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

Email: ForeignInvestmentConsultation@treasury.gov.au

To Whom It May Concern,

Draft *Register of Foreign Ownership of Water or Agricultural Land Rules 2017*

Western Murray Irrigation Limited (**WMI**) welcomes the opportunity to make a submission on the exposure draft of the *Register of Foreign Ownership of Water or Agricultural Land Rules 2017* (**Draft Rules**) and the draft Water Registration Form.

In our previous submission on the draft *Register of Foreign Ownership of Agricultural Land Amendment (Water) Bill 2016* (**Bill**), we identified a number of major difficulties that the Bill posed for irrigation infrastructure operators (**IIOs**), such as WMI. In particular, we noted the difficulty for an IIO to determine whether or not it is a foreign person, as this depends on being able to determine whether the IIO's hundreds (if not thousands) of shareholders are foreign persons.

In our view, WMI's concerns still have not been addressed in the Draft Rules to be made under the *Register of Foreign Ownership of Water or Agricultural Land Act 2015* (Cth) (**Act**).

We submit that the Draft Rules should be amended to ease the compliance burden by:

1. allowing IIOs to disregard shareholdings of less than 5% when assessing whether or not they are foreign persons, consistent with the rules for ASX-listed companies;

2. imposing a notification obligation on shareholders of an IIO so that they must tell their IIO if they are, have become, or have ceased to be, a foreign person; and

3. allowing IIOs to rely on information provided by shareholders about their foreign person status and not penalising the IIOs where the information turns out to be inaccurate or incomplete.

We explain the basis for these submissions below.

Verifying foreign ownership

In order for an IIO to determine whether it is a foreign person, it would be necessary for the IIO to determine whether the IIO's shareholders are themselves foreign persons. Example 12 in the draft Water Registration Form illustrates how the Draft Rules would operate for an IIO with four foreign shareholders each holding 10% in the IIO. What is not explained in the example is how the IIO was able to determine that any of its shareholders were foreign persons. In practice, IIOs commonly have widely held memberships, consisting of hundreds or thousands of irrigators holding shares in the IIO. In WMI's case, there are 430 shareholders and, as an unlisted public company, WMI possesses only the information shown in its register of members and otherwise

Tel: (03) 5027 4953
Fax (03) 5027 4880
Email: enquiries@westernmurray.com.au

Office: 5 Tapio Street Dareton
Postal: PO Box 346 Dareton NSW 2717
Website: www.westernmurray.com.au

provided in the ordinary course of business. This information is not sufficient to assess whether any shareholder is a foreign person.

The Act, unless it is modified appropriately by the Draft Rules, will require every IIO to analyse, and regularly monitor, the status and ownership structure of hundreds, if not thousands, of shareholders to establish whether or not they meet the definition of foreign person, in order to establish whether the IIO is above or below the 40% foreign ownership threshold. This will be impossible for IIOs to accomplish in many cases: the information that would be required to verify each shareholder's status is not available to IIOs and we cannot legally compel the shareholders to provide it. Even if a shareholder were to voluntarily provide such information, we would have no way to verify it, particularly where there are complex ownership structures like trusts. Without any amendment to the Draft Rules, IIOs will be put at risk of unintentionally contravening the Act and attracting a penalty from the ATO.

Further, even if IIOs were able to ascertain and verify the foreign person status of all shareholders (which we believe to be practically impossible), it would impose a very onerous burden on IIOs that they are not resourced to meet. WMI and other IIOs like it are not-for-profit organisations.

Reducing the compliance risk and burden

We submit that the Draft Rules should be amended in the manner suggested below to reduce the significant compliance risk and burden on IIOs.

1. **Disregarding small shareholdings**

   Under regulation 47 of the *Foreign Acquisitions and Takeovers Regulation 2015* (Cth), ASX-listed companies are entitled to disregard shareholdings which are not "*substantial holdings*" (i.e. holdings of 5% or more) when assessing whether or not they are foreign persons.

   In our view, a similar rule should apply to IIOs, which often have more shareholders than many ASX-listed companies. This will considerably reduce the regulatory burden on IIOs like WMI, which have a large proportion of members with very small shareholdings.

2. **Notifying IIOs when shareholders become foreign persons**

   IIOs have no legal mechanism for ascertaining whether their shareholders are, have become, or have ceased to be, foreign persons. Without such a mechanism, IIOs will not be in a position to ensure that they are complying with the Act.

   IIOs might write to their shareholders periodically asking them to volunteer information about whether the shareholder is, has become, or has ceased to be, a foreign person. Some shareholders might reply but we anticipate that most will not.

   As noted above, ASX-listed companies are only required to consider "*substantial holdings*" (i.e. holdings of 5% or more) when assessing whether they are foreign persons. In practice, ASX-listed companies rely on the information provided in substantial holding notices (which their shareholders are compelled, by section 671B of the *Corporations Act 2001* (Cth), to give to the ASX-listed company) when assessing whether they are above or below the 40% foreign ownership threshold.

   In order to be able to comply with the Act, IIOs need a similar mechanism. The Draft Rules should contain a requirement for shareholders of IIOs to notify the IIO if they are, become, or cease to be, a foreign person, at the same time they notify the Commissioner of Taxation under the Act.

3. Reliance on shareholder information

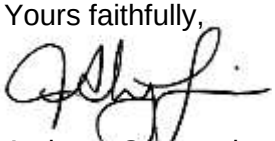
IIOs will not have the capacity to verify the accuracy of information volunteered by hundreds or thousands of shareholders, however, the IIOs should be entitled to rely on this information. Under the Draft Rules, an IIO should be entitled to rely on the information provided by their shareholders about whether they are, have become, or have ceased to be, a foreign person.

Furthermore, when IIOs write to their shareholders periodically asking them to volunteer information about whether the shareholder is, has become, or has ceased to be, a foreign person, we anticipate that most shareholders will not reply. The IIO should not be liable for a contravention if a shareholder fails to notify the IIO that the shareholder is, has become, or ceased to be, a foreign person.

Representations have been made previously by Treasury to the effect that various factors will be taken into account when the 'failure to lodge' penalty is being applied to an IIO. These factors may include steps that the IIO took to achieve compliance. Nevertheless, it would be unsatisfactory to place IIOs in a position where it may be impossible for them to comply with the law and to leave the IIOs to rely on the leniency of the regulator. An IIO will be dependent on large numbers of shareholders volunteering the information required to determine whether the IIO is, has become, or has ceased to be, a foreign person. The Draft Rules need to recognise this by incorporating the amendments we have requested above. While the requested amendments will not eliminate the new compliance burden imposed on IIOs, they will assist in mitigating this burden and reducing undue regulatory risk placed on IIOs.

We look forward to your consideration of this submission.

Yours faithfully,



Anthony Couroupis
General Manager