

Our Ref: RIC:PWrg1266206

2 March 2017

Division Head
Foreign Investment Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: ForeignInvestmentConsultation@treasury.gov.au

Dear Sir/Madam,

Consultation – Register for Foreign Ownership of Water Entitlements

I am writing on behalf of the Law Society of NSW. We understand that the Australian Government is implementing a Water Register by requiring foreign persons to notify and update their interests in water entitlements with the Australian Taxation Office.

The Law Society's Rural Issues Committee contributed to this submission. The Law Society has reviewed the consultation draft rules, and the draft Water Registration Form outlining the proposed data fields for water registration. We provide the following comments on the draft Water Registration Form.

We consider that more guidance is required in relation to what constitutes a "water access right". The concept of a "water access entitlement", a "lease (contractual right)" and an "irrigation right" are clear and well understood within the industry. However, what is intended to be caught within the category of a "water access right" is unclear. If a "water access right" is intended to include a registrable water entitlement, being a right that a person has "to hold water from a water resource" (see definition under s 5A(1)(b)(i) of the *Register of Foreign Ownership of Water or Agricultural Land Act 2015* (the Act)), this should be clearly spelt out in guidance notes, together with examples. If this category is intended to include other categories of rights, this should also be clearly explained in the guidance material.

The Law Society also considers that the water entitlement type "Lease (contractual right)" should be referred to as "Contractual Right (including lease)" so as to be more consistent with the definitions in the Act.

Both the Queensland and NSW jurisdictions provide for a category of water entitlement that allows for the capture of overland flow or floodplain harvesting. The Law Society considers that the guidance material needs to specify if these licences are intended to be registrable, and if so, what type of water entitlement they should be recorded as.

The Law Society notes the inclusion in the Water Details of an "Issue Date". The Law Society considers that these details should not be included, as this date is not easily ascertainable. For example, the "issue date" on a NSW Water Access Licence (WAL) is

the date of issue of the certificate of title, which will change every time a dealing is registered. Furthermore, if there is no certificate of title issued, which will be the case with a co-held licence, there is no issue date. If the “issue date” is intended to mean the date of original issue of the licence, this is not ascertainable from the WAL certificate. Similarly, in Queensland, the title certificate of a water allocation does not specify an issue date.

We suggest that further guidance around the entitlement number/identifier is required, as most licences have more than one number. For instance, in NSW a WAL has a WAL number (e.g. WAL12345) and a Department of Primary Industries (DPI)/NSW Office of Water reference number (e.g. 90AL855559). Likewise, in Queensland, water allocations have a title reference (e.g. 4655556) and an allocation number (e.g. 276 crown plan AZ8976).

The Law Society provides the following comments on the *Register of Foreign Ownership of Water or Agricultural Land Rules 2017* (the Rules).

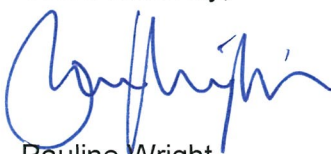
Regarding Rule 5 “Private harvestable rainwater rights”, this rule does not reflect the types of exemptions within the *Water Management Act 2000* (NSW) (NSW WMA). The Law Society notes that s 5A of the Act already excludes stock and domestic rights from the definition of “registrable water entitlement”. However, the NSW WMA includes a category of rights in s 53 being “Harvestable Rights”. These rights are general in nature and not specific to an individual. Therefore, the Rules should make it clear that such rights are not required to be registered.

In addition, NSW DPI has stated that it is introducing a new exemption for “rainfall runoff” for which DPI Water has calculated volumes per property for any landholder that has applied for a floodplain harvesting entitlements. The Law Society queries how such exemptions would fit within this regime.

The Law Society also has some concerns regarding the annual reporting requirements. Specifically, we consider that organisations should have the ability to either report annually, or report on a transaction by transaction basis. We understand that annual reporting may have compliance advantages for larger organisations, particularly those that are involved in water trading. However, for individual or smaller water holders who may only be involved in occasional ad hoc transactions involving water entitlement, there should be the opportunity for reporting to be done at the time of the transaction. This could then be undertaken by the legal advisor or other professional carrying out the transaction for the party. Otherwise, it is foreseeable that the reporting requirement could potentially be overlooked. Even larger holders may prefer to do their reporting on a transaction by transaction basis, as annual reporting introduces a need for the collection of data and further reporting.

Thank you for the opportunity to contribute to this consultation process. The Law Society contact for this matter is Rachel Geare, Senior Policy lawyer, who can be reached on (02) 9926 0310 or at rachel.geare@lawsociety.com.au.

Yours sincerely,



Pauline Wright
President