



Australian Government
Productivity Commission

Register of Foreign-owned Water Entitlements

Productivity Commission
Draft Report
Overview

August 2021

This is a draft report prepared for further public consultation and input. The Commission will finalise its report after these processes have taken place.

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The Productivity Commission

The Productivity Commission is the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. Its role, expressed most simply, is to help governments make better policies, in the long term interest of the Australian community.

The Commission's independence is underpinned by an Act of Parliament. Its processes and outputs are open to public scrutiny and are driven by concern for the wellbeing of the community as a whole.

Further information on the Productivity Commission can be obtained from the Commission's website (www.pc.gov.au).

Opportunity for further comment

The Commission thanks all participants for their contributions to the inquiry and now seeks additional input for the final report.

You are invited to examine this draft report and comment on it by making a written submission by **Friday 10 September 2021**. Further information on how to provide a submission is included on the inquiry website: www.pc.gov.au/inquiries/current/foreign-water-entitlements/make-submission#lodge

The final report will be prepared after further submissions have been received, and will be submitted to the Australian Government by **7 December 2021**.

Commissioners

For the purposes of this inquiry and draft report, in accordance with section 40 of the *Productivity Commission Act 1998* the powers of the Productivity Commission have been exercised by:

Jonathan Coppel	Commissioner (to July 2021) and Special Adviser
Jane Doolan	Commissioner (from July 2021)

Disclosure of interests

The *Productivity Commission Act 1998* specifies that where Commissioners have or acquire interests, pecuniary or otherwise, that could conflict with the proper performance of their functions during an inquiry they must disclose the interests.

Dr Jane Doolan has advised the Commission that she is:

- Independent Chair, Yarra Consultative Committee
- Chair, Independent Panel of Experts on Capacity and Delivery in the River Murray
- Member, Australian Water Partnership Advisory Committee.

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The full report is available at www.pc.gov.au

OVERVIEW

Key points

- There is no compelling case for major changes to the Register of Foreign Ownership of Water Entitlements (the Register). It plays a small, yet useful, role and apart from a few tweaks should continue for now, provided its costs remain low.
- Foreign investment provides capital for businesses to grow, introduces new technologies, practices and technical expertise and enables Australians to enjoy higher standards of living than they otherwise would.
 - There is support for foreign investment within the agricultural and mining industries, but a sizeable share of the broader community has some unease with foreign investment, and it can be conflated with other water market concerns, such as water market manipulation.
- The Register requires foreign persons to notify the ATO if they acquire a specified water asset or if there are changes to their foreign status or water entitlement holdings.
 - It shows that foreign ownership of Australian water assets is low, at around 11 per cent.
- The transparency provided by the Register helps maintain community confidence in Australia's approach to foreign investment. It gives ministers, government agencies and other interested parties an authoritative source of information on foreign ownership of water entitlements in Australia. There is no other source for this information.
- The information provided by the Register is sufficient for its limited purpose.
 - The high-level summary of Register data contained in the statistical reports provides the appropriate transparency. These reports are generally clear and easy to use.
 - Compliance and enforcement activities are proportionate to the minimal risks associated with non-compliance.
- There is not a compelling case to provide more granular information on foreign ownership, such as at the water source or catchment level. Such information could be used to identify registrants, violating confidentiality provisions, and potentially damage Australia's attractiveness as a destination for foreign investment.
- There is no alternative approach to the current Register that would provide the appropriate transparency at a lower cost.
- There is scope for some tweaks to the current Register.
 - The statistical reports should include data on the proportion of foreign owners of water entitlements that also hold agricultural land. This would be of low cost and improve the effectiveness of the Register.
 - The statistical reports should clarify a number of misperceptions, by clearly stating that registration is compulsory, and that foreign ownership need not entail foreign control.
 - The States and Territories should link to the Register from their water information portals.

Overview

Water reforms over the past 30 years, including the introduction of the National Water Initiative in 2004, have supported the development of markets for water. Creating water entitlements as tradable assets has allowed water to be used more efficiently and has provided new opportunities to invest capital — from both domestic and foreign sources. The level of foreign ownership of Australian water assets is now 11 per cent, with most investment coming from Canada, followed by China and the United States (box 1).

Foreign investment can provide capital for businesses to grow, introduce new technologies, practices and technical expertise, and enable Australians to enjoy higher standards of living. There is broad support for foreign investment — including in water entitlements — within the agriculture and mining industries because of the opportunities it provides for businesses to grow and become more efficient.

However, a sizeable share of the Australian community has some unease towards foreign investment, particularly foreign ‘direct’ investment that entails some control of Australian businesses and assets. It is sometimes considered a threat to rural livelihoods, local communities and Australian food security — concerns that carry over to water entitlements. Changes in water resource management and the pressures from prolonged periods of drought have exacerbated these concerns.

