

Establishing a national foreign ownership register for agricultural land

Consultation paper
November 2012

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The Australian Government seeks your feedback on the issues outlined in this consultation paper. To assist those wishing to make a submission, questions for consultation are located at the end of relevant sections. However, you should feel free to address any issue raised in this paper and should not feel obliged to address every question. The information obtained through this process will inform the Government's approach on the way forward and also assist in meeting the requirements of the Office of Best Practice Regulation.

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Closing date for submissions: Friday, 1 February 2013

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1. BACKGROUND

1. On 23 October 2012, the Australian Government announced that it will implement a national foreign ownership register for agricultural land following consultations with stakeholders.
2. The Government also announced that the final design of the register will take into account the need to improve transparency of foreign ownership in agricultural land without imposing unnecessary burdens on investors or duplicating work already undertaken by State and Territory governments.
3. This follows the Government's announcement of 15 June 2012, establishing a departmental working group to canvass the issues and consult with the community on the development of a national foreign ownership register for agricultural land.
4. The working group is led by The Treasury and includes representatives from the Department of Prime Minister and Cabinet, the Department of Agriculture, Fisheries and Forestry, the Department of Foreign Affairs and Trade, the Department of Sustainability, Environment, Water, Population and Communities, the Department of Regional Australia, Local Government, Arts and Sport and the Department of Resources, Energy and Tourism. The working group is now seeking views from interested stakeholders on a range of design and coordination issues associated with the implementation of a national foreign ownership register for agricultural land.
5. The working group will also work with State and Territory governments to consider elements of a national register, and discuss how the register could interact with existing land registration systems and processes. While the Australian Government has an interest in foreign investment and land management, State and Territory governments have primary constitutional responsibility for land management, including land titles.

BOX 1: AUSTRALIAN GOVERNMENT TRANSPARENCY INITIATIVES

The Australian Government continues to maintain an open and welcoming approach to foreign investment.

The implementation of a national foreign ownership register for agricultural land, following the working group's consultations with stakeholders, continues the Government's work to improve transparency in foreign ownership of Australian agricultural land.

In January 2012, the Government announced an ongoing and expanded statistical collection by the Australian Bureau of Statistics (ABS) to improve transparency of foreign investment in agriculture, which will include two stand alone surveys on foreign ownership and two supplementary surveys with the next two agricultural censuses. This builds on the 2011 *Agricultural Land and Water Ownership Survey* which found that, as at 31 December 2010, 89 per cent of agricultural land was entirely Australian owned and a further 5.5 per cent was at least 50 per cent Australian owned.

BOX 1: AUSTRALIAN GOVERNMENT TRANSPARENCY INITIATIVES (CONTINUED)

Recognising the particular sensitivities around agricultural land, in January 2012, the Government released a *Policy Statement on Foreign Investment in Agriculture*, which provides guidance on factors the Government typically considers when assessing foreign investment applications in the agricultural sector.

The Australian Bureau of Agricultural and Resource Economics and Sciences report released in January 2012, *Foreign investment and Australian agriculture*, confirmed the significance of foreign investment in the development of the Australian economy, including agriculture and agribusiness. The report also confirmed that foreign investment improves Australia's food security, increases food production and incomes and is vital for Australian farmers and supports agricultural jobs.

BOX 2: EXISTING REGISTERS OF FOREIGN OWNED AGRICULTURAL LAND

Queensland, Australia

Under its *Foreign Ownership of Land Register Act 1988*, the state of Queensland maintains a register of foreign owned land. All foreigners, as defined in the Act, are required to notify the Registrar of Titles (Queensland) of any acquisition or disposal of land or an interest in land within 90 days. Notifications given in compliance with these requirements are maintained in the Foreign Ownership of Land Register.

United States

The United States maintains a register of foreign owned farm and forest land at the national level. Under the *Agricultural Foreign Investment Disclosure Act of 1978*, it is compulsory for all foreign persons who acquire, transfer or hold an interest in agricultural and forest land to report such holdings and transactions to the Secretary of Agriculture within 90 days.

Argentina

Argentina's 'Rural Land Law' (passed in December 2011) provides for a census of Argentinean land belonging to foreigners. Foreign owners of rural land are required to report their ownership to the National Registry of Rural Land within 180 days of the law's enactment. Any foreign legal entities owning rural land are required to report any modification in their corporate structure within 30 days of such a modification.

