



Australian Government  
Productivity Commission

# Register of Foreign-owned Water Entitlements

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Inquiry Report

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### The Productivity Commission

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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](http://www.pc.gov.au)).



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19 November 2021

The Hon Josh Frydenberg MP  
Treasurer  
Parliament House  
CANBERRA ACT 2600

Dear Treasurer

In accordance with section 11 of the *Productivity Commission Act 1998*, we have pleasure in submitting to you the Commission's final report into the *Register of Foreign-owned Water Entitlements*.

Yours sincerely

A handwritten signature in dark ink, appearing to read 'J. Coppel'.

Jonathan Coppel  
Special Adviser

(Commissioner to July 2021)

A handwritten signature in dark ink, appearing to read 'JDoolan'.

Jane Doolan  
Commissioner

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# Terms of reference

I, Joshua Frydenberg, Treasurer, pursuant to Parts 2 and 3 of the *Productivity Commission Act 1998*, hereby request that the Productivity Commission undertake an inquiry into the effectiveness of the Register of Foreign Ownership of Water Entitlements.

## Background

The *Register of Foreign Ownership of Water or Agricultural Land Act 2015* (the Act) provides for the collection of information, and publication of statistics, about foreign interests in agricultural land and certain water entitlements and rights. The Act requires the Commissioner of Taxation to keep two registers: the Register of Foreign Ownership of Agricultural Land, and the Register of Foreign Ownership of Water Entitlements. These registers were established to provide greater transparency over the level of foreign ownership of Australia's water and agricultural land entitlements. The Act also requires the Commissioner of Taxation to prepare an annual report outlining statistics from the registers.

Under section 34A of the Act, the Productivity Commission (the Commission) is required to undertake an assessment of the effectiveness of the scheme insofar as the scheme relates to the Register of Foreign Ownership of Water Entitlements and requirements to give information about foreign holdings of water entitlements, including the costs and benefits of that scheme. This inquiry is that assessment.

## Scope of the inquiry

In accordance with section 34A of the Act, following a referral for the Commission to undertake this inquiry, the Commission is to report on the matter of the effectiveness of the scheme outlined in Parts 3A and 3B of the Act, which describe the Register of Foreign Ownership of Water Entitlements, and the requirements to give information about foreign holdings of water entitlements. This report is to include an assessment of the costs and benefits of the scheme.

In undertaking this inquiry, the Commission should:

- assess whether the information provided in the Report delivers on the policy objectives of the scheme of increasing transparency of foreign ownership of water entitlements;
- identify the direct and indirect costs and benefits associated with maintaining the Register and producing the Report; and

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- identify the direct and indirect costs borne by foreign owners of water entitlements to ensure compliance with the Act.

## **Process**

The Commission should consult with key interest groups and affected parties, invite public submissions and release a draft report to the public.

The Commission should consult with Commonwealth, state and territory governments and stakeholders from the mining, irrigation infrastructure, urban water supply and agriculture sectors.

The Commission should complete this inquiry by 7 December 2021 as required by section 34A of the Act.

**THE HON JOSH FRYDENBERG MP**  
**Treasurer**

[Received 4 December 2020]

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# Acknowledgments

The Commission has drawn upon a range of information sources in assessing the effectiveness of the Register and considering options for reform. The Commission thanks inquiry participants for their submissions and participation in meetings, and the staff of the ATO who provided many detailed responses to questions on the Register's operation.

The Commission would also like to thank the staff who worked on the inquiry. This team was led by Catie Bradbear and comprised Elizabeth Baldwin, Jonathan Gu, Nicholas Harvey and Tom Nankivell, with Pragya Giri providing administrative and project support.

## 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:

- Director, Southern Rural Water (from October 1 2021)
- 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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# Abbreviations

ABARES	Australian Bureau of Agricultural and Resource Economics and Sciences
ABC	Australian Broadcasting Corporation
ABS	Australian Bureau of Statistics
ACCC	Australian Competition and Consumer Commission
ATO	Australian Taxation Office
BOM	Bureau of Meteorology
CGT	Capital gains tax
DFAT	Department of Foreign Affairs and Trade
FATA	<i>Foreign Acquisitions and Takeovers Act 1975 (Cth)</i>
FDI	Foreign direct investment
FIRB	Foreign Investment Review Board
GDP	Gross Domestic Product
GL	Gigalitre
MDBA	Murray-Darling Basin Authority
NWI	National Water Initiative
OECD	Organisation for Economic Co-operation and Development
PC	Productivity Commission
Register Act	<i>Register of Foreign Ownership of Water or Agricultural Land Act 2015 (Cth)</i>
TAA	<i>Taxation Administration Act 1953 (Cth)</i>



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# OVERVIEW

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## 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. Foreign investment can also 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 of the share of Australian water issued as entitlements, about 11 per cent is foreign owned.
- 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 published by the ATO provides the necessary 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 risk being used to identify registrants, violating confidentiality provisions.
- 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 several misperceptions, including 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.

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# 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 entitlements on issue is now about 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 (box 2). In addition to some personal details, registrants furnish information on:

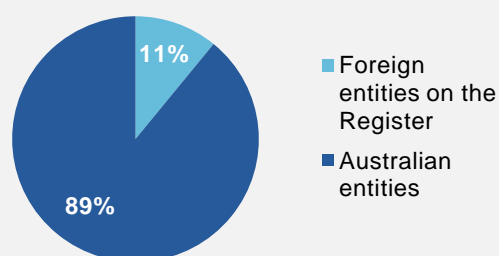
- the type and terms of the water right held
- when and by whom the right was issued
- the State or Territory and water system the right relates to
- the characteristics of the water resource
- the percentage of foreign ownership of the resource
- the sector in which it is used.