1 The Register

In response to community concerns and a perception of rapidly rising foreign control of water assets, the Australian Government introduced the Register of Foreign Ownership of Water Entitlements (the Register) in 2017 to provide transparency about the level of foreign ownership of water. Under the Register, foreign persons are required to notify the ATO if they acquire a specified water asset or if there are changes to their foreign status or water entitlement holdings. In addition to some personal details, registrants furnish information on:

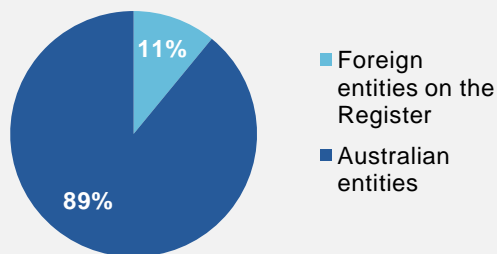
- the type and terms of the water right held
- when and by whom the right was issued
- the State or Territory and water system the right relates to
- the characteristics of the water resource
- the percentage of foreign ownership of the resource
- the sector in which it is used.

Box 1 Characteristics of foreign-owned water in Australia

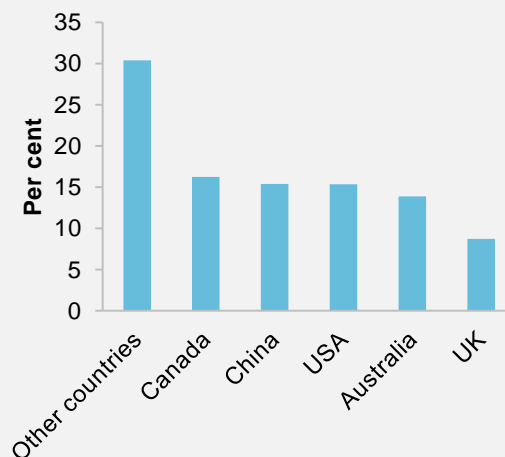
The annual statistical summary of Register data indicates that the level of foreign ownership of Australia's water entitlements is low. At 30 June 2020, 11 per cent of water entitlements on issue in Australia were owned by entities that met the Register's definition of a foreign person. Western Australia and Queensland had the highest proportion of foreign-owned water entitlements. Most foreign-owned water entitlements are used in the agricultural sector, except in Western Australia, where the bulk is used in the mining sector.

Information on foreign-owned water in Australia^{a,b,c}

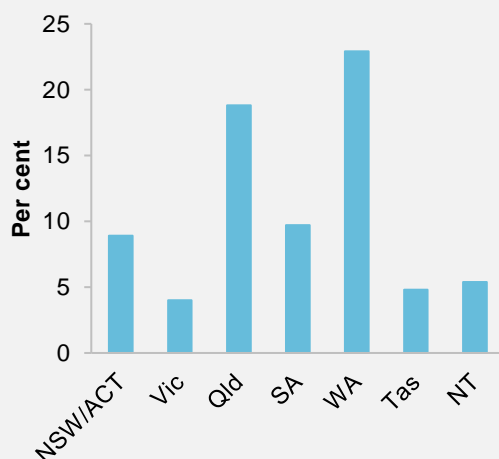
a. Ownership of water entitlements in Australia



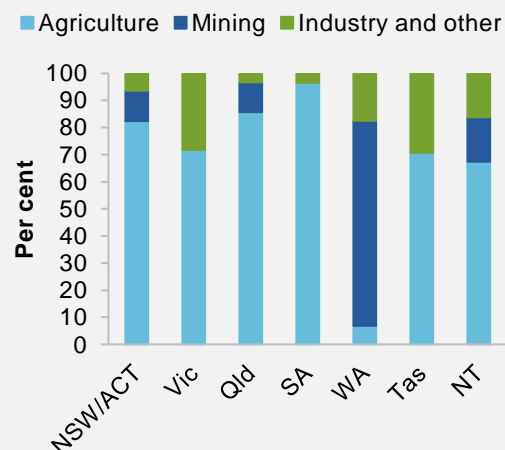
b. Sources of investment in foreign-held water entitlements



c. Foreign-held entitlements by state



d. Uses of foreign-held water entitlements



^a As at 30 June 2020. ^b Water entitlements are recorded as foreign owned if a foreign person, corporation or government has an interest in an entity of at least 20 per cent, or multiple foreign entities have an aggregate interest in an entity of at least 40 per cent. Consequently, entitlements recorded as foreign owned may have a share of Australian equity. This is reflected in panel b, where Australia is shown as a source of foreign investment. ^c Other uses of foreign-held water entitlements include tourism, research and uses by trades.

The ATO holds this information in the 'basic part' of the Register, which is not publicly available, but can be shared with some authorised users for specific purposes.