2. PURPOSE OF A REGISTER

6. A national foreign ownership register for agricultural land will improve transparency of foreign ownership by providing the community with a more comprehensive picture of the size and location of foreign agricultural landholdings.

7. This will contribute to public understanding while remaining consistent with the Government's welcoming stance towards foreign investment.

3. WHAT IS A REGISTER?

8. A national foreign ownership register for agricultural land will constitute a post-acquisition recording system. It will capture actual transactions (including divestments) rather than proposed acquisitions (that may or may not proceed), giving a more accurate picture of foreign ownership of Australian agricultural land.

9. Any registration obligations under the register will be of an administrative nature. While it will not form part of the foreign investment screening process where foreign investors need prior approval from the Government before investing in certain Australian agricultural land, over time a register will assist in informing the Government and the community about emerging investment trends.

4. IMPORTANCE OF FOREIGN INVESTMENT IN AUSTRALIAN AGRICULTURE

10. Business investment from domestic and foreign sources is a key driver of economic activity in Australia. As a capital hungry country, Australia's investment needs continue to outstrip the available supply of domestic savings, which is why foreign investment has always played a critical role in generating growth, employment and prosperity, including in the agriculture sector.

11. Foreign investment plays an important role in supporting Australia's position as a net exporter of agricultural produce, including by delivering productivity gains and technological innovations. Foreign investment in agriculture supports agricultural production, job creation and contributes to the prosperity of rural communities and the broader Australian economy.

12. For Australia's agriculture sector to be globally competitive and productive, the sector and Australia generally must remain an attractive place to invest. Investment is influenced by the prospective return on the investment itself as well as a range of other factors. These factors include perceptions of the economy, the nature of the regulatory environment, price and availability of important businesses inputs, access to infrastructure, long-term commercial prospects and social and environmental conditions.

5. RECENT DEVELOPMENTS IN FOREIGN INVESTMENT IN AGRICULTURE

13. Comprehensive information about foreign investment in Australian agricultural land is limited.

14. The Australian Bureau of Agricultural and Resource Economics and Sciences report, *Foreign Investment and Australian Agriculture*, released in January 2012 noted that recent foreign buyers of agricultural land in Australia appear to fall into three main categories:

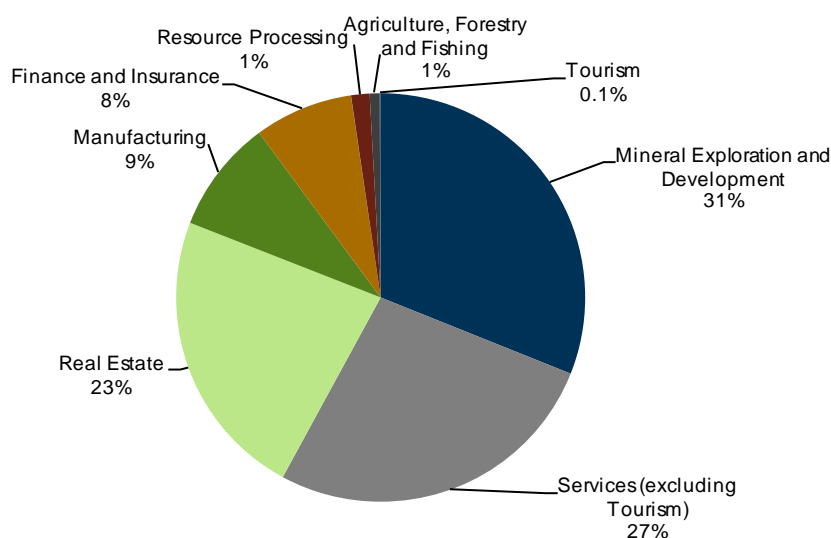
- agribusiness companies seeking to extend their activities up the supply chain to secure sources of supply;
- investment or pension funds seeking profits from owning and operating Australian agricultural land, but where those operations do not form part of any larger agricultural or food business; and
- purchases of farmland by foreign owned mining companies.

15. The report also noted that, while there may have been an increase in foreign ownership of Australian agricultural land in recent years, this ownership trend has not always been upward. Foreign investors sell as well as buy land, with foreign landholdings tending to expand and contract at different times.

