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AgForce Response to Consultation Paper
Development of a national foreign ownership register for
agricultural land



Introduction

AgForce Queensland welcomes the opportunity to contribute a submission to the consultation paper on the development of a national foreign ownership register for agricultural land.

AgForce Queensland is the state's peak rural organisation representing over 5,000 of Queensland's rural producers and agribusinesses. AgForce actively assists and represents broadacre producers in the beef, sheep and grain sectors at a local, state and national level and strives to ensure the long term growth, viability, competitiveness and profitability of these broadacre industries.

Foreign investment has long been a feature within Queensland agriculture and has contributed significantly to the economic development of broadacre industries within the state. Given this and our interest in further economic growth, AgForce has a keen interest in the occurrence of further foreign investment in a way that is open and transparent and aligns with our national interests.

AgForce's current policy position is that we do not oppose commercially-motivated foreign investment in broadacre agriculture provided that it:

1. does not compromise market transparency, competition or pricing mechanisms
2. does not distort resource allocation or agricultural land use
3. is effectively monitored and regulated, including industry-relevant investment disclosure thresholds, to ensure Australia's national interests are not compromised.

Currently comprehensive information about foreign investment in Australian agricultural land is limited. In late October 2012, the Australian Government announced that it will implement a national foreign ownership register for agricultural land to improve transparency by providing the community with a more comprehensive picture of the size and location of foreign agricultural landholdings. A register is seen as contributing to increased public understanding while retaining a welcoming stance towards foreign investment.

This register will be a post-acquisition recording system to record actual transactions (including subsequent sales) rather than just proposals that may or may not proceed (as occurs under the Foreign Investment Review Board). Such a registration system will not form part of the foreign investment screening process but will give a more accurate picture of current foreign ownership of Australian agricultural land and emerging investment trends as information builds up over time.

The national register goes to point 3 of AgForce's policy statement above aimed at effective monitoring of foreign investment. While it does not address the issue of specific disclosure thresholds under the investment screening process, it will provide information that is relevant to creeping acquisitions and threshold setting in future. Any monitoring program should not stifle genuine, commercially-motivated foreign investment through excessive or intrusive reporting requirements but it must be effective in delivering a clear picture of what is happening in our industries so that as a nation we can respond appropriately.

The following sections of our submission is structured around providing responses to the specific questions raised in the Consultation Paper.

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

It is important to define exactly what the additional transparency for the public is meant to achieve as this will guide the scope and information collection requirements of the register. The second consideration is the level of comprehensiveness desired against the cost of delivery.

The identified potential risks from foreign investment include:

- loss of Australian control of strategic industry or national assets such as water resources and/or processing, transportation and marketing infrastructure with a concurrent reduction of access to these by local producers or an undue exertion of market power.
- State owned/supported businesses channelling production through non-market routes to home countries or otherwise distorting local markets by pushing up land/other asset prices or acting with politically or strategically-driven motivations
- reduced employment through enterprise consolidation or additional implementation of labour saving technology leading to negative impacts on local supporting communities
- immediate and cumulative negative land use impacts where resource or mining company actions reduce food production (note: this is also a domestic investment issue).

Australia's 'national interest' is not defined in legislation but the Government has previously provided a 2-page policy statement on the National Interest Test aimed at ensuring investments 'do not adversely affect the sustainability of Australia's national agricultural resources, including their economic, social and environmental contribution to Australia'. In considering the effect that a foreign investment proposal has on the national interest the following factors are examined by the Foreign Investment Review Board (FIRB):

- the quality and availability of Australia's agricultural resources including water
- land access and use and biodiversity
- agricultural production and productivity
- Australia's capacity to remain a reliable supplier of agricultural production, both to the Australian community and our trading partners
- employment and prosperity in Australia's local and regional communities
- national security implications
- competition (may seek advice from the Australian Competition and Consumer Commission)
- other Australian Government policies (e.g. tax revenues, environmental policies, etc.)
- the character of the investor (e.g. extent of independence from foreign governments).

Recommendation: AgForce supports the scope of the proposed national register covering:

- *land and significant water resources and strategic processing infrastructure assets*
- *all foreign entities with a significant or controlling interest in these assets*
- *the current and proposed use of the land or other significant asset.*

How would AgForce like 'agricultural land' to be defined?