## Box 1 Characteristics of foreign-owned water in Australia

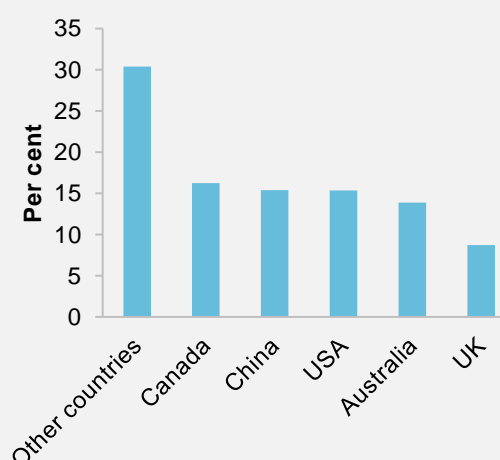
The most recent annual summary of Register data — for the year to 30 June 2020 — indicates that the level of foreign ownership of Australia's water entitlements on issue under State water planning frameworks (as distinct from Australia's total water) is about 11 per cent. Western Australia and Queensland 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 are used in the mining sector.

### Information on foreign-owned water in Australia<sup>a,b,c</sup>

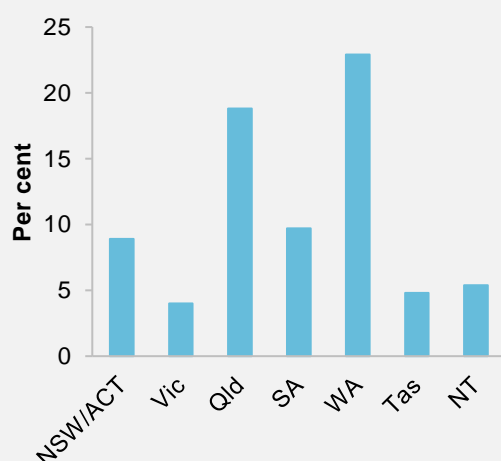
a. Ownership of water entitlements in Australia



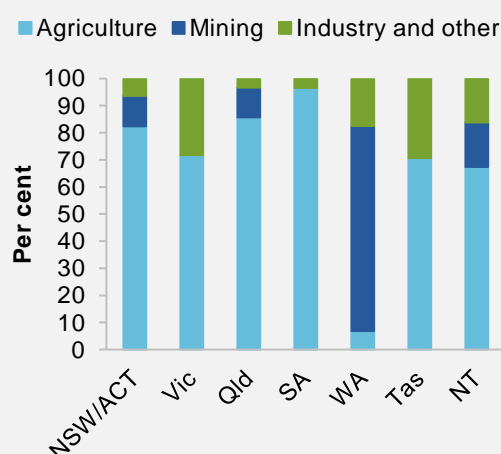
b. Sources of investment in foreign-held water entitlements



c. Foreign-held entitlements by State



d. Uses of foreign-held water entitlements



<sup>a</sup> As at 30 June 2020. <sup>b</sup> 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. <sup>c</sup> Other uses of foreign-held water entitlements include tourism, research and uses by trades.

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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 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. 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, 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, 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 when 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.

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## 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 the 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 has been 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. 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). The Victorian Government noted that the Register is the 'key source of information' for responding to community interest. 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 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, which reported the share of foreign-owned water entitlements to be 10.4 per cent. This number was lower than imagined, and the Commission heard that the report was sufficient to persuade some



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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 community members 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 entitlements, 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 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 limited**

There is little awareness of the Register, even among active participants in water markets. This is illustrated by the low level of stakeholder engagement in this inquiry (only 12 submissions to the issues paper and 5 submissions providing feedback on the draft report). Limited awareness of the Register was also evident in a recent 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.

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## 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 can 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 entitlements 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, even this level of transparency 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, can the Register play 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 these policies provide the Australian community. For example, it is estimated that the establishment of water trading increased GDP in the southern Murray-Darling Basin by \$5.2 billion (in 2020-21 dollars) over the five years to 2010-11.

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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 to policy settings. 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 Australian 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*.

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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 is intended to 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.

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Further, a number of participants have expressed dissatisfaction with the timeliness of the statistical reports, which have been published 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 factors it is unable to control, such as lags in receiving data from other sources. The time taken for the quality assurance process ensures the robustness of the data.

### **Limited enforcement activity does not risk the Register’s integrity**

Some inquiry participants 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 processes for the

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(Water) Register and the Agricultural Land Register are 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. These are unlikely to add significantly to registrants' costs. They are not a duplication of processes per se (the States do not collect information on foreign ownership of water) and mean 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. While plans are yet to be finalised, the new platforms may reduce the need for registrants to re-input personal information and water entitlement data every time they update their holdings, as is currently the case.

Although the Register may not create 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 Queensland 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.

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## 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 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, the Commission has assessed whether possible changes to the current and forthcoming Register offer a clear improvement and are consistent with their aims.

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## Should mining entitlements be exempt?

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 in the process of dewatering. This water 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. It could also undermine confidence in water markets, given that such exemptions would be inconsistent with the direction of broader water reform initiatives. Even if there were 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).

## Publishing more detailed data is generally not warranted

As noted above, participants have suggested the ATO publish more granular data. Most common among these proposals is that the statistical report include more granular geographic data on foreign ownership, such as 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, particularly within the southern Murray-Darling Basin
- conditions associated with any FIRB approval.

Some of this information is already collected — such as data at the catchment or 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



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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.

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 granular information would increase the administrative costs and other risks associated with the Register, which would not be justified by the benefits. The Commission considers that the current level of information published in the statistical report, with figures published at the national, state and (northern and southern) Murray-Darling Basin levels, is generally sufficient to provide confidence to most people across Australia.

Nevertheless, the Commission recognises that the southern Murray-Darling Basin is unique in terms of the value of its water entitlements (more than \$26 billion in 2018-19) and the extent to which trade in water entitlements occurs. Both the NSW and Victorian Governments have noted concerns for communities within this region and have advocated for further information on foreign ownership. In future statistical reports the southern Murray-Darling Basin could be split in two, with data shown for the NSW and Victorian parts of that basin, along with the rest of Victoria. The ATO, in consultation with relevant federal and state government agencies, could conduct further work to explore the feasibility, cost and merit of this proposal as part of the development of the forthcoming Register.

## **A few tweaks to improve effectiveness**

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.

Pending further consideration by the ATO in consultation with other government agencies, the statistical reports could also contain the split of foreign ownership in the southern Murray-Darling Basin, as outlined above.

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Further, while the statistical reports are user-friendly, there is scope for them to be more accessible for the general public, including those in the community who 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 (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.