16. The September 2011 release of the *Agricultural Land and Water Ownership Survey* by the Australian Bureau of Statistics suggested that Australia's agricultural industry is mostly Australian owned. It found that around 89 per cent of Australian agricultural land is entirely Australian owned, with a further 6 per cent of Australian agricultural land majority owned by Australians. In addition, more than 90 per cent of water entitlements for agricultural purposes in Australia are entirely Australian owned. These results are broadly comparable with levels of foreign ownership of agricultural land reported in the agricultural census of 1983-84.

17. The Foreign Investment Review Board collects data on approvals for proposed investment given by the Australian Government for foreign investment. Only larger transactions, transactions by foreign government related entities and residential real estate transactions are reflected in the data. Further, the data covers proposed investment but does not capture any subsequent activity (for example, the statistics may include some transactions that do not proceed and the statistics do not record subsequent resales to Australian nationals). The most recent Foreign Investment Review Board data suggests that foreign investment proposals for the agriculture, forestry and fishing sector during 2010-11 represented around 1 per cent of all foreign investment proposals for that year in value terms. The largest source country of investment by value in this sector was the United Kingdom, followed by Switzerland and Canada.

Proposed investment by industry in 2010-11



6. DEVELOPMENT OF A NATIONAL FOREIGN OWNERSHIP REGISTER

6.1 ISSUES IN DEFINITION AND DESIGN

18. There are a number of design issues which need to be considered in developing the national foreign ownership register for agricultural land. One consideration is whether the register should capture the ownership of water access entitlements and possibly other kinds of water access rights. Other issues include the way in which agricultural land is defined for the purposes of registration, whether a registration threshold should apply below which smaller investments in agricultural land are not recorded, whether there will be an initial stocktake of foreign ownership of agricultural land, the need to register land disposals as well as land acquisitions and meeting Australia's international trade obligations.

6.1.1 Scope and definition

19. The starting point for the register is the definition of agricultural land. A broad range of definitions are currently used for regulatory and statistical purposes. The key conceptual difference between these methods is that some, such as those used by the Australian Bureau of Statistics, the Foreign Investment Review Board, the Australian Taxation Office and the Australian Securities Exchange, classify land according to the *uses* or *business activities* associated with that land whereas others, including at the State and Territory level, classify land on the basis of where it is *located*.

20. There are other terms which are relevant to the scope of a national foreign ownership register for agricultural land, and will therefore need to be defined, including: foreign persons, foreign corporations and foreign trusts.

BOX 3: EXISTING DEFINITIONS OF RELEVANT TERMS

One key definitional requirement for a foreign ownership of agricultural land register is the determination of an appropriate definition of agricultural land. Definitional clarity will also be required in identifying who will need to be subject to the register. This includes how foreign corporations and natural persons are to be defined. Existing definitions may go some way towards informing consideration of these issues.

Agricultural land

Under the current foreign investment regulatory framework, the term 'rural land' is used to denote land that is used wholly and exclusively for the carrying on of a primary production business. The definition of a primary production business is taken from the *Income Tax Assessment Act 1997* and refers to production resulting from the cultivation of land, animal husbandry, horticulture, fishing, forestry, viticulture or dairy farming.

Some land that is zoned as, or located in, agricultural areas of Australia are not considered to be rural land for the purposes of the foreign investment framework, such as rural residential land and hobby farms not conducting a primary production business. Of course, this framework is linked to regulatory screening objectives rather than to statistical collection objectives.

In the United States, agricultural land is defined as land used for farming, ranching, or timber production. This includes land where production is temporarily idle.

Foreign ownership

The *Foreign Acquisitions and Takeovers Act 1975* defines the terms *foreign corporation* and *foreign person*.

The *Foreign Acquisitions and Takeovers Act 1975* 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'.

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.

21. It is also necessary to define the type of interests that will be required to be registered. For instance, consideration will need to be given to whether and how the following interests in agricultural land are captured:

- interests under a lease or licence;
- part-foreign ownership interests in companies or trusts;
- indirect or ultimate foreign ownership interests;
- interests in arrangements involving the sharing of profits or income from the use of, or dealings in, agricultural land; and
- security interests.

