



THE LAW SOCIETY
OF NEW SOUTH WALES

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14 March 2016

Water Access Entitlements Register Consultations Working Group
Foreign Investment and Trade Policy Division
The Treasury
Langton Crescent
Parkes ACT 2600

By email: ForeignInvestmentConsultation@treasury.gov.au

Dear Sir/Madam,

National Register of Foreign Ownership of Water Access Entitlements

Thank you for the opportunity to comment on the consultation paper, *National Register of Foreign Ownership of Water Access Entitlements*, issued on 22 February 2016. The Law Society of NSW provides the following comments.

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?

The Law Society does not have a strong view on whether or not a register is needed. However, the answers below are based on the premise that a register will be established.

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

We note that the consultation paper states that a Commonwealth administered register can be established more quickly and at less cost compared to state-based approaches. It will also mean that the information collected is consistent across jurisdictions.

The main disadvantage is that there is potential for duplicating existing state-based reporting requirements, which increases business compliance costs. The costs of duplication increases if changes to title details also need to be provided to the register, because changes to titles within the state systems will not automatically flow through to the register.

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

We agree that the existing Agricultural Land Register would be the most effective vehicle for registering WAEs, as this will reduce compliance costs. Given that agricultural land is the largest consumer of water, it is likely that foreign holders of WAEs are already required to comply with the Agricultural Land Register (but not always, as water rights are tradeable, so do not always follow ownership of the land).

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

We agree that it is appropriate to exclude water allocations from the register, as they are subject to change on a frequent basis.

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

The Law Society considers that the register should include irrigation rights, including any irrigation right that is able to be transformed into a WAE, and water use rights. The consultation paper states that, in 2013-14, 21 per cent of the entitlements on issue in the Murray Darling Basin were held by Irrigation Infrastructure Operators (IIOs). The areas in which the major IIO's operate (e.g. Murray Irrigation, Murrumbidgee Irrigation and a number of the Sunwater systems) are economically significant irrigation areas. The exclusion of those entitlements would undermine the integrity of the data obtained.

In nearly all States, the unbundling process is not complete. We suggest that further consideration should be given to the definition of a WAE, and as to whether some entitlements that are still attached to land should be included in the register due to their significant economic importance.

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?

The Law Society considers that the register should capture WAEs for all industry sectors as well as current water use (agricultural, mining, manufacturing, environmental). We note that the Land Register captures information about current land use, despite it only being valid at the time of a reportable transaction.

Question 7: What other type of information would be important for the register to collect and why?

The information suggested in the consultation paper appears to be sufficient. However, we note that some of the details of licences and the terminology vary significantly from State to State. We suggest that the ATO and/or Treasury undertake further consultation with State authorities and larger water holders before finalising the format of the proposed register.

Consideration needs to be given to how changes to information are to be captured and recorded. For example, the Agricultural Land Register does not have a facility to record land subdivisions. This makes the recording of sales of land following a subdivision difficult.

WAEs can be the subject of a number of changes and thought needs to be given in designing the register as to how those changes will be recorded.

Question 8: What other information on water is available that the working group could consider utilising for the Water Access Entitlement Register?

Consideration should be given to State requirements to avoid duplication where possible.

Question 9: Assuming registration details were similar to the Agricultural Land Register, what would be the likely compliance costs from the requirement to register foreign ownership of WAEs?

For large landholders, compliance with the Agricultural Land Register is a significant burden. In order to minimise compliance costs, the Law Society encourages the ATO to seek practical input and guidance from State authorities, solicitors who undertake numerous water transactions, and known larger water holders, as well as those who trade water rights and facilitate and record that trading.

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

The register should not be launched until the supporting legislation has been passed to avoid uncertainty.

For the Agricultural Land Register, the ATO developed an online registration form which was designed to capture land information based on a landholder holding one lot. In practice, most rural land holdings comprise multiple lots which rendered the on line system impractical to use. The ATO then had to design a spreadsheet for use by most landholders.

The ATO was then required to redesign the spreadsheet as there was some uncertainty regarding what land details were required because there are variations between the States as to the terminology around land title information. Anecdotally, the ATO is still returning forms seeking information that is not applicable to the land in question.

These difficulties with the register contribute to additional compliance costs for business as forms need to be completed multiple times. This has been further exacerbated by the delay between lodgment of forms and the ATO seeking further advice from landholders as to the content of the forms.

The difficulties appear to stem from a lack of consultation with industry regarding the detail of information required and from a lack of knowledge and training within the ATO. The Law Society recommends that, before finalising the design of the register and the particular details required, Treasury and the ATO undertake widespread industry consultation, including with lawyers who deal regularly with water rights.

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

We agree that the register should, as far as possible, adopt the definitions already used by the Agricultural Land Register. If the register applies to all industry sectors then additional definitions will be needed.

However, we note that it can be difficult and time consuming to determine whether an interest in agricultural land needs to be registered, as this involves consideration of definitions and exemptions located across several different Acts and Regulations. Greater clarity about how interests are defined would simplify this process and significantly reduce compliance costs.

Question 12: What types of interests should the Water Access Entitlement Register capture and why?

For the sake of consistency, the register should capture long term leases. We suggest that industry and authority consultation should be undertaken, as the concept of "lease" in relation to a WAE can vary significantly from State to State.

Question 13: Should a similar approach to the Agricultural Land Register be adopted so that rules for exemption can be made?

We agree that a similar approach to the Agricultural Land Register should be adopted so that rules for exemption can be made, noting that these may need to apply to other industry sectors.

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 interest in WAEs? If not, what alternative(s) do you propose and why?

We agree that a similar approach to the Agricultural Land Register should be adopted to minimise compliance costs.

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?

In some jurisdictions it is possible to apply for and hold a water licence that has no water access entitlement attached to it. A person may do this for a number of reasons: in anticipation of having a WAE transferred into that licence at a future time or to temporarily transfer a water allocation into it. Those water licences should not be required to be registered as there is no economic value in that licence and it creates an unnecessary compliance burden for business to have to register those licences. If a water access entitlement is transferred into a zero licence at that point it should be registered.

The register should not capture WAE that are purely for stock watering and domestic or household purposes. These terms are defined in the *Water Management Act 2000* (NSW) as follows:

Domestic consumption, in relation to land, means consumption for normal household purposes in domestic premises situated on the land.

Stock watering, in relation to land, means the watering of stock animals being raised on the land, but does not include the use of water in connection with the raising of stock animals on an intensive commercial basis that are housed or kept in feedlots or buildings for all (or a substantial part) of the period during which the stock animals are being raised.

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

See response to question 17 below.

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

The Law Society notes that registration was reported to be very low prior to the supporting legislation being passed. To avoid the uncertainty that surrounded the Agricultural Land Register, we suggest that the stocktake period should not begin until the supporting legislation has passed.

Question 18: Should aggregate statistics derived from the Water Access Entitlement Register be published on a regular basis? If not, what alternative(s) do you propose and why?

We agree that only aggregate statistics should be available.

If you have any questions about this letter please contact Gaby Carney, Director of Policy and Practice, on 02 9926 0256 or gaby.carney@lawsociety.com.au.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Gary Ulman', with a small dot to its right.

Gary Ulman
President