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# Findings and recommendations

## Rationales for the Register

### 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.

### 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.

### 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?

### FINDING 4.1 THE REGISTER PROVIDES TRANSPARENCY BUT IS LITTLE KNOWN

The information contained in the Register and published in the statistical reports prepared by the ATO 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.

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#### 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.

#### 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.

#### 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.

#### 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.

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

The direct compliance costs created by 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.

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## Reconsidering the Register

### 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.

### 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.

### 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 information sources, 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.

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

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

### 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.

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#### FINDING 5.6 GEOGRAPHIC INFORMATION IN THE STATISTICAL REPORTS

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 policy settings.

There could be scope for the ATO to provide further geographic information on foreign ownership in the southern Murray-Darling Basin. The ATO, in consultation with relevant federal and state government agencies, could conduct further work to explore the feasibility, cost and merit of this proposal as part of the development of the forthcoming Register of Foreign-Owned Assets.

#### FINDING 5.7 THE 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.

#### 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.

#### 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.

#### 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.

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#### 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.





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# CHAPTERS



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# 1 About the inquiry

## Key points

- The Register of Foreign Ownership of Water Entitlements (the Register) was established in 2017 as one response to community concerns about foreign investment in agricultural and water assets.
  - The Register will be incorporated, largely unchanged, into a new and broader Register of Foreign Ownership of Australian Assets by December 2024.
- The inquiry has evaluated the rationales for the Register, its effectiveness, costs and benefits, and possible improvements, for both its current and future forms.
- In making its assessments, the Commission has drawn on publicly available information, discussions with government officials and industry stakeholders, and the submissions received.

## Origins of the Register

The Register of Foreign Ownership of Water Entitlements (the Register) emerged out of concerns held by some community members about foreign investment and developments in water markets.

Australia has been a net recipient of capital for most of the last two centuries and maintains a broadly open stance toward foreign investment. This results in greater capital investment than would otherwise be possible, and innovations from overseas often spill over to local businesses — ultimately allowing Australians to enjoy higher standards of living than they otherwise would (PC 2020a). At the same time, some members of the community have reservations about foreign investment and its potential costs.

This tension between the benefits of foreign investment on the one hand and the potential costs on the other is particularly prominent in the agricultural sector. Foreign investment in agriculture has introduced new technologies, facilitated access to export markets, and provided capital to prepare new land for agriculture (PC 2016). It also stirs strong community reactions. For example, high-profile acquisitions of agricultural land and businesses by foreign investors, such as the purchase of Cubbie Station, a large cotton farm, by a Chinese-led consortium in 2012, have been opposed by some in the community (Jasper 2016).

Some of these concerns extend to water entitlements. Water reforms over the past 30 years have enabled water entitlements to be traded separately to land, meaning that foreign investors can buy and sell water, just as they can land and other assets (chapter 2).

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Overall, the development of water markets has benefited Australia (ACCC 2021; Grafton, Horne and Wheeler 2016; box 3.4). Water trading allows water to be used more efficiently. Irrigators can increase their water supplies and expand production or release capital when water rights are more valuable to someone else. Ultimately, this enables more certainty in decision making and flexibility in dealing with changing market conditions (PC 2021c).

However, some members of the community have concerns about the structural changes that have occurred in water markets. For example, even though economic activity in the southern Murray-Darling Basin has increased due to water trading (ACCC 2021; NWC 2012a), the benefits from water market reforms have not been shared equally across regions (Sefton et al. 2020). Others have raised concerns about the possible negative consequences of foreign ownership of Australian water, including potential risks for Australia's food security (Siewart 2016), water price manipulation and hoarding (chapter 3).

A register of foreign-owned water entitlements was first proposed to address the concerns aired by some members of Parliament during the parliamentary debate on the Register of Foreign Ownership of Agricultural Land in 2015. Members suggested that there should be oversight of the ownership of water assets, in addition to agricultural land assets, given they are often as valuable as land (Whish-Wilson 2016).

The Australian Government established the (Water) Register in 2017 under the *Register of Foreign Ownership of Water or Agricultural Land Act 2015* (Cth) (the Register Act). The Register Act obliges foreign persons to notify the ATO of their interests in certain Australian water entitlements and keep it informed of any changes to these interests. The Foreign Investment Review Board publishes a statistical report on foreign ownership levels each year.

When the Register Act was debated in the Senate, then Senator Leyonhjelm moved an amendment — section 34A — that the Productivity Commission review the effectiveness of the Register (Leyonhjelm 2016). The amendment was agreed to, and this inquiry is the result.

## **The Commission's task and approach**

Section 34A of the Register Act requires the Productivity Commission to inquire into the effectiveness of the Register, including an assessment of its costs and benefits, and to make recommendations in relation to it. The terms of reference for this inquiry asked the Commission specifically to examine:

- whether the information provided in the Register delivers on 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 Report
- the direct and indirect costs borne by foreign owners of water entitlements to ensure they are compliant with the legislation.

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This inquiry has not covered the Agricultural Land Register, which is also established by the Register Act. Other related policy areas, such as foreign investment screening, taxation of foreign companies and the operation of water markets, are discussed where relevant, but are not investigated in detail.

The Commission considered three key questions in reviewing the Register.

- Is there a well-founded rationale for the Register?
- How is the Register performing against its objectives?
- Is there a compelling case for changes to the Register?

In identifying and evaluating possible rationales, chapter 3 revisits the Australian Government's statements on the Register's purpose — about maintaining community confidence in Australia's foreign investment regime — and also looks at other issues raised by community members and during the parliamentary debates about the Register. The chapter then asks whether, in principle or practice, the Register (or some other transparency mechanism) could be an appropriate tool for addressing the concerns raised by the Government and others.

To assess the Register's performance and effectiveness, chapter 4 examines how, and the extent to which, its information has been used, and its economic and social costs and benefits. These costs and benefits may accrue to governments, foreign persons, other water market participants and society at large. Some bear a clear price tag, such as the costs to Government of administering the Register. Others are indirect, and more difficult to measure — for example, whether the compliance requirements of the Register diminish Australia's attractiveness as a destination for foreign investment.

With only scant data available on some of these matters, the Commission has qualitatively assessed the size of the different costs and benefits, drawing on the views of industry stakeholders and government agencies, submissions and publicly available information.