The ATO also prepares a statistical summary of the Register data — termed the ‘statistical part’ — which provides an overview of the level of foreign ownership of water nationally, by State and Territory, by type of water resource and by sector at 30 June each year (box 2). This report is published on the Foreign Investment Review Board (FIRB) website.

Box 2 What does the Register involve?

The Register of Foreign Ownership of Water Entitlements (the Register) was established in 2017 under the *Register of Foreign Ownership of Water or Agricultural Land Act 2015* (Cth). The Commissioner of Taxation administers the Register in accordance with the *Taxation Administration Act 1953* (Cth).

Who must register?

An owner of a water entitlement must register with the ATO if they are deemed to be a foreign person according to the *Foreign Acquisitions and Takeovers Act 1975* (Cth). A ‘foreign person’ is:

- an individual not ordinarily resident in Australia, or
- a corporation, trustee of a trust or general partner of a limited partnership in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds an interest of at least 20 per cent, or
- a corporation, trustee of a trust or general partner of a limited partnership in which two or more persons — each of whom is either an individual not ordinarily resident in Australia, a foreign corporation or a foreign government — hold an aggregate interest of at least 40 per cent, or
- a foreign government.

What must be registered and when?

Foreign persons must register their holdings of ‘registrable water entitlements’ and ‘contractual water rights’.

- Registrable water entitlements comprise irrigation rights (rights to receive water from an irrigation infrastructure operator) and rights under State or Territory law to hold and/or take water from a water resource in Australia. These rights have different names in different jurisdictions, including water access licences, water access entitlements and water shares.
- Contractual water rights are rights to all or part of another person’s registrable water entitlement or water allocation. Such rights only need to be registered where the term of the contract (after the foreign person starts holding the right) is reasonably likely to exceed five years.

A foreign person may register at any time during the financial year, or no later than 30 days after the end of the financial year in which the transaction occurred. The Register relies on foreign persons to self-report their water entitlement transactions.

2 The inquiry’s focus

The Productivity Commission is required to evaluate the effectiveness of the Register under section 34A of the *Register of Foreign Ownership of Water or Agricultural Land Act 2015* (Cth). The inquiry assesses:

-
- whether the information provided in the Register meets the objective of increasing transparency of foreign ownership of water entitlements
 - the direct and indirect costs and benefits of maintaining the Register and producing the annual statistical report
 - the direct and indirect costs borne by foreign owners of water entitlements to ensure they are compliant with the legislation.

The inquiry is being conducted against the backdrop of the Government’s announcement of a new registration scheme, due to commence by 11 December 2024. The forthcoming Register amalgamates the existing (Water) Register, the Register of Foreign Ownership of Agricultural Land and the Register of Foreign Ownership of Residential Land. It will also expand registration requirements to foreign owners of Australian commercial land, exploration tenements and asset acquisitions that are subject to the Treasurer’s powers. Many aspects of the current Register will be maintained under the forthcoming arrangements. The Commission has sought to draw lessons for the new Register from its assessment of the current (Water) Register. The findings and recommendations throughout the report apply to both the current and forthcoming Registers, except where specified.

3 The Register is a resource for fact checking

The Register fills an information void, but is little used

The Register provides ministers, government agencies and other interested parties with an authoritative source of information on the foreign ownership of water entitlements in Australia (box 1). While the States and Territories (the States) generally maintain registers of water asset ownership, they do not collect information on the nationality of asset owners. The Victorian Government noted that the Register is the ‘key source of information’ for responding to community interest.

The Register is used in a limited way to inform public discussion. For example, in 2019 the then Chief Executive Officer of the National Irrigators’ Council commented that the statistical reports showed that ‘we’ve got no particular domination by any country or company’ in water entitlements. In the same year, the Victorian Farmers Federation issued a fact-sheet that stated ‘in Victoria only 2.7 per cent [of water entitlements are] foreign owned’. These comments followed the release of the first statistical report, and the Commission has heard that this report was sufficient to persuade some members of the community that there was little cause for concern about foreign investment in water entitlements.

Governments make some use of the Register, particularly in responding to concerns from members of the community with facts about the level and type of foreign ownership in water entitlements. Several agencies at both the federal and state level told the Commission that they have used Register data when responding to ministerial correspondence. For example, the Australian Government Department of Agriculture, Water and the Environment noted that, in 2020, it received over 20 items of correspondence raising concerns specifically about

foreign ownership of water assets, and a larger number that raised foreign ownership of water along with other issues.

