



THE LAW SOCIETY
OF NEW SOUTH WALES

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20 July 2015

The Manager
International Investment and Trade Unit
Foreign Investment and Trade Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: ForeignInvestmentConsultation@treasury.gov.au

Dear Sir or Madam,

Implementing foreign investment reforms

I am writing on behalf of the Rural Issues Committee ("Committee") of the Law Society of New South Wales. The Rural Issues Committee represents the Law Society on rural issues, as they relate to the legal needs of people in rural and remote NSW. The Committee includes experts drawn from the ranks of the Law Society's membership.

The Committee has reviewed the draft legislation released for consultation and provides the following comments on the *Register of Foreign Ownership of Agricultural Land Bill 2015* (Cth) ("the Bill").

Briefly, the Committee is concerned about the retrospective effect of the provisions in the Bill and practical uncertainties surrounding the reporting obligations created. The Committee is concerned that 30 days from the commencement of the legislation is an insufficient period of time for corporations or individuals with large land holdings to notify the ATO of interests in agricultural land. This is also an insufficient period of time for an executor and administrator of a deceased foreign person's estate or a corporate liquidator to comply with the notification requirements.

1. Mandatory reporting of interests in agricultural land

The Bill establishes a Register to be maintained by the Australian Taxation Office ("ATO"). The Bill creates an obligation on foreign persons to report interests in agricultural land held on or after 1 July 2015¹.

Two distinct reporting obligations are created in respect of:

(a) Foreign persons who held interests in agricultural land on 1 July 2015; and

¹ Exposure Draft *Register of Foreign Ownership of Agricultural Land Bill 2015* (Cth) sections 19 and 20.

- (b) Foreign persons (and persons who have since ceased to be foreign persons) to notify of certain events involving agricultural land that occur on or after 1 July 2015.

Each foreign person with a direct legal interest is required to notify the ATO of their interest. If the natural person dies, the executor or administrator of their estate must give the notice. If a corporation has become insolvent, the liquidator of the corporation must give the notice.

A person must give notice to the ATO in the approved form by the later of the commencement of the legislation or within 30 days of the event occurring for which notice must be given. There is an administrative penalty for failure to give notice in the approved form on time.

The Committee is concerned about the retrospective effect of the provisions in the Bill and practical uncertainties surrounding the reporting obligations created. In the Committee's view retrospective laws would generally be inconsistent with the rule of law, particularly if they retrospectively change legal rights and obligations. In this instance the proposed provisions retrospectively change obligations and impose administrative penalties for a failure to meet newly created obligations.

The Committee notes that the time in which the notification must be given is unclear. The Explanatory Material to the Bill refers to an obligation to report to the ATO on or after both 1 December 2015 and 30 December 2015, and the ATO Register and Foreign Investment Review Board webpages refer to 31 December 2015².

The Committee notes that a person or corporation with large land holdings may elect to notify their interest to the ATO prior to the commencement of the legislation, often because 30 days is insufficient time in which to provide the required information. The Committee is concerned that there is no guarantee that early notification will be recognised by the ATO.

The Explanatory Material to the Bill states that if a person notifies the ATO of their interest before 1 December 2015, "...it is anticipated that the ATO would treat them as having complied with the requirement to give notice under this Exposure Draft"³. This is problematic for the following reasons:

- (a) The Explanatory Material only 'anticipates' how the ATO may treat an early notification. Without confirmation from the ATO, this remains uncertain;
- (b) The notification referred to is a requirement to give notice under the Exposure Draft. In fact no legal requirement to give notice is created by the Exposure Draft Bill;
- (c) The current Register available on the ATO website may not reflect the final form of notification required to be in the "approved form" under the Bill; and

² Explanatory Material Exposure Draft *Register of Foreign Ownership of Agricultural Land Bill 2015* (Cth) pages 8 and 21 and <https://www.ato.gov.au/general/Foreign-investment-in-Australia/agricultural-land-register/> and <http://www.firb.gov.au/content/agland/agland.asp> accessed on 14 July 2015.