Drawing on the earlier assessments, chapter 5 looks at whether there is an ongoing need for a Register and then explores whether there are lower cost and/or more effective ways of achieving the Register's objectives. Many of the reform options assessed are drawn from inquiry participants' suggestions, and include changes to the scope and detail of the information reported in the Register's statistical reports.

Throughout this report, the Commission has considered the implications of its findings and recommendations for the forthcoming Register of Foreign Ownership of Australian Assets. Under the *Foreign Investment Reform (Protecting Australia's National Security) Act 2020* (Cth), the Australian Government will establish this new register by 11 December 2024 — that is, four years after that Act's assent. It will amalgamate the existing (Water) Register and other registers of foreign ownership (chapter 2).

Most aspects of the existing (Water) Register will continue under the new arrangements, although there will be some changes to how information on the Register can be accessed and used. Details on how the forthcoming register will be implemented are still being

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determined. Given the similarities between the current and foreshadowed arrangements, the Commission has sought to draw lessons from its assessment for the development of the forthcoming Register. Conclusions in this report about the current Register apply to both, except where specified.

## **The inquiry process**

The Commission received the terms of reference for this inquiry on 4 December 2020. An issues paper was published on 17 February 2021, outlining the scope of the inquiry and requests for information and views. The inquiry was advertised in the national press and on social media. Twelve submissions were received in response to this paper — a low level of engagement that reflects the narrow nature of the topic and limited awareness of the Register in the community (chapter 4). The Commission also held discussions with a number of interest groups and affected parties, including governments and representatives from the mining, irrigation infrastructure, urban water supply and agriculture sectors (appendix A). The Commission drew on these consultations and the submissions received, together with other publicly available information, to develop draft findings and recommendations.

A draft report was published on 17 August 2021. The Commission received just a further five submissions and two brief comments, and held some further, targeted discussions (appendix A). Most of the participants who made submissions or spoke with the Commission were comfortable with most or all of the recommendations and findings in the draft report. While a number of minor changes and refinements have been made for this final report, the findings and recommendations are little changed from those in the draft report.

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## 2 Setting the scene

### Key points

- The ATO maintains a Register of Foreign Ownership of Water Entitlements (the Register). Foreign persons are required to notify the ATO when they acquire specified water entitlements or make changes to their holdings.
- The ATO publishes an annual statistical report summarising the data recorded on the Register. The report shows that 10.9 per cent of Australian water entitlements on issue were foreign owned at 30 June 2020.
  - Most foreign-owned water entitlements are used in the agricultural sector, except in Western Australia, where the majority are used in the mining sector.
  - The three largest country sources of foreign investment in water entitlements are Canada, China and the United States.
- The Register forms part of a broader landscape of foreign investment policy. Investments that meet certain criteria are screened by the Treasurer and may be prohibited or approved with conditions if they are deemed contrary to the national interest. Investments in water entitlements are generally not screened, unless they are tied to other acquisitions that meet screening criteria.
- A forthcoming Register of Foreign Ownership of Australian Assets will commence by 11 December 2024. This new Register will amalgamate existing registers of water and agricultural land, and expand coverage to other asset types.
  - Key features of the (Water) Register will be carried over to the forthcoming Register. Access to the information on the Register for select policy purposes will be expanded.

### 2.1 How the Register of Foreign Ownership of Water Entitlements operates

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 Register Act).

The Register is administered by the Commissioner of Taxation. Foreign persons are required to notify the ATO if they acquire a specified water asset (box 2.1) or if there are changes to their foreign status or water entitlement holdings (box 2.2). In addition to some personal details, they are required to provide information on:

- the type and terms of the water right held
- when and by whom the right was issued

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- the State or Territory and water system the right relates to
  - the characteristics of the water resource
  - the percentage of foreign ownership of the water entitlement
  - the sector in which it is used (ATO 2021).

The Register Act uses the definition of a ‘foreign person’ specified in the *Foreign Acquisitions and Takeovers Act 1975* (Cth). A foreign person is:

- an individual not ordinarily resident in Australia, or
- a corporation, trustee 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 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.

### **Box 2.1      Water rights covered by the Register**

Foreign persons must register their holdings of ‘registrable water entitlements’ and ‘contractual water rights’. Throughout this report, the term ‘water entitlements’ is used to encompass both types of 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 for consumptive uses, which include agricultural, industrial and urban uses. 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 entity’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.

There are limited exceptions to this requirement. Stock, domestic or riparian rights are not required to be registered — about 3 per cent of water use in the Murray-Darling Basin was under these rights in 2019-20. Similarly, rights held by irrigation infrastructure operators that are the subject of an irrigation right held by another individual or entity do not need to be registered.

The Register does not cover water allocations. Allocations refer to the actual amounts of water distributed to entitlement holders in a given year. This amount is determined by the water resource manager (usually a State or Territory Government), considering factors such as inflows, storage levels and the volume of different entitlements on issue.

*Sources:* ACCC (2021, pp. 42, 61); ATO (2021); Australian Government (2016, pp. 9–13); BOM (2021b); *Register of Foreign Ownership of Water or Agricultural Land Act 2015* (Cth); Register of Foreign Ownership of Water or Agricultural Land Rules 2017 (Cth).



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## Box 2.2      When are foreign persons required to register?

A person (which can be an individual or entity) is required to notify the ATO if:

- they are a foreign person and they acquire a registrable water entitlement or contractual water right
- they become a foreign person while holding a registrable water entitlement or contractual water right.

A foreign person must update an existing registration when:

- they cease to hold the registrable water entitlement or contractual water right
- they cease to be a foreign person
- there is a change in the volume of water or share of a water resource attached to their registrable entitlement or contractual water right.

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.

Foreign persons must self-report their water entitlement transactions. To date, the ATO has not conducted any enforcement activities, instead focussing on activities that build awareness of registration obligations. These activities have included notifying stakeholders of statistical report releases and reminding existing registrants of obligations to maintain up-to-date registration details (chapter 4) (ATO, pers. comm., 9 April 2021; 18 June 2021).

Source: *Register of Foreign Ownership of Water or Agricultural Land Act 2015* (Cth).

The Register comprises two parts — a ‘basic part’ and a ‘statistical part’.

