

Australian Property Institute

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3rd February 2013

Land Register Consultations Working Group
Foreign Investment and Trade Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

BY EMAIL: landregisterconsultations@treasury.gov.au

Dear Sir / Madam,

Joint Submission to the Land Register Consultations Working Group Foreign Investment and Trade Policy Division, the Treasury.

The attached submission document refers.

The Australian Property Institute (API) and the Spatial Industries Business Association (SIBA) welcomes the opportunity to be able to make a joint submission on this important matter.

Both The Institute and SIBA are available to further discuss their submission on this matter.

Yours faithfully



David Haythorn
National Director / CEO



AUSTRALIAN PROPERTY INSTITUTE INC.

AND

SPATIAL INDUSTRIES BUSINESS ASSOCIATION LTD.

JOINT SUBMISSION TO

LAND REGISTER CONSULTATIONS WORKING GROUP

FOREIGN INVESTMENT AND TRADE POLICY DIVISION,

THE TREASURY

1st FEBRUARY 2013

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Australian Constitution, s.100

PREFACE

This joint submission to The Treasury has been prepared by the Australian Property Institute (API) and the Spatial Industries Business Association (SIBA) as part of ongoing joint collaborative research efforts and dissemination of factual and dispassionate information about property rights and spatial information in Australia.

This close disciplinary collaboration between the property profession and spatial science professionals has been further strengthened through the preparation of this joint submission to The Treasury. In addition, the API and SIBA record their appreciation for the invaluable and numerous discussions that occurred during the preparation of this submission with members of the joint Submission Committee viz Appendix 3.

The content of this submission does not necessarily represent the views of any member of the joint Submission Committee.

INTRODUCTION

This submission constitutes a response by API and SIBA to the consultation paper entitled *Establishing a National Foreign Ownership Register for Agricultural Land* released by The Treasury in November 2012 for public consultation and input.

The overall need for a National Foreign Ownership Register of Agricultural Land was announced by the Australian Government on 23 October 2012, and subsequently in November 2012 a Consultation Paper was released by the Land Register Consultations Working Group within The Treasury. The Consultation Paper invites submissions on a “range of design and co ordination issues¹” associated with the proposed implementation of the Register. The consultation sought from interested stakeholders is supported by API and SIBA, and in particular it is noted that The Treasury in the Consultation Paper seeks to work with State and Territory Governments regarding how the proposed Register “could interact with existing land registration systems and processes.”²

It is noted with approval that whilst the Australian Government has a recognised interest in foreign investment and land management matters, the six States in particular are recorded in the Consultation Paper as having “primary constitutional responsibility for land management including land titles”³. Hence the various matters addressed in the Consultation Paper reflect a pragmatic recognition of the intergovernmental context of the proposed Register, and The Treasury is to be commended for its attempt to address these concerns given the immensely broad nature of most of issues.

In analysing the content of the Consultation Paper, API and SIBA have formed the view that there are two distinct elements embedded within the various matters canvassed, firstly the definition of foreign ownership and secondly, the crucial definition of which land should be categorised as agricultural land. With this understanding, this submission has been prepared recognising that both elements have a number of aspects that require careful consideration. These aspects are dealt with in the main body of this submission following the brief introductory comments below.

¹ The Treasury (2013) *Establishing a National Foreign Ownership Register for Agricultural Land* Consultation Paper (Canberra: November), 1.

² The Treasury, 1.

³ The Treasury 1.

Importantly, it is noted by API and SIBA with approval that the Consultation Paper in introducing the proposed Register (Page 4) has recognised the jurisdictional aspects arising from the Australian *Constitution* impacting upon the proposed Register. The six Australian states were, until 1901, separate British colonies and they retained individual responsibility at Federation for land management (such as title recording) within each state as this task is not a power specifically vested in the Commonwealth of Australia under the *Constitution*. Management of riverine water is also vested firmly in the states⁴. There has been a reluctance to harmonise the land transfer and titling systems nationally, arguably reflecting the jealously preserved powers of the states at Federation. It is this dysfunctional situation that clearly requires reform to enhance overall efficiency and effectiveness of the proposed Register for the national benefit.

Finally, API and SIBA would be pleased to discuss any of the matters raised in this submission or provide any additional information that may be requested. Arrangements can be made by initially contacting David Haythorn API Chief Executive Officer on telephone number 02 6282 2411, or David Hocking, SIBA Chief Executive Officer on telephone number 02 6282 5793

The following comments adopt the order of content as detailed in the Consultation Paper.