Definitions of agricultural land can be on the basis of use or business activity or alternatively on geographical location, e.g. in rural or remote regions. Applying a location-based system runs the risk of inadvertent 'lines of maps' exclusion of relevant land or business interests. The FIRB defines agricultural or rural land as that used wholly and exclusively for carrying on a business of primary production (i.e. occurring at a commercial scale). However, this approach may also rule out

diversified businesses that still retain a significant primary production component. The definition on page 6 from the *Income Tax Assessment Act 1997* seems to be comprehensive and applicable.

Recommendation: AgForce supports a definition of agricultural land as 'land on which a primary production business is undertaken, including production resulting from the cultivation of land, animal husbandry, horticulture, aquaculture, forestry, viticulture or dairy farming'.

How would AgForce like 'foreign' to be defined?

The consultation paper refers to the definition of a foreign person and foreign corporation being defined under the *Foreign Acquisitions and Takeovers Act 1975*. The Act treats a foreign corporation as a 'foreign corporation to which paragraph 51(xx) of the Constitution is applicable or a corporation that is an external Territory to which this Act does not extend' and a foreign person is defined as:

- a) a natural person not ordinarily resident in Australia;
- b) a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest;
- c) a corporation in which two or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest;
- d) the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or
- e) the trustee of a trust estate in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest

The *Income Tax Assessment Act 1997* defines a resident to mean a person who resides in Australia and includes a person whose 'permanent place of abode' is in Australia and who has actually been in Australia, continuously or intermittently, during more than one-half of the year. The resident definition includes a company which is incorporated in Australia, or if not incorporated in Australia, carries on business in Australia and has either its central management and control in Australia, or its voting power controlled by shareholders who are residents of Australia (the secondary residency test).

These are standard definitions already being applied to foreign investors in other contexts and in the interests of streamlining of the register with other Commonwealth legislation it seems sensible to retain and apply these definitions.

Recommendation: AgForce supports the application of definitions of foreign persons and corporations as already exist under the Foreign Acquisitions and Takeovers Act 1975 and the Income Tax Assessment Act 1997 when establishing the national register.

QUESTION 2: What interests should or should not be included when defining foreign ownership?

In terms of the need for transparency it is the capacity for foreign entities to exert non-commercially motivated influence that is of most concern to our members and would point to the need to monitor the level of foreign control rather than simple ownership of an asset. However, as it is very difficult to effectively monitor control or motivations, financial interest is a suitable proxy for control in this case. Presumably indirect or more removed interests are also hard to identify and monitor, although

Queensland's FOLR Act includes sections aimed at defining these in the context of companies, corporations and trusts.

It is also important to obtain a comprehensive picture of the extent and trends of foreign interests in Australian agriculture and so a broad range of interests should be captured. Significant financial interests in agricultural assets, including companies, trusts, leases, and licenses should be captured by the register. The 2012 threshold level of investment for non-government foreign entities that triggers a referral of a proposed purchase of agricultural land or agribusiness to the FIRB is a 15% or greater interest in a primary production business.

Recommendation: That the national register include transactions where a 15% or greater interest is held by foreign entities in an agricultural asset that generates an actual or 'imputed' revenue stream.

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

In Queensland, under the *Foreign Ownership of Land Register Act 1988 (Qld)*, all foreign entities are required to notify the Registrar of Titles of any acquisition or disposal of any land or an interest in land or water allocations. Building on the data proposed to be collected in the biennial Australian Bureau of Statistics survey, Queensland's Foreign Ownership of Land Register (FOLR) and internal AgForce discussions the following is our view on a comprehensive list of potential information to be collected in a register with an indication of the priority we would place on the collection of individual data items.