The basic part of the Register contains the information provided by registrants. This part is not available to the public. As the Commissioner of Taxation administers the Register Act, it is a taxation law for the purposes of the *Taxation Administration Act 1953* (Cth). Under this legislation, the disclosure of information that identifies or is reasonably capable of being used to identify an entity is prohibited, except in certain circumstances (chapters 4 and 5).

The statistical part is an annual summary of the data contained in the basic part. This report 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 (section 2.2).<sup>1</sup> Like the basic part of the Register, the statistical report is subject to confidentiality restrictions, and cannot contain information that could be used to identify a foreign person.

To prepare the statistical reports, the ATO validates all data provided by registrants (box 2.3). It then estimates the proportion of foreign ownership of water entitlements using total volumes from the Register and Bureau of Meteorology (BOM) data.

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<sup>1</sup> The report is a summary of holdings at a point in time, which may differ to foreign holdings of water throughout the year. For example, an entitlement that a foreign person purchased and then sold within one financial year would not be captured.

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## Box 2.3      **Validating registrations and estimating the share of foreign-held water entitlements**

### **Data validation processes**

The ATO validates the information provided by all registrants, by checking key details and liaising with registrants to revise data as required (ATO, pers. comm., 9 April 2021). This process involves checking data against State and Territory water registers to identify volumes or water sources that have been entered incorrectly or at the wrong scale. The ATO also ascertains the source country of companies and trusts on the Register by identifying the nationality of the owner, or the location of the directors, headquarters or public listing of the entity (ATO 2021, p. 25). This attribution is made using data from the ATO and other government agencies.

At the end of each reporting period, further validation activities are undertaken, including checking outlier figures — particularly large or small volumes, such as entitlements that are recorded as zero volumes.

### **Estimating the proportion of water entitlements under foreign ownership**

The ATO estimates the proportion of foreign-owned water entitlements using the volumes recorded on the Register and the Bureau of Meteorology's (BOM) data on the total volume of water entitlements on issue.

However, there are small disparities in the entitlements that are recorded in BOM data and the Register (ATO 2021, p. 4).

- In some water systems, the volumes reported on the BOM dataset may be misaligned with Register data (ATO, pers. comm., 6 May 2021).
- The BOM dataset does not contain water rights issued outside of state water planning and entitlement frameworks that the Register captures.
- The BOM dataset only captures water entitlements issued with a nominal volume (which generally states the maximum amount of water that can be taken over a given period), whereas the Register includes entitlements with a nominal volume *or* a volumetric limit (which is a different method of measuring the volumes of water entitlements).

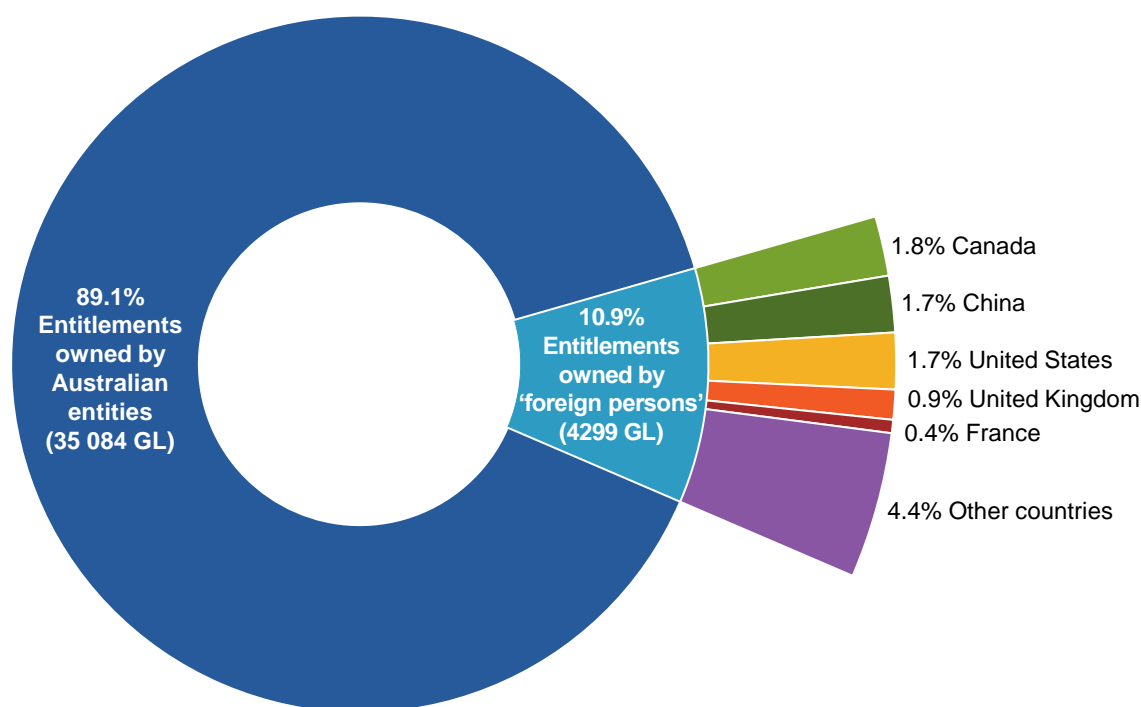
Some of these differences result in small measurement errors that lead to a slight overestimation of the proportion of foreign-held water entitlements. For example, at 30 June 2020, the Register's coverage of water rights issued outside state water planning frameworks led to a three gigalitre (or less than 0.1 per cent) overstatement. The differences also affect the extent to which the ATO is able to provide granular information on the foreign ownership of water entitlements (chapter 5).

## **2.2      What does the Register show about foreign ownership of water in Australia?**

By volume, about 10.9 per cent of water entitlements on issue in Australia were owned by foreign persons (as defined in the *Foreign Acquisitions and Takeovers Act 1975*) at 30 June 2020 (ATO 2021, p. 5) (figure 2.1). This share was little changed from 2019, when foreign persons owned 10.5 per cent of total entitlements.

**Figure 2.1 Level and sources of investment in foreign-owned water entitlements recorded on the Register<sup>a</sup>**

As at 30 June 2020



<sup>a</sup> Some Australian investors have equity in 'foreign persons' recorded on the Register. This equity is captured under 'other countries'.

Source: ATO (2021).