COMMENTS AND RECOMMENDATIONS

The following comments and recommendations have been framed to respond to the sequence of the pages and headings in the Consultation Paper.

Question 1 What should be the scope of a national foreign ownership register for agricultural land, including definitions?

Response:

API / SIBA consider the scope of the proposed Register should be to provide reliable information on direct foreign ownership of agricultural land, water rights and businesses undertaking agricultural activities in Australia.

The issue of definitions is addressed in the response to Question 4.

Question 2 What interests should or should not be included when defining foreign ownership.

Response:

API/SIBA considers as regards “ownership”, leasehold interest in land should also be included. It is noted investment in agricultural land in Australia can also be undertaken through leasehold as pointed out by The Department of

⁴ s.100 Australian *Constitution*.

Agriculture, Fisheries and Forestry in a report in 2011 entitled *Foreign investment and Australian agriculture*⁵

As regards holders of agricultural land leases of 5 years or longer, the holders of these interests should be determined to be owners of the land for the purposes of the Register. It is considered that such interests should therefore include direct foreign ownership of agricultural businesses domiciled in Australia, direct foreign ownership of agricultural land in Australia, and direct foreign ownership of water rights (utilized for agricultural purposes) in Australia.

Question 3 What do you view as the most important data requirements of a national foreign ownership register for agricultural land and why?

Response:

API/ SIBA consider in respect to the Register should be as follows:

1. Foreign ownership of Australian agricultural businesses;
 - The number of foreign businesses.
 - Percentage.
2. Foreign ownership of Australian agricultural land;
 - Area of holding
 - Percentage
3. Foreign ownership of Australian water rights (used for agricultural purposes)
 - Volume of water
 - Percentage

The list of data to be collected must include:

- The owner/owners
- The land ownership, if not a sale transaction (for example lease)
- Date of transaction, either purchase or sale
- Existing primary land use
- Planned primary land use
- Country of ultimate owner
- Contact details
- Transaction value

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Department of Agriculture, Fisheries and Forestry (2011) *Foreign investment and Australian agriculture* (Canberra: November), 23.

The information described above is consistent with the information required under other planning and registration mechanisms and is not unreasonable for a proper understanding of ownership.

Question 4 How do you think the following terms should be defined for a national foreign ownership register for agricultural land and why?

- a) **Agricultural land**
- b) **Foreign ownership**

Response:

- a) Agricultural land

“Agricultural land” means all land that is in agricultural use or has the potential for agricultural use, that has not been zoned or developed for another use or would not be unduly restricted for agricultural use by its size, shape and proximity to adjoining non-agricultural uses.

Agricultural use

“Agricultural use” means use of the land for propagating, cultivating or harvesting plants or for keeping and breeding of animals, excluding domestic animals and pets. It includes the handling, packing or storing of produce for dispatch to processors. It includes controlled environment agriculture and plantation forestry.

Controlled environment agriculture

“Controlled environment agriculture” means an agricultural use carried out within some form of built structure, whether temporary or permanent, which mitigates the effect of the natural environment and climate. These include production techniques that may or may not use imported growth mediums. Examples of controlled environment agriculture structures include greenhouses, polythene covered structures, and hydroponic facilities.

Plantation forestry

“Plantation forestry” means the use of land for planting, management and harvesting of trees predominantly for commercial wood production, including the preparation of land for planting but does not include the milling or processing of timber, or the planting or management of areas of land for shelter belts, woodlots, erosion or salinity control or other environmental management purposes, or other activity directly associated with and subservient to another form of agricultural use.

The above definition is taken from *State Policy on the Protection of Agricultural Land* 2009, Tasmania: (source: http://www.dpac.tas.gov.au/data/assets/pdf_file/0004/82714/State_Policy_on_the_Protection_of_Agricultural_Land_2009.pdf)

It is noted that this definition, in incorporating plantation forestry is broader than the current United Nations Food and Agriculture Organisation definition (see <http://faostat.fao.org/site/379/DesktopDefault.aspx?PageID=379> and select A for agricultural area), which specifically excludes plantation forestry. Currently there is no standardised definition amongst states in Australia. For example, by way of contrast in Queensland, "*agricultural land* is defined as land used for crop or animal production, but excluding intensive animal uses such as feedlots, piggeries, poultry farms and plant nurseries based on either hydroponics or imported growth media" (source: <http://www.dlg.qld.gov.au/resources/policy/plng-guide-identif-ag-land.pdf> page 1).