The media occasionally draws on the Register, often prompted by the release of the statistical reports. Many of these stories portray the Register’s information in a negative light and reflect the concerns of some that even the low levels of foreign ownership of water entitlements are ‘too high’. Of 35 news articles that cited Register statistics between 2019 and 2021, almost two thirds signalled concerns about the involvement of foreign investors in Australia’s water markets or publicised calls for tighter scrutiny of foreign investment in water. Headlines such as ‘Foreign ownership of Victorian water hits whopping high’ and ‘China becomes the biggest foreign owner of Australian water ... as local farmers struggle to compete ...’ illustrate how Register information can be used in the context of debate about foreign ownership.

Aside from these examples, the Register is not used extensively, even by water market participants.

Awareness of the Register is extremely limited

There is little awareness of the Register, even amongst active participants in water markets. This is illustrated by the low level of stakeholder engagement in this inquiry (only 12 submissions). Limited awareness of the Register was also evident in a recent New South Wales (NSW) Government survey of water users, interested community members and government agencies. The survey, which sought views on the accessibility and transparency of water markets information, found that only half of the 177 respondents were aware of the need for foreign owners to register their entitlements, and only 30 per cent were aware of the annual statistical reports.

4 Pre-empting a problem

The low level of use and awareness of the Register raises the question of whether it serves any useful purpose.

Maintaining public confidence

The stated rationale for the Register is to increase transparency of foreign ownership of water entitlements, and thereby maintain community confidence in Australia’s approach to foreign investment.

The role of transparency in supporting community confidence

Transparency can promote trust because it allows the community to hold governments to account — for both their successes and failures. The public is able to scrutinise the processes

and outcomes of government actions and make its own assessments. Even if the information is rarely used, people place value on knowing it is available.

Concerns regarding foreign investment in agriculture are long running and well documented in public surveys, including the ABC's Vote Compass, Essential Media polls and annual polls conducted by the Lowy Institute for International Policy. The Australian community generally perceives the risks and threats associated with foreign investment more prominently than the benefits. In the case of water entitlements, concerns may become elevated with media reporting and during periods of water scarcity.

In contrast, the Commission has observed that the agricultural and mining sectors, which are the predominant holders of water entitlements, have few concerns about foreign investment in water entitlements and generally support it. For example, foreign ownership of water assets is rarely raised as a concern with the peak bodies. Indeed, many within these industries acknowledge that foreign investment is an important source of capital for their businesses.

The transparency offered by the Register is relatively narrow in focus — it reveals the level of foreign ownership of water entitlements, including by source of investment and type of water asset. Nevertheless, this may reduce the likelihood of disinformation taking hold and allay some community concerns. The Register may also provide some comfort that the Government has oversight of foreign investment in water entitlements.

Does the rationale hold water?

The question becomes what role, if any, the Register can play in practice in supporting Australia's approach to foreign investment. One way to think about this is to consider what might happen to foreign investment — and, indeed, water market — policy settings were the Register removed.

The answer may be not a great deal. The Commission considers it unlikely that, in the absence of the Register, the Australian Government would significantly tighten its policies for foreign investment or water markets in response to pressure from community members. This is due largely to the considerable benefits of these policies for the Australian community. For example, in its 2012 inquiry into the National Water Initiative, the National Water Commission estimated that the establishment of water markets had increased GDP in the southern Murray-Darling Basin by \$4.3 billion.

However, in the absence of the Register and in the face of mounting community pressures, it is possible that the Government might make small adverse changes. Indeed, establishment of the Register may have pre-empted a more stringent policy approach. Inquiry participants involved in the Register's creation noted that it was viewed as a light touch policy measure that would deter calls for a more restrictive alternative.

It is unclear what the cost of a change might be, but even a small tightening of the foreign investment regime or water market policies would incur some cost for the agriculture and mining industries.

This provides a prima facie rationale for a Register (or some other transparency mechanism) to provide information on the level of foreign-owned water entitlements.

Informing policy development and administration

Another rationale sometimes advanced for the Register is that it can inform policy development. The Government has indicated the forthcoming Register will support an expanded range of policy purposes, as well as the administration of foreign investment policy.

However, the Commission has not heard a convincing case for how the current (and forthcoming) Register could support policy development. Registrants notify the ATO after a transaction takes place (or as details change), which means the Register does not play a role in the foreign investment approval process. Further, State governments have indicated that they are unlikely to use the information collected in the Register. The States have noted that they do not have a role in foreign investment policy and that their focus is on appropriate water resource management, irrespective of ownership.

5 The Register cannot address all concerns ...

Concerns within the community are often broader than foreign ownership of water entitlements. Issues raised with the Commission include:

- the potential for large water holders and brokers to manipulate prices
- a perception that the taxation system (specifically, the capital gains tax) disadvantages domestic water holders compared with foreign owners.