By country, the top three sources of investment at 30 June 2020 were:

- Canada, with 1.8 per cent of the total volume of Australian water entitlements (16.2 per cent of the volume of foreign-held water entitlements)
- China, with 1.7 per cent of total entitlements (15.4 per cent by volume)
- the United States, with 1.7 per cent of total entitlements (15.4 per cent by volume).

Some water entitlements on the Register are partly Australian-owned. This is because the Register captures entities with 20 per cent or more foreign equity, meaning that the Australian share of equity in registered water entitlements may be up to 80 per cent. In 2020, the proportion of Australian equity in foreign-held water entitlements was about 13.9 per cent, down slightly from the previous year (table 2.1). There is no equivalent measure of foreign equity (below the 'foreign persons' threshold) in Australian-owned water entitlements.

Western Australia had the highest proportion of foreign-owned entitlements (22.9 per cent), followed by Queensland (18.8 per cent) (figure 2.2) (ATO 2021, p. 10). There were only small changes in these proportions between 2019 and 2020 in all States and Territories.

**Table 2.1 Australian equity in foreign-held water entitlements**  
2019 and 2020

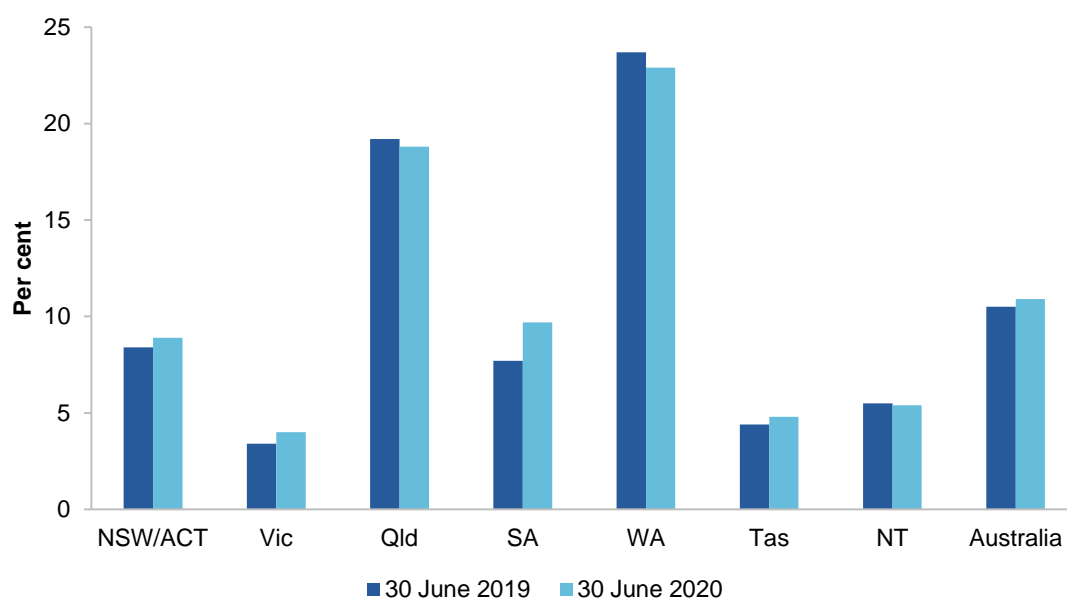
	30 June 2019		30 June 2020	
	<i>Foreign-held water entitlements</i>		<i>Foreign-held water entitlements</i>	
	GL	Share %	GL	Share %
Foreign-held portion	3 519	85.6	3 702	86.1
Australian portion	594	14.4	597	13.9
<b>Total</b>	<b>4 113</b>		<b>4 299</b>	

Source: ATO (2021, p. 21).

The statistical report also outlines the level of foreign ownership of water entitlements in the northern and southern regions of the Murray-Darling Basin. Foreign owners held approximately 11 per cent of the volume of entitlements on issue across the Basin at 30 June 2020 (ATO 2021, p. 14).

**Figure 2.2 Foreign-held water entitlements by State and Territory**

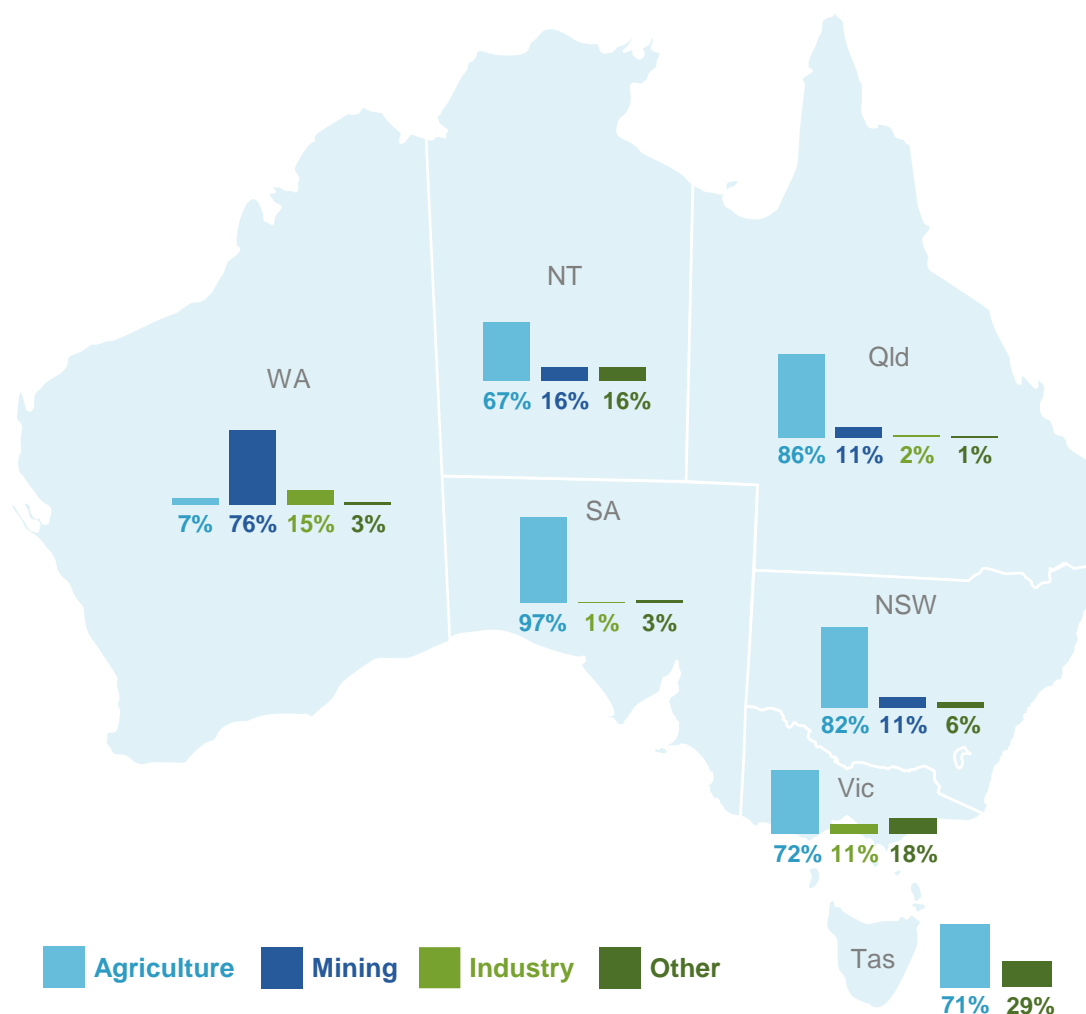
Foreign-held water entitlements as a proportion of total water entitlements in each State and Territory, as at 30 June 2020