Irrespective of the above definitions, it is the view of API/SIBA any definition should clearly and transparently define which lands ought to be classified as agricultural including, arable land, grazing land, horticultural land, and non-urban lands required for a range of future agricultural uses.

It is noted the NSW Department of Agriculture has a broad definition of agricultural land and this definition may be considered a useful benchmark to develop a more inclusive definition of those lands to be included in the proposed register. In addition, attention is drawn to the highly useful document published jointly by the NSW Departments of Primary Industries and (formerly) Infrastructure Planning and Natural Resources in February 2005 entitled *Northern Rivers Farmland Protection Project*⁶, which identifies "significant" agricultural land using soil landscape mapping.

It is recognised by API/SIBA that soil landscape reports themselves will not capture all lands which ought to be included in the proposed register. Nevertheless, the use of soil landscape selections in the 2005 document referred to above resulted in the categorisation of three classes of agricultural lands, namely state significant, regionally significant and significant non contiguous. However, the report focussed on a need to distinguish between very high quality and unique agricultural soils/lands, and other lands whilst important to agriculture were more extensive and less productive generally per unit area.

It is recognised by API/SIBA some very scarce highly productive agricultural lands such as horticultural lands in the Hawkesbury-Nepean Valley are very small in plottage, numerous in number and arguably verging on national importance.

Other factors which should be considered in formulating the proposed definition are water property rights (whether deployed on land or not), multiple land use

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Departments of Primary Industries and Infrastructure, Planning and Natural Resources (2005) *Northern Rivers Farmland Protection Projects: Final Recommendations* (February), 7.

(e.g. grazing and wind farms) and quantitative triggers for inclusion such as number of hectares, market value of land, or income (gross actual or potential).

b) Foreign ownership

Foreign ownership has been defined as an international organisation that has an investment of 10% or more in a direct investment enterprise in an economy other than the one in which the direct investor resides.

(Definition taken from 5311.0 Balance of Payments and International Investment Position, Australia, Concepts, Sources and Methods, 1998 - Chapter 12 – per ABS).

Notwithstanding the above definition, API/ SIBA consider the proposed Register obviously raises questions of what is in fact “foreign” ownership. This submission by API/SIBA does not substantially address this question as it is recognised other stakeholders are better placed to assist the Treasury in defining the scope of the word “foreign”. However, API/SIBA does consider if the definition of “foreign” for the purposes of the register is contrary to existing Commonwealth legislation (e.g., Corporations Law), it may be necessary to expand such definitions in the abovementioned existing legislation to ensure harmonisation and obviously transparency of the proposed register.

In addition, API/SIBA also consider definitions are needed for:

c) Water property rights

d) Ownership

API / SIBA consider that the definition of ownership should include holders of agricultural land leases, pastoral leases, plantation leases, agribusiness leases, or water property leases/licences/access rights, of 5 years or longer, or freehold interests. It is considered that all of these interests should be determined to be capable of ownership for the purposes of data collection for the proposed Register.

Questions 5 What additional information could a national foreign ownership register for agricultural land collect, and why? Example, what types of water access rights (such as a water access entitlement) could be included?

Response:

API /SIBA that the proposed Register should include the following additional information:

Agricultural freehold transactions (including terms, i.e. parties, area, and annual sale price)

Agricultural land leases (including terms, ie. duration, parties, lease area, and annual rental)

Pastoral leases (including terms, i.e. duration, parties, lease area, and annual rental)

Plantation leases (including terms, i.e. duration, parties, lease area, and annual rental)

Agribusiness leases (including terms, i.e. duration, parties, lease area, and annual rental)

Water property leases/licences/access entitlements/rights (including terms, i.e. duration, parties, volume, and annual licence payment)

Question 6 Is it desirable to exclude from a national foreign ownership register of agricultural land some smaller transactions? If so, what threshold is appropriate, and why?

Response:

No, it is recommended that all transactions be included/recorded. If a minimum area requirement is made it will create the opportunity for a loophole where multiple smaller transactions could be initiated.

The above recommendation by API/SIBA reflects concerns that a raft of smaller transactions in freehold or leasehold agricultural land may not necessarily trigger inclusion in the proposed register if plottage or market value is to be the criteria for inclusion. Realistically, a raft of smaller transactions in sum may result in an overall plottage of many hectares of agricultural land forming a coherent agribusiness investment.