Some of these broader concerns can be conflated with foreign ownership, when in fact they relate to a general lack of trust in the operation of water markets. For example, some inquiry participants have asserted that water markets lack transparency, which enables market participants to manipulate prices. Many of these concerns are consistent with the feedback provided to other inquiry processes, such as the Commission's *National Water Reform 2020* inquiry and the ACCC's 2021 *Murray-Darling Basin water markets inquiry*.

The Register is ill equipped (and not intended) to respond to these policy problems. Issues such as manipulative behaviour in water markets are not associated with foreign ownership per se, and should be addressed directly through competition or water markets policies, rather than through the foreign investment policy regime.

6 ... but its design is appropriate for its narrow uses

The scope of information collected and published is about right

To the extent that the Register has a role in maintaining support for the current foreign investment framework, the information currently collected and published is appropriate.

In addition to the headline number, the statistical report provides information on water owners' country of origin and characteristics of their water entitlements such as volume, water resource (groundwater or surface water), industry use and type of entitlement. According to the NSW Government's survey, half of the respondents indicated that this information was 'highly' or 'very' appropriate to address concerns relating to transparency of foreign ownership, with only 12 per cent suggesting that it was inappropriate. The Commission understands that the scope of information collected will remain the same under the forthcoming Register.

Notwithstanding this, some inquiry participants have contended that the ATO should publish more detailed data, such as foreign ownership at the catchment or water source level. For example, the NSW Irrigators' Council said that publishing these data would enhance its understanding of the presence of foreign companies in particular markets and their control of water entitlements of varying levels of security. Participants have pointed to State water registers, many of which present information on water owners and their entitlements, as a model to follow. The merits of this proposal are discussed further below.

The statistical reports are clear and user-friendly

Few inquiry participants raised concerns about the clarity and user-friendliness of the statistical reports. The reports run to about 30 pages and include a summary of key statistics and short descriptions of the data and methodology used, as well as a more detailed presentation of the results. These reports — particularly the most recent release in 2021 — are simpler to understand than many of the State water registers (noting the Register's singular purpose of providing transparency on the level of foreign ownership of water entitlements).

However, the terminology used in water markets can be highly technical and is characterised by differences in definitions across jurisdictions. This could cause some misinterpretation by readers, particularly those with little prior knowledge of water markets. For example, a reader may not understand the distinction between concepts such as water entitlements, available water resources and water allocations.

Further, a number of participants have expressed dissatisfaction with the timeliness of the statistical reports, which have been published about 7–10 months after the deadline for registrants to update their details. However, the data presented in the Register are not time sensitive and have not significantly changed from one year to the next. The delays are largely due to the ATO's quality assurance processes and are necessary to ensure the robustness of the data.

Limited enforcement activity does not risk the Register's integrity

Some inquiry participants have raised concerns about compliance, including a misperception that registering foreign-held water entitlements is voluntary. The ATO has promoted awareness of the Register through webinars, speaking opportunities and newsletters to tax professionals, but has had limited opportunities for enforcement activities to date.

Any non-compliance is likely inadvertent and limited to smaller water market participants (such as individuals) who are unfamiliar with their legal obligations. Their non-compliance would likely have minimal effect on the integrity of Register data. As such, the ATO's compliance and enforcement activities appear proportionate to the minimal risks associated with non-compliance.

That said, ongoing engagement with foreign owners will help mitigate the risks of non-compliance. The transition to the forthcoming Register presents an opportunity for the ATO to engage more proactively with foreign owners and raise awareness of their obligation to record their water assets on the Register.

7 Costs associated with the Register are low

A small team administers the ATO's foreign ownership registers. Around two (full-time equivalent) staff work on the (Water) Register, supplemented by other ATO staff expertise. Some other government agencies have a small role in administering the Register, including the Treasury, which hosts the statistical reports on FIRB's website, and the Bureau of Meteorology (BOM), which provides the ATO with data.

The Commission estimates that the ongoing administration costs of the Register are no more than \$0.5 million a year. This was approximately 2.5 per cent of the total operational costs associated with administering the foreign investment regime in 2019-20 (\$19.7 million).

Registrants face only a small compliance burden relative to the costs associated with broader water and foreign investment regulatory requirements — for example, a FIRB application fee for agricultural land can be as much as \$503 000. Inquiry participants said it takes about one hour to register one entitlement. The registration process for the (Water) Register and the Agricultural Land Register is often completed simultaneously, easing the process for foreign owners.

Some participants have pointed out overlaps in the information collected by the (Water) Register and the State water registers. This is unlikely to add significantly to registrants' costs. It is not a duplication of processes per se (the States do not collect information on foreign ownership of water) and means that registrants have much of the necessary information at hand when they complete the (Water) Register requirements.

IT platforms to be developed for the forthcoming Register may lower the costs of compliance by reducing the need for registrants to re-input personal information and water entitlement

data every time they update their holdings, as is currently the case. However, plans for these changes are yet to be finalised.