³ Note 2, pp 8 and 21.

- (d) Thirty days is insufficient time for corporations or individuals with large agricultural land holdings to notify the ATO of these interests.

The Committee suggests one solution to the uncertainty and administrative burden created by a retrospective obligation to notify the ATO of an interest in agricultural land is to change the obligation to a prospective obligation. The obligation could arise after the legislation commences, such as from 1 July 2016. In respect of the 30 day notice requirement, the Committee suggests that a longer time period should be provided or alternatively a mechanism to seek an extension of time where it is difficult to comply with the 30 day requirement.

2. Holding of agricultural land

Under the Bill there are two types of interests, or changes to interests, in agricultural land that a foreign person must report, including⁴:

- (b) A right to occupy agricultural land under a lease or licence whose term (including any extension or renewal) after the person starts to hold the right is reasonably likely to exceed 5 years.

The Committee notes that in New South Wales landholders may have legal rights to occupy land granted by the State. Such rights include enclosure permits, and there may be uncertainty about whether these types of rights would be “licences” under the Bill.

The term “reasonably likely to exceed 5 years” in relation to a lease may be difficult to apply in practice. The Explanatory Material provides that a lease that is reasonably likely to exceed five years could be a lease with a term of three years with a three year renewal option that is likely to be exercised⁵. The Committee notes that it is often not possible to know at the beginning of a lease whether or not a person is “reasonably likely” to exercise an option. Agricultural leases operate differently to commercial leases, there being no goodwill in the lease.

The Bill refers to reportable events occurring when a person “starts to hold” and “ceases to hold” an interest in land⁶. To avoid uncertainty surrounding when this event is taken to have occurred, the Committee submits that these terms could be defined in the legislation.

3. Reporting obligations

The Committee is concerned about the obligations the Bill imposes on executors, administrators and corporate liquidators⁷. The Committee suggests that executors, administrators and corporate liquidators are unlikely to be able to comply with a 30 day time frame for notification of the interests of deceased persons or a corporation that is being wound up. Further, the obligation to notify the ATO that a deceased foreign person or wound up company holds an interest on 1 July 2015, or started to hold and ceased to hold an interest after 1 July 2015 will lead to duplication of information on the Register and will be administratively onerous.

⁴ Note 1 ss 19 and 21-26.

⁵ Note 2 p 19.

⁶ Note 1 ss 21 and 22.

⁷ Note 1 ss 27 and 28.

The Committee notes that a foreign person is not ordinarily resident in Australia. This means that a death certificate must be obtained from the country of the deceased foreign person's usual residence. Further, the Supreme Court may need to grant probate before an executor or administrator would have authority to notify the ATO of the deceased person's interest in agricultural land. This process may take many months for the estate of a person who is not ordinarily resident in Australia.

4. Agricultural Land Register

The Committee notes that the Register is now available and foreign persons can notify the ATO of their interest in agricultural land online. Information is required on a "per lot" basis. Many rural properties consist of a number of lots or titles, often greater than 15 titles. This means that a person must provide 15 separate notifications on the Register. This is a very time-intensive process. At present, the Register requires the following information "per lot":

- Name of landholder
- Address
- Email of contact
- Phone number
- Registration reason
- FIRB application number
- Property name
- Address
- Unique Property ID (number issued by the Office of State Revenue)
- Plan type
- Lot plan number
- Volume
- Folio
- Land area
- Land use code
- Title holding type
- If a lease, the term of the lease
- Date of acquisition (meaning those with existing interests have to find their old contracts)
- Market value
- Percentage of land use (crops/livestock/intensive horticulture/forestry/other farming/non-farming).

The Committee is of the view that the information to be provided on the Register should be simplified to ensure compliance and accuracy.

The Committee would welcome an opportunity to be involved in any future stakeholder consultation. Questions can be directed to Emma Liddle, policy lawyer for the Committee. Ms Liddle is available on 9926 0212 or emma.liddle@lawsociety.com.au.

Yours sincerely,



Michael Tidball
Chief Executive Officer