The difficulty in creating such a trigger for inclusion could be overcome through cross indexing of purchasers or lessees throughout the six states and two territories. Nevertheless, it is highly likely that the consolidation of a raft of smaller transactions may be confounded by the utilisation of a number of separate holding companies, perhaps obscuring the actual ownership of the agribusiness investment. Similarly, a trigger based upon market value even if consolidated over the six states and two territories may be affected by the utilisation of separate holding companies.

Realistically, a national register of foreign ownership of agricultural land will necessitate an intergovernmental protocol between the Commonwealth, and the six states and two territories to ensure access to the relevant existing registers of land transfers and registered lease hold interests. As previously mentioned there

is also the jurisdictional issue of Constitutional responsibility for land management resting almost wholly with the six states in their area of responsibility. In addition water management is also a management responsibility under the Constitution of the six states (*viz.s.100 Australian Constitution*). Clearly an intergovernmental agreement will be necessary to ensure that these cross jurisdictional issues are dealt with in a manner that ensures the proposed register is both efficient and effective.

Question 7 Do you consider it important that the national foreign ownership register for agricultural land should include an initial stock take of holdings by foreign persons noting the potential compliance and other costs that may be involved.

Response:

Yes, an initial stock take a foreign ownership of agricultural land should be undertaken to provide a benchmark for the proposed national register. It is recognised that the various registers of foreign ownership conducted by States may operate using historical data that varies, and hence the issue of harmonisation will have to be addressed.

Question 8 What is the most effective way to undertake an initial stock take?

Response:

The most effective way to undertake a stocktake is to identify those state and federal agencies that currently collect data that fulfils the data requirements of the Register. Any additional information can then be categories as essential and non-essential. This will indicate the requirement for any immediate additional collection burden including costs.

Issues will arise where there are competing interests in agricultural land – agriculture, carbon sinks, coal seam gas, coal, urbanisation, etc. These are state issues and under state control (Constitutional issue).

SIBA believes that as part of the land data capture process, collected information should include the potential for secondary land uses to be included. For example, the primary land use may be cattle grazing; a secondary land use may be a quarry or wind turbines. The definition of primary use should be the activity that is currently earning the greatest revenue, or similar measure. If the register is about determining foreign ownership, then any primary land use may be extracted from the data to map.

A stocktake should take account of existing registers of land, minerals and water held by states and territories. COAG must be convinced to order that such information be made available for this purpose.

Agreement must be reached with the states and territories on data standards and interoperability – this means that there is no need to replicate data collection and to ensure currency and consistency of data.

The private sector must be used to secure any additional information as this makes use of existing investment in technology and will speed up the process.

SIBA refers to its previous recommendation that the most effective to gather information is to request all foreign owners to register their current interests in land. Allow a period of 12 months for this to occur (this is a method that has been adopted in Queensland).

Question 9 What specific rules or other arrangements do you consider important to include in any compliance framework?

Response:

As previously mentioned triggers for inclusion of land holdings in the proposed register will need to be carefully conceived to ensure transparency and efficiency. For any register of land transfers or lease holdings to be meaningful it will have to be as current as possible. It is recognised there is always a lag in the publication of sales and leasehold data, and this will of necessity impact upon the currency of the data available.

Question 10 Having regard to arrangements in Australian jurisdictions and overseas, what timeframe for the provision of registration information do you consider appropriate?

Response:

API / SIBA consider the timeframe for inclusion in the proposed register should be the registration of land transfers or lease hold interests by the relevant state or territory agency. Where foreign ownership pertaining to an agri-business investment does not require a land transfer or registration of a lease hold interest, such investment should be mandated for provision to the register within 90 days. It is likely that foreign ownership through a change of domicile of shareholding of part or whole of a private or public company would in such circumstances not necessarily involve a land transfer or lease hold registration. This may be a

significant source of foreign investment in agricultural enterprises and should be recognised in the construction of the proposed register

Question 11 How should information collected in the register be reported and disclosed, and in what level of detail, while meeting privacy and confidentiality obligations?

Response:

Except in National security circumstances, all data required and collected for the register should be available freely in as much detail as possible.

Question 12 How could the data collection processes underpinning a national foreign ownership register for agricultural land be coordinated with other related data collection processes?

Response:

Cross indexation of land and leasehold interests will need to occur with other related data collection processes such as those undertaken ASIC and the ASX, and any other public or private agencies.

Through the collection of sales data, this typically includes some ownership information and could be expanded to incorporate further relevant information. If applied generally to ownership of land then there would be no suggestion of bias.

