researching a possible whitebait spawning habitat.
- (c) Tiwhaiti Farm: The Department of Conservation thinks it unlikely that there would be significant areas of indigenous vegetation or significant habitats on this farm, but nevertheless would prefer a precautionary approach. It therefore reached agreement with the Applicant for measures including fencing, surveying fish numbers and weed and pest control.
- (d) Plateau Farm: The Department of Conservation supported the recommendations made in the Wildland Consultants Report and the Applicant agreed to adopt them.

The relevant counterfactual

4.28 It is necessary to make the comparison by reference to the same four farms:

- (a) Taharua Farm: This farm would be acquired by the Tauhara hapu Trust. Over many years the Tauhara hapu Trust has participated with various government departments to establish programmes to protect the land in this area, including by working with the Department of Conservation to halt the degradation of the Mohaka River by more careful management of the Mohaka catchment. The Tauhara hapu Trust is acutely aware of the importance of the Mohaka and would implement plans to protect riparian stream margins through stock proof fencing and by any other reasonable means. They will also commit to negotiating in good faith for the placement of Nga Whenua Rahui covenants for the protection of any relevant parts of the land as may be appropriate. The Tauhara hapu Trust has been and will continue to be a champion of these environmental measures.
- (b) Ferry View Farm: This farm would be acquired by [REDACTED]. As a lifelong responsible dairy farmer with a close connection to the land, [REDACTED] is committed to implementing any reasonable measures to protect the land and would be willing to negotiate the same with the Department of Conservation in good faith.

- (c) **Tiwhaiti Farm:** This farm would also be acquired by [REDACTED]. As noted above, [REDACTED] has an established record of sound environmental practices and would be willing to commission an environmental report and to negotiate in good faith with the Department of Conservation to establish responsible protection measures for the land.
- (d) **Plateau Farm:** This would be acquired by [REDACTED], controlled by [REDACTED]. [REDACTED] also has an outstanding environmental farming record at [REDACTED] and is committed to and supports all reasonable protection measures for the land. [REDACTED] is also willing to commission an environmental report and negotiate responsible protection measures in good faith.

Is there a substantial and identifiable benefit arising as a consequence of the overseas investment?

- 4.29 The protection measures offered by the Applicant are very likely to be realised (or bettered) even if the Overseas Investment does not proceed. The likely New Zealand acquirers of the land all have established records of commitment to responsible farming and land conservation practices and are willing to negotiate with the Department of Conservation in good faith to reach agreement on appropriate protections for the farms.

s17(2)(d) Overseas Investment Act 2005

Are there, or will there be, adequate mechanisms in place for protecting or enhancing historic heritage within the relevant land?

The benefit claimed

- 4.30 The OIO recognised benefits through:
- (a) the Applicant's commitment to use "reasonable endeavours" to reach agreement with the Office for Treaty Settlements to sell to the Crown the Nga Heranga pa site on the Benneydale Farms; and
- (b) the Applicant's agreement to enter into a heritage covenant in respect of the pa site on the Tiwhaiti Farm.

The relevant counterfactual

- 4.31 The Benneydale Farms are to be acquired by the Tiroa E and Te Hape B Trusts, which are ahu whenua trusts constituted under the Te Ture Whenua Maori Act 1993. Those Trusts are the most appropriate guardians of the Nga Heranga pa site and the Trusts would allow full access to the pa site and protect this by special Land Covenant. The Trusts would also encourage Wananga education imparting the history of the Nga Heranga pa site as the place of Nga Rereahu.
- 4.32 The Tiwhaiti Farm is to be acquired by [REDACTED] and it will enter into a heritage covenant for the pa site.

Is there a substantial and identifiable benefit arising as a consequence of the overseas investment?

- 4.33 There is no benefit arising from the overseas investment which does not also arise in the counterfactual.

s17(2)(e) Overseas Investment Act 2005

Are there, or will there be, adequate mechanisms in place for providing, protecting, or improving walking access over the relevant land, or a relevant part of that land, by the public or any section of the public?

The benefit claimed

- 4.34 The benefits recognised by the OIO in this category largely repeat those discussed in relation to s17(2)(b)-(c) above and the submissions made in relation to that section are therefore repeated. The OIO also refers specifically to measures to facilitate walking access to two farms, namely the Benneydale Farm and Taharua Station.

The relevant counterfactual

- 4.35 In relation to the Benneydale Farm, the Tiroa E and Te Hape B Trusts propose to allow full and unimpeded walking access across the portion of the Te Araroa (Length of New Zealand) Trail crossing the farm's land and will allow full and unimpeded access across that part of the National Cycle Trail crossing the farm's land.
- 4.36 Taharua Station is to be acquired by the Tauhara hapu Trust which will allow walking access along Taharua River and to Te Rere Falls on terms to be negotiated with the New Zealand Walking Access Commission in good faith. The Tauhara hapu Trust already owns the land adjoining the Taharua Farm and therefore public walking access will be improved and broadened through linking the contiguous access-ways over the adjoining properties.

Is there a substantial and identifiable benefit arising as a consequence of the overseas investment?

- 4.37 There is no benefit arising from the overseas investment which does not also arise in the counterfactual.

r28(a) Overseas Investment Regulations 2005

Will the overseas investment result in, or is it likely to result in, other consequential benefits to New Zealand (whether tangible or intangible benefits (such as, for example, additional investments in New Zealand or sponsorship of community projects)?