Although the Register may not be a significant compliance burden, this is no reason for complacency. Recent history indicates that redundant regulatory measures can continue to impose costs on businesses, even when there is no discernible benefit (box 3).

Box 3 Queensland's Foreign Ownership of Land Register

In the 1980s, a series of large-scale property investments in Queensland by Japanese companies captured significant public attention. Contemporary newspaper headlines such as 'Japanese land grab shock: 70 per cent of Coast's future prime resort land controlled from Tokyo' and 'Putting the lid on the "yen menace"' illustrate the incendiary nature of public discussions on these matters.

In response, the Queensland Government introduced the *Foreign Ownership of Land Register Act 1988* (Qld) to compel foreign investors to register their interests in Queensland land, with the aim of providing clarity on foreign-ownership levels.

From the early 1990s, large investments by Japanese companies in Queensland land became less frequent, partly due to downturns in global financial markets, and community concerns about Japanese investment dissipated.

Nevertheless, Queensland's register has remained in place and foreign investors must continue to register their interests in Queensland land. This has occurred even with the Australian Government's introduction of the Agricultural Land Register and Residential Land Register, and despite the register's information rarely being used or accessed — statistical reports have not been published since 2018.

Further, the Register adds, in a marginal way, to the cumulative burden of Australia's foreign investment regime. As the Commission has noted previously, the Government has responded to community concerns about foreign investment with an incremental tightening of policy and a patchwork of screening requirements that vary across sectors and by an investor's country of origin. The Register is a small part of this patchwork.

8 There are no better alternatives

In considering the Register's future, the Commission has investigated alternatives that might fulfill its purpose at a lower cost. The three main alternatives to the Register are:

- reinstating the ABS' Agricultural Land and Water Ownership Survey (ALWOS)
- for the States to collect information on foreign ownership and publish it on their water registers
- to align the existing State registers and combine the information from them, including on foreign ownership, into a national register.

Each of these options has its own disadvantages.

The ALWOS, conducted three times between 2010 and 2016, provided information on the level of foreign ownership of water assets, but at a lower level of detail than the current Register. Its focus was the agricultural sector, which meant there were no data collected on competing uses of water, such as mining and industry. The survey was also relatively expensive to run, with the administrative and compliance costs associated with the 2016 survey estimated to total more than \$2.2 million.

The second option could reduce duplication, but it would not produce a ‘national’ figure, and differences in terminology and collection methods between the States might create problems of comparison. Some State governments told the Commission that even seemingly simple IT changes can involve substantial costs.

Option three would be very expensive and pose significant practical challenges. In 2016, the Australian Government estimated that the cost to harmonise and develop a national register based on State registers could be more than \$80 million. Moreover, previous efforts to create a single national register have failed.

None of these options are cost-effective alternatives to the current or forthcoming Register.

9 Can the Register be improved?

There remains a small, yet useful, role for the Register in reducing pressures for a more restrictive approach to foreign investment screening and retrograde changes to water policy. Although the benefits are difficult to measure, they plausibly exceed the Register’s administration and compliance costs.

To help ensure that the Register continues to deliver net benefits, policy makers need to keep a tight check on its scope and associated costs and look for ways to guard against its misuse. Accordingly, in assessing possible changes to the current Register and its foreshadowed replacement, the Commission has considered whether they offer a clear improvement and are consistent with its aims.

Some suggested changes would not offer an improvement

Publishing more detailed data

As noted above, participants have suggested the ATO publish more detailed data. Most common amongst these proposals is that the statistical report include more granular data on foreign ownership at the catchment or water source level. Other suggestions included:

- information on the size or structure of foreign businesses that hold water entitlements
- information on the reliability or security of water entitlements
- conditions associated with any FIRB approval.

Some of this information is already collected — such as data at the catchment/water source level and reliability of entitlements — but is not currently published by the ATO.

A major constraint to the ATO publishing this information is the confidentiality provisions contained in the *Taxation Administration Act 1953* (Cth) and the *Register of Foreign Ownership of Water or Agricultural Land Act 2015* (Cth). These provisions limit the public disclosure of information that could be used to identify individual holders of water entitlements, with breaches of the provisions a criminal offence. The small number of foreign registrants across the country — only 586 at 30 June 2020 — along with the low number of entitlements on issue in some geographic areas could lead to more detailed Register data being used to identify foreign owners. Revealing the personal details of foreign water owners could harm Australia’s attractiveness as a destination for foreign investment.

A further limit on the publication of some of these details, particularly the more geographically granular information, is the ATO’s methodology for calculating the proportion of foreign-owned entitlements. The ATO derives this number using BOM data on the total volume of entitlements on issue. As such, it may not be possible to calculate the share of foreign ownership at a more localised level if it does not align with comparable BOM data.