Table 1. Potential data that could be collected in a National Register

Data collected	Purpose	Priority*
Identity (name or business number) of investing entity or entities	To track cumulative interests over time towards applying FIRB assessment	H
Nationality of the foreign entities	To track trends in sources of investment and identify any national interest issues	H
Entity type (for corporations, solely commercial or state-involvement)	Important gauge of potential motivations for investment	H
Nature of entity (natural person, corporation or trust including % foreign interest)	Important for understanding sectors of investment interest across time	M
Identity and type of asset purchased (land and associated water allocations, tradeable water allocations, or processing facility, etc.)	Important to track foreign capacity to influence production or marketing in certain areas of Australia	H
Geographical location, current industry sector(s) involvement and value of asset purchased	Important to track investment locations and magnitude over time in different sectors of production	H
Main intended use of the land (output type and average value of production)	Important to track impacts on industry viability in different areas over time	M
Whether further development is proposed or not (including capital amount to be invested, number of persons employed, time scale of investment intentions, etc.)	Likely impacts on local socio-economic factors and further infrastructure needs	M

* H = High, M = Medium

Recommendation: That the national register include the above information.

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

See the response to Question 1 above as AgForce supports the proposed national register as covering land and significant assets and extending to all foreign entities with a significant or controlling interest in the asset.

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

Australia is an arid continent and water resources are an incredibly important element to productive and profitable agriculture in our country. With tradeable allocations of water goes significant control of productive potential. This asset class should be monitored, particularly given recent water planning processes including for the Murray Darling Basin, and the potential to further develop large areas of arable soils for irrigated agriculture across northern Australia.

The 2011 ABARES report into foreign ownership stated that 40% of red meat processing is undertaken through foreign owned plants, namely JBS Australia (Brazil), Cargill (US)/Teys and Nippon Meat (Japan), and this proportion may be greater in some states such as Queensland. Given the market influence that can accompany control of local purchase and processing of agricultural goods it is important that significant processing facilities in each sector be monitored across time.

Recommendation: That the national register include tradeable water allocations and food and fibre processing assets that are significant on a regional, state or national level.

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?

It is expected that the register will capture assets being used for commercial scale primary production businesses and there is little further benefit to be gained from recording non-business operations. The Australian Tax Office has an extended Taxation Ruling (TR 97/11 Income tax: Am I carrying on a business of primary production?) which defines what a 'primary production business' is and could form the basis of a self-assessable system by which foreign investors can determine if they are subject to the register and the need to subsequently provide their information.

Further, in determining what a commercial operation is it is important that Australia's transfer pricing rules are applied to foreign investment. This will counter 'international profit shifting' or underpayment of Australian tax by requiring businesses to price their products on the basis of what parties acting independently would reasonably be expected to have done in the same situation, i.e. at arm's length and reflecting a fair return for the activities carried out in Australia, the assets used, and the risks assumed in carrying out these activities.

Recommendation: That non-commercial primary production operations are excluded from the requirement to register but that appropriate values are applied to any primary produce created in making this determination.

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

Recommendation: For completeness and the development of an accurate basis for watching and analysing trends over time, and to give confidence to the Australian people that there is effective monitoring of foreign investment, AgForce supports that an initial stock take be undertaken.

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

Due to the costs and administrative resourcing required for an initial stock take plus the recording of other purchases and sales occurring during in the same establishment period, it is proposed that a longer timeframe be adopted for the progressive recording of existing holdings of agricultural land, water and processing assets. Previously we have only had periodic surveys so even if it takes 1 to 2 years to accrue the initial data this will still be an improvement on previous systems. Queensland's FOLR provided up to 12 months for the initial registration of interests and then a period of 90 days subsequently for registration of acquisition or disposal of an interest or becoming or ceasing to be a foreign entity.

For example, one option could be that existing land purchases must be registered within the first 9 months, water assets by the end of the first 12 months and processing facilities within the first 15 months after the register is enacted. Concurrently, new purchases within this period would have to be registered within 3 months of settlement. In relation to cost of collection, the final use of the data should be remembered in setting the required timeframes – what use of the data would justify the additional cost if it is collected within a shorter time period, particularly when the main aim is to build up a comprehensive picture and look at trends in investment over time?

Existing state-based systems should be used to the greatest possible extent to collect this information, and modified as required to ensure a full and consistent set of data is collected across jurisdictions for collation and reporting by the Commonwealth. Thus within 2 years the system might be fully up-to-date and operational. Given the national interests at stake, the Commonwealth should fund the costs of aggregation and analysis of information that occur beyond a reasonable cost to each investor in registering their purchase with the applicable state.