Sources: ATO (2020, 2021).

Across the States and Territories, most foreign-held water recorded on the Register is used in agriculture, except for Western Australia, where mining accounts for the largest share (figure 2.3). Nationally, 66.5 per cent of foreign-owned water entitlements by volume are used in agriculture, followed by mining (23.6 per cent) and industry (4.7 per cent) (ATO 2021, p. 7).

**Figure 2.3 Use of foreign-held water entitlements by State and Territory<sup>a</sup>**  
As at 30 June 2020



<sup>a</sup> 'Industry' includes construction, energy, industrial, manufacturing and transport. 'Other' includes tourism, research and uses by trades.

Source: ATO (2021).

The Register also captures other information on the characteristics of water resources with foreign ownership. By volume, most of the water resources recorded on the Register are water access entitlements (91.2 per cent) as opposed to contractual rights (4.8 per cent) or irrigation rights (4.0 per cent) (ATO 2021, p. 19). Nationally, foreign persons own a greater proportion of the volume of groundwater entitlements (18 per cent) than surface water entitlements (8.6 per cent), although the overall volume of foreign-held surface water (2621 GL) is greater than the volume of foreign-held groundwater (1651 GL) (ATO 2021, p. 12).

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## 2.3 Australia's foreign investment policy landscape

The Register is part of a broader landscape of foreign investment policy.

Foreign investment benefits Australians by providing cheaper access to capital, leading to more capital investment and greater economic development (PC 2020a, pp. 52–64). It can also facilitate access to new technologies and management practices, which often spill over into the broader economy. These benefits allow Australians to enjoy a higher standard of living than would otherwise be possible (PC 2020a).

However, the benefits of investment are not always shared equally and some regions and industries may face painful periods of adjustment to new sources of competition. More broadly, some members of the community worry that foreign investors may pose a threat to national security, or may not abide by Australia's social, environmental and economic laws. To manage these concerns, the Australian Government has regulated foreign investment since 1975 (figure 2.4).

### Screening of foreign investment

Under the *Foreign Acquisitions and Takeovers Act 1975* (Cth), the Treasurer can screen foreign investment proposals that meet certain criteria (relating to the entity proposing the investment, the type of asset being acquired and the value of the investment). If the Treasurer, with advice from the Foreign Investment Review Board, forms the view that the investment would be contrary to Australia's national interest, they can:

- allow the investment but impose conditions
- prohibit the investment
- order disposal of the investment if it has already gone ahead (PC 2020a, p. 8).

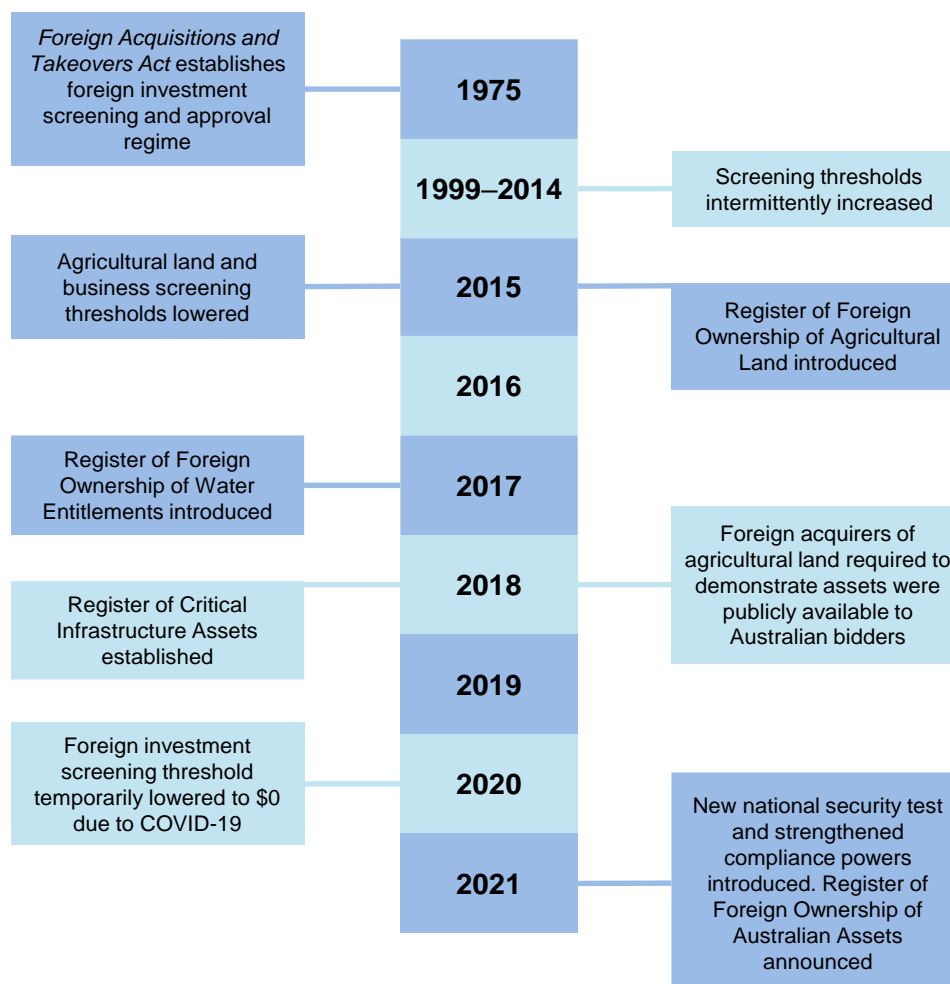
The meaning of the 'national interest' is not defined in the legislation. However, the Australian Government's current foreign investment policy outlines five factors that are typically considered: national security, competition, other Australian Government policies (such as tax policies), impact on the economy and the community, and the character of the investor (PC 2020a, pp. 42–43).