These constraints aside, publishing more detailed information would increase the administrative costs associated with the Register. These costs would not be justified by the benefits. The current level of information published in the statistical report, with figures published at the national, state and Murray-Darling Basin levels, is sufficient to support confidence in Australia’s foreign investment regime.

Exempting certain mining entitlements

The Register captures a broad range of water entitlements across a spectrum of industry uses. However, the Minerals Council of Australia (MCA) has called for two types of water used in mining operations to be exempted from the Register:

- saline or hypersaline water that is extracted from aquifers and that would be unsuitable for purposes other than uses in mining and minerals processing
- ‘associated water’ taken from dewatering activities, which is extracted incidentally during mining activities and is not typically used but is returned to the environment or treated for other uses.

The MCA argued that these water rights have different characteristics and purposes than the water rights of most interest to people concerned about foreign ownership of water entitlements. It also noted that these water rights are not of a type immediately suitable for use in the agricultural sector.

While most community interest in foreign-owned water does centre on the water used in agriculture, moves to narrow the scope of the Register could reduce its credibility and undermine confidence in water markets, given that such exemptions would be inconsistent with the

direction of broader water reform initiatives. Even if there was an appetite to exempt these entitlements from the Register, there are challenges and costs to identifying the specific entitlements that should be exempted, given they are not distinguished on all State and Territory water registers. As a result, there is not sufficient cause to exempt these rights from the Register. The statistical reports and related documentation should, however, provide additional information on the usage of water entitlements in mining (discussed further below).

A few tweaks are warranted

The Commission has identified a small number of low-cost tweaks that would improve the performance and quality of the Register, particularly the statistical reports.

One additional piece of information that the ATO should publish in the statistical reports is the number and proportion of water registrants at the national level that also own agricultural land (and are therefore on the Agricultural Land Register). The Commission understands that publishing this information would not violate the confidentiality constraints outlined above. Publishing these data would clarify the extent to which foreign owners of water entitlements are also land holders, which is sometimes raised as a concern by the community.

Further, while the statistical reports are user-friendly, as noted above, there is scope for them to be more accessible for the general public, including those in the community that do not have a background in water markets. Some matters that could be given more prominence or explanation are:

- that registration is mandatory, rather than voluntary, and that penalties apply for non-compliance
- the relationship between foreign ownership and foreign control, and the considerations associated with determining what level of ownership provides ‘control’
- that the statistics are about the foreign ownership of water entitlements on issue rather than total available water resources or the quantity of water allocated and used in a particular year
- the issues around the different uses of water entitlements in the mining sector raised by the MCA (see above).

Given these changes are low cost, they could be implemented when the next statistical report is released and carried through to the forthcoming Register.

Finally, all State government agencies should ensure that their online water registers and related portals provide information on, and a link to, the Register. They should also ensure that their water licence application processes inform applicants of the requirement for entitlement holders who are foreign persons to register with the ATO. This would help to clarify obligations and assist with raising awareness of the Register.

Findings and recommendations

Rationales for the Register

DRAFT FINDING 3.1 A TRANSPARENCY RATIONALE

There is a prima facie rationale for a transparency mechanism, such as a Register, to maintain community confidence in foreign ownership of water entitlements. In the absence of a transparency mechanism, the Government may be more likely to be pressured to make (small) adverse changes to the foreign investment regime and water policy settings.

DRAFT FINDING 3.2 THE REGISTER CANNOT ADDRESS COMPETITION ISSUES IN WATER MARKETS

The Register cannot — and nor is it intended to — respond to problems with the efficient and fair operation of water markets. Anti-competitive conduct, where it exists, should be dealt with through competition or water market policy.

DRAFT FINDING 3.3 THE REGISTER DOES NOT SUPPORT POLICY DEVELOPMENT OR ADMINISTRATION

Information from the Register is intended to support policy development and administration. However, the Commission has not been able to identify a tangible use of Register information for these purposes.

How is the Register performing?

DRAFT FINDING 4.1 THE REGISTER PROVIDES TRANSPARENCY BUT IS LITTLE KNOWN

The information contained in the Register and published in the statistical reports is appropriate for its narrow function. It provides clarity on the level of foreign ownership of water entitlements. However, there is a low level of awareness of the Register in the community and its information is sometimes negatively portrayed.

DRAFT FINDING 4.2 PRIVACY RESTRICTIONS ON ACCESS TO DATA ARE APPROPRIATE

Privacy restrictions on access to Register data help to preserve its integrity by maintaining registrants' trust in the ATO and the foreign investment regime more broadly.

DRAFT FINDING 4.3 THE STATISTICAL REPORTS ARE ACCESSIBLE AND USER-FRIENDLY

The statistical reports are accessible and user-friendly. However, some terminology requires prior knowledge of water market concepts. Current explanatory materials risk not being understood by those unfamiliar with water markets.

