Law Council
OF AUSTRALIA
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Mr David Earl
Unit Manager
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Langton Crescent
PARKES ACT 2600

24 March 2016

Via email: david.earl@treasury.gov.au
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Dear Mr Earl,

FOREIGN INVESTMENT REFORMS – DRAFT REGULATION

This is a submission prepared by the Foreign Investment Committee of the Business Law Section of the Law Council of Australia ("**Committee**"), in response to the Consultation Paper of February 2016 on the proposed national register of foreign ownership of water access entitlements ("**Submission**").

The Committee has previously made submissions:

- on 17 July 2015 in relation to the exposure drafts of the Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015 and the Register of Foreign Ownership of Agricultural Land Bill 2015 ("**Agricultural Land Register Bill**") and the July draft of the regulations ("**Draft Legislation Submission**");

- on 30 September 2015 in response to the draft agricultural land and agribusiness provisions of the draft Foreign Acquisitions and Takeovers Regulation 2015 provided to us on 21 September 2015 (on a confidential basis) ("**Draft Agricultural Definitions Submission**"); and

- on 30 October 2015 in response to the exposure draft Foreign Acquisitions and Takeovers Regulation 2015 and the exposure draft Foreign Acquisitions and Takeovers Fees Imposition Regulation 2015 ("**Draft Regulations Submission**").]

Unless specified, section references are to sections in the *Register of Foreign Ownership of Agricultural Land Act 2015* ("**Agricultural Land Act**").]

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Below are our responses to the questions in the Consultation Paper.

Question 1: Do you agree with the Government's decision to establish a register to collect information on foreign ownership of water access entitlements? If not, what alternative could be used instead of a register?

We would not oppose the establishment of the register if it is done in a manner that avoids imposing an undue burden on foreign owners of water access entitlements ("**WAEs**"). However, we believe there is a risk that the register will impose such a burden and, as a result, will discourage investments that require (or are expected to require) such registration.

If the proposal to establish the register proceeds we recommend that its establishment be deferred until the Agricultural Land Register has been in operation for a sufficient period of time to identify and address problems arising from its implementation. For example, the forms developed for use with the Agricultural Land Register by the ATO have been shown to be inadequate and will need to be corrected, and liaison between the ATO and FIRB appears to the Committee to require improvement. Lessons learned from implementation of the Agricultural Land Register can then be applied efficiently to implementation of the WAE Register.

Question 2: What are the main advantages and disadvantages of a Commonwealth administered register?

If in fact the use of a Commonwealth administered register imposes less of a regulatory burden on owners of WAEs and potential investors, that is a major advantage, which is likely to outweigh any potential disadvantages. We note, however, that there appears to be inherent inefficiency in having two layers of government running separate registers over the same subject matter.

Question 3: Is the existing Agricultural Land Register the most effective vehicle for registering WAEs? If not, what alternative(s) do you propose and why?

Yes, provided it is done is such a manner as to reduce the compliance burden for investors and potential investors. Critical to that, in our view, is the approach taken to the definition of WAEs that triggers any requirement to register. It is essential that the definition provides clarity and certainty as to what is included and is not unnecessarily over-inclusive (given the significant costs to the economy that would impose). This is an extremely difficult issue given, as the Consultation Paper notes, the complexity of water rights in Australia, the primary role of the States and Territories and the variation and inconsistencies of approach in the various jurisdictions. There is a range of different state and territory schemes, none of which necessarily correlate with the others, relating to different sorts of water rights, some of which are water access entitlements, some of which are water allocations, some of which are independently tradeable and some which must be attached to land.

We believe the formulation of an appropriate and effective definition will require careful consideration of the various State and Territory regimes, and development and adjustment over time.

To allow this, we strongly urge that the substance of the definition is set out in delegated legislation. The definition of WAEs in the Act itself should merely refer to "such rights in relation to water as are specified by the Rules". In addition, there should be provisions equivalent to those relating to Agricultural Land, providing for the making of rules that can specify that certain rights are not WAEs (s5), or are exempt from notification (s30).

Question 4: Is the proposed approach to exclude water allocations from the register appropriate? If not, what alternative(s) do you propose and why?

Yes. See also the response to Question 3.

Question 5: Should the register exclude irrigation and water use rights? If not, what alternative(s) do you propose and why?