Land ownership information is held by state lands agencies. Therefore, the process of data collection must be coordinated with current data collection activities of jurisdictions to ensure that they are capturing the same data, which would enable the Register to be created.

Work is currently underway to provide core fundamental data layers that should be used as reference to underpin the Register. This would ensure efficiency, consistency, sustainability and wider (re-) usability of the Register. Information about this work can be found at <http://spatial.gov.au/node/124>, which is under the auspices of the ANZ National Foundation Spatial Data Framework.

Question 13 Do you have any suggestions or comments on how to minimise the regulatory burden associated with a national foreign ownership register for agricultural land?

Response:

API / SIBA consider the cost of the registry burden associated with a National Foreign ownership register ought to be borne by the initiating party, most likely

the foreign investor. Notwithstanding the likely benefit of foreign investment in land, leasehold or agri-business ventures, the cost of the registry overall should not be borne by the Australian taxpayer.

Question 14 Please consider providing any general or additional feedback to the working group to assist in developing a national foreign ownership register for agricultural land?

Response:

API / SIBA consider the prospect of avoidance of scrutiny of foreign investment in land or leasehold interests ought to be counted through the requirement that such investment involving land or leasehold acquisition be subject to a formal valuation by an Australian domiciled appropriately qualified valuer. It is also considered the value of any agri-business acquired by foreign interests should also be the subject of such a valuation, notably where an actual or prospective income stream is to occur from land or leasehold interests.

APPENDIX 1

AUSTRALIAN PROPERTY INSTITUTE INC.

The Australian Property Institute enjoys a proud and long history, originally formed in 1926, the Institute today represents the interests of more than 8000 property experts throughout Australia. As the nation's peak professional property organisation, the API has been pivotal in providing factual, objective and dispassionate advice on a broad range of property issues addressed by the Commonwealth and State/Territory governments since the Institute was formed.

In addition, the Institute's advice has increasingly been sought by overseas bodies such as the United Nations, the FAO and the World Bank, evidencing a level of expertise within the API and its membership, which is recognised globally.

However, as a professional organisation the primary role of the Australian Property Institute is to set and maintain the highest standards of professional practice, education, ethics and discipline for its members.

Institute members are engaged in all facets of the property industry including valuation, property development and management, property financing and trusts, investment analysis, professional property consultancy, plant and machinery valuation, town planning consultancy, property law, and architecture. Membership of the Australian Property Institute has become synonymous with traits and qualities such as professional integrity and client service, industry experience, specialist expertise, together with tertiary level education and life long continuing professional development.

The Membership of the Australian Property Institute is bound by a Code of Professional Conduct. Many members of the Institute are accredited as a Certified Practising Valuer (CPV). The CPV certification issued by the Institute is recognised throughout Australia notably by banking and financial institutions as the benchmark for both experience and education in the fields of valuation and compensation assessment.

APPENDIX 2

SPATIAL INDUSTRIES BUSINESS ASSOCIATION LTD.

At the national and global level, location intelligence is at the heart of some of our most pressing problems: environmental degradation, climate change, crime and security, defence, border security, social welfare, asset management, food security, controlling disease and pests, planning our cities, managing and recovering from natural hazards and disasters and coping with poverty and starvation.

Governments use location data to determine where and when their services are needed. Companies make loans and investments, build factories and offices, analyse risks and assign insurance rates according to location decisions. Farmers use location based information to boost their productivity in operations like controlled traffic farming and precision agriculture.

Spatial information also meets many of our personal needs, particularly those arising from our increasing desire for mobility while maintaining instant access to location information – from GPS navigation systems for our vehicles to the rapidly growing use of location based devices for personal communication.

The spatial industries provide the tools and methods to meet, represent, analyse and resolve these important activities and demands of our modern society. It is, therefore, crucial to the information age of the 21st century.

The latest economic study of the spatial industry shows that it contributes up to \$12.5 billion annually to Australia's gross domestic product and that it delivers significant other financial and social benefits.

The Spatial Industries Business Association (SIBA) is the peak industry body and represents companies throughout Australia and New Zealand that deliver a range of business services and products such as remote sensing, surveying, mapping, geographic information systems software and services, GPS technologies and systems and location intelligence systems and services.

SIBA members range in size from large multi-national corporations to small medium enterprises. Our members operate in most sectors of Australia's economy including resources and energy, defence, transport, on-line services, property services, agriculture, emergency management, and insurance amongst many others.

APPENDIX 3

SUBMISSION COMMITTEE (in alphabetical order)

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