- 4.38 The matters identified as benefits under this factor have already been addressed in the course of addressing other matters above.
- 4.39 One further benefit identified by the OIO under this factor was that the Applicant would "assist Landcorp to extend its business to, and market its products in, China." This is not a relevant benefit attributable to the Applicant's proposed overseas investment because:
- (a) The Maori entity Awhenua Group is already in discussions with Chinese companies and other overseas parties to market dairy products in China and elsewhere. The iwi members of the CFIPG are members of the Awhenua Group and therefore the benefit of extended business links to China will also arise in the counterfactual.
 - (b) In any event, Landcorp is not an exporter of dairy products. It is therefore unclear how an investment by the Applicant in New Zealand dairy farms could assist Landcorp to "market its products" in China. At best this is speculative and fails to meet the threshold of a substantial and identifiable benefit.

r28(f) Overseas Investment Regulations 2005

Will the overseas investment give effect to or advance, or is it likely to give effect to or advance, a significant Government policy or strategy?

The benefit claimed

- 4.40 The OIO recognised the benefits of “supporting the efforts of business to connect internationally” and furthering the goals of the Dairying and Clean Streams Accord through riparian fencing on some farms.

The relevant counterfactual

- 4.41 The CFIPG are committed to environmentally sustainable farming and there is no evidential basis to conclude that the Applicant will achieve the objectives of the Dairying and Clean Streams Accord to any greater extent than the CFIPG or any other New Zealand buyers.
- 4.42 Moreover, the acquisition of farmland by iwi entities will itself advance significant Government policies. We have noted above the statutory recognition that land is a taonga tuku iho of special significance to Maori and this interest is clearly advanced in the counterfactual but is defeated if the Farms are sold to the overseas Applicant.

Is there a substantial and identifiable benefit arising as a consequence of the overseas investment?

- 4.43 Government policy objectives will be advanced to a greater degree in the counterfactual than through the Applicant’s proposed overseas investment and this cannot therefore be a relevant benefit of the Applicant’s proposed overseas acquisition.

r28(i) Overseas Investment Regulations 2005

Will New Zealand’s economic interests be adequately promoted by the overseas investment?

The benefit claimed

- 4.44 Regulation 28(i) of the Overseas Investment Regulations 2005 requires the OIO to consider whether New Zealand’s economic interests will be adequately promoted by the overseas investment, including, for example, matters such as all or any of the following:
- (i) whether New Zealand will become a more reliable supplier of primary products in the future:
 - (ii) whether New Zealand’s ability to supply the global economy with a product that forms an important part of New Zealand’s export earnings will be less likely to be controlled by a single overseas person or its associates:
 - (iii) whether New Zealand’s strategic and security interests are or will be enhanced:
 - (iv) whether New Zealand’s key economic capacity is or will be improved.

- 4.45 The OIO considered each of these factors and concluded that:

- (i) The investment would cause a “relatively small” increase in New Zealand’s reliability as a supplier of primary produce in the future. This small benefit of

increased reliability arises solely as a consequence of the expected increase in productivity from the farms.

- (ii) The acquisition would have no impact on the likelihood New Zealand's dairy industry being controlled by a single overseas person.
- (iii) The investment does not raise any strategic or security issues.
- (iv) The investment would cause a "relatively small" increase in New Zealand's key economic capacity. Again, this arises solely as a consequence of the expected increase in productivity.

The relevant counterfactual

- 4.46 This category requires consideration of both positive factors (i.e. factors which actively promote New Zealand's economic interests) and negative factors (i.e. aspects of the Overseas Investment which detract from New Zealand's economic interests).
- 4.47 The two positive factors identified by the OIO (in paragraphs (i) and (iv) above) flow solely from the expected increase in the farms' productivity. Specifically, the relatively small increases in reliability of supply and New Zealand's key economic capacity are the result of increasing the farms' production of dairy products. These benefits will accrue equally in the counterfactual for the reasons discussed above.
- 4.48 In terms of negative considerations, the OIO referred to the Minister of Finance's directive letter about the Government's general policy approach to overseas investments in the land based primary sector. The Minister of Finance identified two specific concerns about overseas investment in the land based primary sector. The first concern related to overseas investment in vertically integrated firms which involve production, processing, and distribution of products from the land based primary sector on a large scale. The second concern relates to the aggregation of farmland by overseas investors which may not be beneficial to New Zealand's economic interests.
- 4.49 Because the counterfactual scenario involves a New Zealand purchaser, none of these negative considerations arise.
- 4.50 The counterfactual therefore involves benefits at least equal to those said to arise from the Applicant's proposed investment, and the potential negative effects of overseas investment in farm land are necessarily avoided in the counterfactual which will see the Farms remain in New Zealand ownership.

Is there a substantial and identifiable benefit arising as a consequence of the overseas investment?

- 4.51 The Overseas Investment does not cause any substantial or identifiable benefit because the only identifiable benefit would accrue with or without the Applicant's proposed overseas investment.

5. Conclusion

- 5.1 The available evidence therefore demonstrates that the Applicant's proposed overseas investment of the Crafar Farms will bring no benefit to New Zealand.
- 5.2 The thrust of the Applicant's submissions to the OIO was that it would increase production beyond receivership levels and that this provided the requisite benefit. Clearly that argument cannot survive a proper counterfactual analysis and so the economic aspects of the benefit

test – which are the majority of those factors which the OIO is directed to treat as matters of high relative importance – are not met.

- 5.3 Equally the non-economic benefits claimed by the Applicant (including ecological, heritage and walking access) will arise to the same extent, or more likely to a greater extent, under New Zealand ownership and, in particular, by the likely acquisition of the relevant Farms by iwi interests.
- 5.4 We and our clients are available to provide any further information which the OIO requires in relation to the matters raised in this submission.

Yours faithfully
Bell Gully

David Cooper
Partner