Yes. See also the response to Question 3.

Question 6: Should the register capture WAEs for all industry sectors, not just for agricultural use? If not, what alternative(s) do you propose and why?

No, just agricultural use. But see also the response to Question 3.

Questions 7 to 9: No comment

Question 10: What experiences can be drawn from the introduction of the Agricultural Land Register?

See the response to Question 1. It is clear that there are lessons to be learned from implementation of the Agricultural Land Register and they should be considered in the implementation of the WAE Register.

In particular, the complex forms utilised by the Tax office have led to time poor outcomes for land owners. A much simpler process needs to be adopted to avoid incurring additional red tape costs. many of the Agricultural Land Register participants will have water entitlements and the administrative burden will be substantially increased.

Clarity of definition is paramount. The lack of detail and understanding of the carve outs led to the Tax office extending the time for historic registration after the definition only became clear on 1 December 2015. This should not be repeated with the WAEs.

Question 11: Should the register adopt the definitions already used by the Agricultural Land Register to minimise complexity and compliance costs? If not, what alternative(s) do you propose and why?

Yes in so far as they relate to agricultural land and foreign person concepts under the foreign investment regime. Consistent definitions across the various pieces of legislation is critical.

One aspect of significant complexity in the legislation is the use of ordinary language as defined terms. To assist with this issue, all defined terms throughout the legislation should be bolded or italicised.

Questions 12 to 13: No comment

Question 14: Should a similar approach to the Agricultural Land Register be adopted so that there is a 30-day period for foreign persons to register their interests in WAEs? If not, what alternative(s) do you propose and why?

Yes. Make it clear though that the 30 day runs from after completion of acquisition of the interest. That is when title has passed.

A longer period should however be allowed where an entity is moving from Australian to foreign. It is impractical for all registrations to be completed in 30 days in such circumstances.

Question 15: Should the register capture all water access entitlements regardless of their size (volume or monetary value)? If not, what alternative(s) do you propose and why?

There should be thresholds set for quantity and value or reportable WAE transactions. Requiring reporting of small transactions would add unnecessary “red tape” for little policy benefit. In order to determine the initial threshold analysis should be undertaken of each of the State and Territory data bases as to the relative values of the entitlements being transferred. The threshold should be set in statutory rules to provide flexibility.

Question 16: Is a six-month stocktake period appropriate? If not, what alternative(s) do you propose and why?

See the response to Question 1. An assessment should be made of the effectiveness and efficiency of the six-month stocktake period for the Agricultural Land Register before a position is taken on this point.

Question 17: What experiences can be drawn from the stocktake period for the Agricultural Land Register?

See the responses to Questions 1 and 16.

Question 18: No comment

Other matters

The Committee submits that it is not appropriate to impose a compliance burden on persons who are not foreign persons but who may be transacting with foreign persons.

The Agricultural Land Act goes even further, and potentially results in a contravention by a person who unknowingly transacts with a foreign person. Section 20 requires a "person" to give a notice to the Commissioner of "an event described in Subdivision B involving the person". These events are acquiring or disposing of land holding, becoming or ceasing to be foreign persons and land becoming or ceasing to be agricultural land. Because of the use of "person involved" the notification obligation applies not just to the foreign person but also to others involved in the transaction as seller, buyer or lessor (for leases over 5 years). It is of course possible that these persons will not be aware they are transacting

with a foreign person. This position should not be replicated in relation to the WAE Register.

We believe the main advantage is that the register would provide additional information about ownership of WAEs. However, we question the value of gathering information about "foreign" ownership alone. The main disadvantages, in our view, are:

- the difficulty of ensuring a consistent approach given the differing regimes in the various States and Territories may mean that the information gathered is of little value, or even positively misleading;

- the information gathered may mislead, and confuse the public, if "foreign" ownership is defined consistently with the *Foreign Acquisition and Takeovers Act 1975*, given that will include entities (such as BHP Billiton) that are "foreign" only in a highly technical sense;

- the costs imposed on "foreign" owners by the register may discourage investment and have an adverse impact on our economy.

If you have any questions in relation to this submission, in the first instance please contact the Committee Chair, Malcolm Brennan, on 02-6217 6054 or via email: malcolm.brennan@au.kwm.com

Yours sincerely,

Teresa Dyson, Chair
Business Law Section