There have been delays in the release of the statistical reports due to the ATO's quality assurance processes. However, Register information is not time sensitive.

DRAFT FINDING 4.4 ADMINISTRATION IS LOW COST AND SUPPORTS DATA INTEGRITY

Administrative costs of the Register are low, estimated at no more than \$0.5 million a year. Included in this cost are activities necessary to support the integrity of Register data.

DRAFT FINDING 4.5 CURRENT COMPLIANCE AND ENFORCEMENT ACTIVITIES ARE SUFFICIENT

The ATO's approach to compliance and enforcement has been targeted towards raising awareness of the Register. Enforcement activities have been limited but sufficient, in part reflecting the low risks associated with non-compliance.

DRAFT FINDING 4.6 LOW COMPLIANCE COSTS, BUT THE REGISTER ADDS TO COMPLEXITY

The direct compliance costs of the Register are low. However, it contributes to a complex set of regulatory requirements in both agriculture and foreign investment, imposing indirect costs on foreign water entitlement holders.

Reconsidering the Register

DRAFT FINDING 5.1 THE REGISTER SHOULD CONTINUE

There remains a small, yet useful, role for the Register in reducing pressures for adverse changes to foreign investment and water policies. Although the benefits are difficult to measure, they plausibly exceed the Register's administration and compliance costs.

DRAFT FINDING 5.2 ADAPTING STATE WATER REGISTERS WOULD NOT BE COST-EFFECTIVE

State and Territory water registers should not be adapted and used in place of the Register of Foreign Ownership of Water Entitlements. The registers vary significantly in coverage, terminology and frameworks used to record ownership information.

Simply adding foreign ownership information to the existing, separate registration systems would entail moderate costs and be less effective than retaining the Register.

It would be prohibitively expensive to recalibrate and align the different systems to enable them to provide nationally consistent estimates.

DRAFT FINDING 5.3 SURVEYS WOULD NOT PROVIDE A COMPLETE PICTURE

The Agricultural Land and Water Ownership Survey, last conducted by the ABS in 2016, provided information on the level of foreign ownership of water assets, but at a lower level of detail than the current Register. It was relatively expensive to run, and would not meet the Government's objective at a lower cost than the Register.

Other existing government surveys, such as ABS agricultural and foreign investment data sources and ABARES farm surveys, are not suitable for adaptation and use in place of the Register.

DRAFT FINDING 5.4 THE REGISTER'S MEASURE OF FOREIGN OWNERSHIP IS REASONABLE

The Register uses a reasonable method of measuring foreign ownership, which is based on the definition specified in the *Foreign Acquisitions and Takeovers Act 1975* (Cth).

DRAFT FINDING 5.5 MINING WATER ENTITLEMENTS SHOULD NOT BE EXCLUDED FROM SCOPE

Although some water entitlements used in mining have different characteristics and purposes than other water entitlements, they should not be excluded from the Register's scope. Retaining a comprehensive scope adds to the Register's credibility.

DRAFT FINDING 5.6 INFORMATION IN THE STATISTICAL REPORTS IS SUFFICIENTLY GRANULAR

The geographic breakdown of information in the statistical reports provides sufficient transparency to support confidence in the maintenance of Australia's foreign investment and water market policy settings.

DRAFT FINDING 5.7 NO CASE FOR PROVIDING ADDITIONAL DATA

Most proposals to include additional information — such as on the size and structure of entitlement owners — in the statistical report would not further the Register's objective and would entail additional cost.

DRAFT FINDING 5.8 NO CASE TO MOVE TO 'REAL TIME' PUBLICATION

Updating the statistical report online in real time would provide few benefits to users but would create material costs and difficulties for the ATO and registrants.

DRAFT RECOMMENDATION 5.1 LINKING TO THE REGISTER FROM STATE WATER REGISTERS

All State and Territory governments should ensure that their online water registers and related portals provide a link to the Register of Foreign Ownership of Water Entitlements.

They should also ensure that their water licence application processes inform applicants of the requirement for entitlement holders who are foreign persons to register with the ATO.

DRAFT RECOMMENDATION 5.2 THE SHARE OF REGISTRANTS THAT HOLD LAND

In future statistical reports, the ATO should specify the share of water registrants that also hold agricultural land.

DRAFT RECOMMENDATION 5.3 CLARIFYING CONCEPTS AND AVOIDING MISUNDERSTANDINGS

The ATO should revise the statistical reports or develop release materials to highlight or explain:

- that registering is mandatory
- the concepts of foreign 'owned' and foreign 'controlled' entitlements
- the distinctions between water market concepts, such as entitlements and allocations, and total available water resources
- the distinct characteristics of the use of water entitlements in the mining sector.