Recommendation: AgForce supports a sequential stock take of existing holdings extending over the first 1 or 2 years of operation of the register alongside ongoing registration of new purchases, with data collected at a state level and aggregated federally.

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

Any national register must be established consistent with existing trade agreements and be implemented in such a way as to be equitable and so as not to compromise those trade agreements currently under negotiation. To ensure holdings are reported to the register there will need to be a legal requirement for registration and perhaps some penalty system developed to act as a disincentive to avoidance of registration. This should be strong enough to ensure compliance but not too onerous or punishing that potential investors in Australia are discouraged and go elsewhere.

Under Queensland's FOLR, there are significant penalties for non-compliance and making false statements including financial sanctions, which increase with each offense, and escalating up to forfeiture of land following an unsuccessful appeals process within the Land Appeals Court for failure to disclose obtaining an interest or becoming a foreign entity. AgForce does not know if these penalties act as a significant disincentive to commercial investment by foreign entities.

Any penalty system implemented under the national register will require an understanding of what will be effective at ensuring compliance and that legitimate overseas investors are likely to accept. This requires input from specialist trade advisors, such as within DFAT, and must be within the states' capacities to monitor and police effectively.

Recommendation: AgForce supports a robust but equitable system to ensure compliance and that it is developed collaboratively by the appropriate government departments at a State and Commonwealth level.

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

Recommendation: As stated above, AgForce supports a 3 month (90 day) period within which new transactions must be reported as operates under Queensland's 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?

It is important that commercial sensitivities and privacy considerations are applied to any disclosure of foreign investment decisions, as would be fair and applicable to any domestic investor. Queensland's FOLR allows fee-paying persons to access particulars of information contained in the register and copies of any computerised statistical data available but there are restrictions on disclosure of information about the address of the principal place of residence of embassy staff.

There are statistical methods that can be applied to the pooling or aggregating of data to ensure that there are enough data sets combined upon public release to ensure that individual information cannot be identified or separated back out. Depending on the density or consistency of information this pool size will vary, e.g. due to there being few processing facilities the aggregated data might only be able to be presented at a state or national level, whereas for land holdings the data may be able to be presented at a local government level.

The Commonwealth could be responsible for data aggregation and reporting at the national level with the states retaining the capacity to deliver more targeted reporting depending on the specific public interests within their state and available resourcing. Such reporting should occur annually and not less frequently than every 2 years.

Recommendation: AgForce supports the National register delivering annual information at as fine a scale as possible that is consistent with relevant privacy and cost considerations.

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?

The Commonwealth Government has indicated that an important principle be that the data is collected as a by-product of the normal course of doing business. As the consultation paper suggests all states and Territories have a land title system and also record registers of water access rights. Where these are recording the required information it may be relatively straightforward to include foreign ownership reporting requirements into those existing State data entry systems. Processing sector assets generally require environmental or other State approvals to operate. This may be another point of data entry for those businesses to avoid the need for duplication. AgForce supports the removal of unnecessary red tape and the minimization of regulation wherever possible for the agricultural sector.

Recommendation: AgForce supports the use of existing systems of reporting such as land and water title registration and existing environmental approval processes to facilitate the collection of necessary foreign ownership data.

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?

The register should be broadly based (comprehensive) to capture all significant agricultural business interests of foreign investors, but with a considered minimization of the information sought and as far as possible through existing data collection systems and with longer time periods to provide the information to ensure the regulatory burden is minimal.

Recommendation: AgForce supports a 'broader but shallower' collection of targeted information relating to foreign ownership rather than a 'deeper but narrower' approach.

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.

AgForce has no further feedback apart from highlighting the potential to use the register data to further fine tune foreign investment screening and approvals in the future, including the FIRB

disclosure threshold which is seen as set at a magnitude that is largely irrelevant to most purchases of agricultural assets.

Conclusion

AgForce is supportive of the establishment of a national register that increases transparency around foreign ownership and contributes to an improved understanding of the level and location of foreign ownership over time so that an informed debate can occur and our national interests effectively monitored. We are ready to provide additional feedback if required and to work with governments in implementing such a register.

Contacts

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