22. Which interests are included on a register will depend on the value of the information and the burden placed on investors and the Government in obtaining it. For example, identifying foreign freehold or leasehold interests would be highly valuable and relatively straight forward for the purposes of a register. However, the capture of part foreign interests that arises well down a corporate ownership chain and where control or influence is limited may be considerably more complex and potentially burdensome, providing limited policy insight in return. These issues may also be dealt with through the definition of foreign corporation and foreign person. In other examples, including security interests held by money lenders or profit-sharing arrangements, given the limited nature of the entities' interest in the land itself, the low value of having such information would most likely be outweighed by the burden placed on investors to register that interest. However, these interests may become registrable once an event triggers a more direct interest.

23. Finally, at a detailed level, a national foreign ownership for agricultural land registration system will need to collect specific information from investors, including the legal name and address of relevant foreign persons or companies, location, purpose and size of the asset and details of the purchase price. There may be additional information that could be captured, such as information about how land use may be changing.

24. An important design issue will be to ensure that any spatial data collected as part of the register is in a standard format to facilitate maximum analysis and comparability with other data collections.

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

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

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

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

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?*

6.1.2 Use of thresholds to exclude smaller transactions

25. It may be desirable to exclude from registration requirements some transactions that, due to their size, are not regarded as material enough to be included in the register. In some cases the registration of such transactions would impose an unnecessary burden of compliance on investors relative to the significance of them. To minimise future costs, enhance efficiency and to ensure a register's statistical integrity, it is desirable to set any minimum threshold levels at the register's establishment and to avoid varying these thresholds over time. Consideration will also need to be given to how a registration system that used small transaction thresholds dealt with the issue of accumulations of land interests.

BOX 4: THRESHOLDS USED ELSEWHERE

By way of illustration, the United States foreign ownership of agricultural land recording system does not require registration of foreign acquisitions of agricultural land with an area of less than 10 acres (four hectares), so long as the land in question does not yield more than USD1,000 in gross annual sales.

The foreign ownership of land register in Queensland does not exclude investments on the basis of size or value.

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?*

6.1.3 Initial stocktake of foreign ownership interests

26. An initial stocktake is an important element in the integrity of a national foreign ownership register for agricultural land. An initial stocktake will provide a baseline against which changing levels of ownership data could be assessed. Consideration will need to be given to what would be a reasonable period for foreign owners to register their interests and ways to reduce compliance costs for an initial stocktake. For example, an obligation to notify existing foreign ownership within six months of the commencement of relevant legislation could provide a reasonable period.

BOX 5: EXPERIENCE IN OTHER JURISDICTIONS

The United States *Agricultural Foreign Investment Disclosure Act 1978* required all foreign persons holding agricultural land as of 1 February 1979 to file a report of such holdings within six months. All foreign persons who acquire or transfer an interest in agricultural land thereafter are required to report such transactions within 90 days of the date of acquisition or transfer. In addition, any foreign person who holds land that subsequently becomes or ceases to be agricultural land, or any person who holds agricultural land and subsequently becomes or ceases to be a foreign person, is also required to file a report within 90 days of such change.

Under the *Queensland Foreign Ownership of Land Register Act 1988*, notification of existing foreign interests in land was required no later than 12 months following commencement of the legislation.

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

QUESTION 8: *What is the most effective way to undertake an initial stocktake?*

6.1.4 Registration of divestments as well as investments

27. In order to give an accurate picture of ownership, a national foreign ownership register for agricultural land will need to include an obligation for investors to register divestment of their interests in Australian agricultural land as well as new investments. This will ensure over time that the register records current ownership information. It will also ensure that any initial stocktake of existing ownership levels does not need to be repeated in future years in order to obtain an accurate picture of the stock of foreign ownership at a given point in time.

28. As noted in Box 2, agricultural land registers in the United States, Argentina and Queensland require the notification of relevant divestments of land.

6.1.5 Meeting Australia's international obligations

29. Any national foreign ownership register for agricultural land will need to be designed and implemented in a way which is consistent with Australia's international trade obligations and uphold Australia's reputation as a safe and reliable place to invest.

30. Australia is a party to a number of free trade agreements and bilateral investment agreements, which seek to strengthen trade and commercial ties and encourage investment. As part of Australia's commitment to trade liberalisation, Australia is obliged to treat foreign investors from our free trade agreement, and certain bilateral investment agreement partner countries, no less favourably than it treats, in similar circumstances, domestic investors.

31. Any obligations under a national foreign ownership register for agricultural land must be consistent with our existing international trade commitments.

6.2 ISSUES IN COMPLIANCE

32. As well as defining what needs to be registered, legislation to implement a register will need to include a compliance mechanism to ensure that there is a legal requirement for relevant parties to fulfil their registration obligations. Consideration will also need to be given to whether there are any institutional systems to ensure compliance over time.

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

6.2.1 Timeframes for registration

33. A threshold issue in designing a registration system is to consider what timeframes may be desirable for the provision of information from investors. The timeframe for the provision of information in an initial stocktake could be longer than that for the provision of individual transactions.

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

6.3 PUBLIC ACCESS ISSUES

34. The purpose of a national foreign ownership register for agricultural land is to improve transparency of foreign ownership by providing the community with a more comprehensive picture of the size and location of foreign agricultural landholdings. Therefore, information from the register needs to be publicly available to meet these aims.

35. However, complete and open public access to information contained in a national foreign ownership register for agricultural land needs to be balanced against commercial sensitivities and privacy considerations. There are also national interest arguments for limiting the accessibility of some of this information. For example, where individual foreign investors purchased Australian agricultural land as natural persons, issues of privacy and confidentiality may arise and release of this information may discourage otherwise beneficial investment. The need for Australia to remain a welcoming destination for foreign investment, including in the agricultural sector, is an important consideration when designing a national foreign ownership register for agricultural land.

36. There are a number of reporting and disclosure options that would be consistent with maintaining the confidentiality of the information and providing more transparency to the community. One option is for key information contained in the register to be collated and publicly reported by the Government on a regular basis. Such reporting would be directed at meeting the key policy and public interest requirements of a register and include, for example, levels of ownership, trends in ownership changes by State/Territory and country of origin information.

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?*

7. OVERLAPS WITH OTHER REGULATORY REQUIREMENTS

37. The establishment and maintenance of a national foreign ownership register for agricultural land will most likely require its own specific legal framework, which will need to include enforcement and compliance administration. Such a legal framework could take a number of forms. For example, it could exist under separate or existing legislation at the Commonwealth level or alternatively under a cooperative legal framework agreed between the Commonwealth and State and Territory governments. All of the alternative legal frameworks supporting a land register will need to consider any existing regulatory requirements that impacted on relevant foreign investors.

38. At the Commonwealth level relevant existing legislation is the *Foreign Acquisitions and Takeovers Act 1975*, providing the legal framework under which foreign investors are required to submit and receive prior approval before undertaking certain investments in Australian corporations, businesses and assets. For some investors there will be overlaps; approval to invest would first be needed and eventual investments will need to be registered. However, the *Foreign Acquisitions and Takeovers Act 1975* applies generally to foreign investment in Australia and not specifically to foreign investment in agricultural land. Further, a national foreign ownership register for agricultural land is

not an approval-based screening system. Therefore, it would seem more appropriate to operate a foreign ownership register through a legal framework separate to the foreign investment screening process framework.

39. At the State and Territory level, only Queensland maintains a foreign ownership of land registration system, which is operated in conjunction with the land title registration system operating in that State. This registration system is focussed on *all* foreign acquisitions of land in Queensland rather than specifically on agricultural land.

40. In Queensland, as in other States and Territories, all investors must register their acquisitions of land titles.

41. The existence of different land registration and screening regulations across Australia opens the potential for duplication of data collection and hence the reporting burden on foreign investors.

42. Each State and Territory already has well-established land registration systems and processes. There is not, at a national level, a land register or title system. Additionally, States and Territories also capture ownership information relating to water access rights within register systems. These registers do not currently capture foreign ownership. There is currently no national level water register or title system.

43. The design of a national foreign ownership register for agricultural land will need to consider ways, if any, for business-to-government reporting processes to be standardised across all levels of government. To minimise the regulatory reporting burden, an important principle for the collection of the data, is that data is collected as a by-product of existing business processes. For example, this could include the re-use of data obtained through State and Territory land title systems to populate a register.

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?*

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?*

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.*