Temporary changes to the foreign investment screening thresholds, introduced in March 2020 in response to COVID-19, came to an end on 1 January 2021.<sup>2</sup> However, at this time, other significant changes to the foreign investment regime came into effect (Frydenberg 2020b). These changes provided new powers for the Treasurer to review investments in specified national security areas, regardless of value; streamlined screening of some less sensitive investments; and strengthened penalties, compliance and enforcement powers (PC 2021d, pp. 84–90; Treasury 2020).

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<sup>2</sup> The temporary changes tightened the screening regime by reducing the screening threshold to \$0, meaning that all foreign investment required approval from the Treasurer (Frydenberg 2020a).

Figure 2.4 **Timeline of changes to Australia's foreign investment regime**



Source: PC (2020a, pp. 111–114).

These changes continued the recent trend of increasing the restrictiveness of Australia's foreign investment regime (PricewaterhouseCoopers Australia and American Chamber of Commerce in Australia 2021). Indeed, Australia had the fifth most restrictive foreign investment regime in the Organisation for Economic Cooperation and Development (OECD) in 2020, according to the OECD's index of foreign direct investment regulatory restrictiveness (OECD 2021b).

The restrictiveness of foreign investment regulation is particularly pronounced in the agricultural sector. Some foreign investment restrictions are specific to this sector, including lower screening thresholds for agricultural land and agribusinesses from some countries, and the requirement that foreign buyers of agricultural land demonstrate that the assets were publicly available to Australian bidders (PC 2020a, pp. 40, 111). This is reflected in the OECD index, which shows that Australia is the fourth most restrictive OECD country for agricultural investment, and has become more restrictive in recent years (OECD 2021a).

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Foreign acquisitions of Australian water assets are not usually screened, unless the assets are attached to other acquisitions that meet screening criteria,<sup>3</sup> or are in specified national security areas. Consequently, only a small proportion of entitlements recorded on the Register have been screened by the Foreign Investment Review Board and the Treasurer. As at 30 June 2020 (before the new national security powers came into effect), 9.5 per cent of water registrations were connected with a land purchase that had been approved by the Foreign Investment Review Board (ATO, pers. comm., 9 April 2021).

## Registers of foreign ownership

Another element of the foreign investment regime is a series of registers of foreign ownership of certain Australian assets.

Currently, foreign persons who acquire an interest in agricultural land, residential land, water entitlements, media assets or specified critical infrastructure assets must notify the appropriate authority (Australian Government 2020b).

- The ATO manages the Register of Foreign Ownership of Water Entitlements, the Register of Foreign Ownership of Agricultural Land and the Register of Foreign Ownership of Residential Land.
- The Australian Communications and Media Authority maintains a Register of Foreign Owners of Media Assets.
- The Department of Home Affairs maintains a Register of Critical Infrastructure Assets.

The Australian Government announced changes to this suite of registers in 2020. The *Foreign Investment Reform (Protecting Australia's National Security) Act 2020* (Cth) provides for the creation of a Register of Foreign Ownership of Australian Assets that amalgamates the existing Register of Foreign Ownership of Water Entitlements, the Register of Foreign Ownership of Agricultural Land and the Register of Foreign Ownership of Residential Land. The forthcoming Register also expands registration requirements to foreign owners of Australian commercial land and exploration tenements, and to asset acquisitions that are subject to the Treasurer's powers (Australian Government 2020b). The forthcoming Register is still under development, but must be implemented by 11 December 2024.

The Commission understands that the scope of information collected on foreign-owned water entitlements is intended to remain the same under the forthcoming Register. It will use the same definitions of foreign persons and water entitlements, impose the same reporting obligations on foreign persons, and be used to provide annual reports on aggregate foreign ownership levels (Australian Government 2016, 2020b).

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<sup>3</sup> For example, foreign investment in agricultural land is screened when the cumulative value of a foreign person's agricultural land holdings exceeds \$15 million. Foreign investment in agribusinesses is typically screened when the value of a foreign person's interest in that business exceeds \$61 million (FIRB 2020).



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However, there are some differences in the way the information on the forthcoming Register will be used. Currently, the Register is administered under the *Taxation Administration Act 1953* (Cth), which limits access to a small group of authorised users that includes relevant ministers and departmental secretaries. Information on the forthcoming Register will be available to a broader group of users to support the administration of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) and other select Commonwealth legislation (box 4.4) (Treasury 2020).

## **2.4 Key features of Australian water markets**

### **The development of water markets in Australia**

Water markets in Australia are a relatively new phenomenon. Historically, water rights were tied to land titles, and reforms to support trading in water allocations and entitlements only began around 30 years ago. Initial forays into trading were small in scale, mostly between irrigators in the same region (ACCC 2021, p. 12).

Water markets expanded significantly during the first decade of the 21<sup>st</sup> century, spurred by drought and the National Water Initiative (Horne and Grafton 2019). The National Water Initiative, introduced in 2004, is an agreement between the Australian, State and Territory Governments that supports a nationally-compatible market and system for managing water resources (COAG 2004). Key objectives include removing barriers to trade and facilitating the efficient development and operation of water markets (COAG 2004; PC 2021b, p. 26).

Water markets are now at different levels of maturity across Australia. The Murray-Darling Basin water market is well established (especially in the southern Basin), with \$1.8 billion of trades annually (ACCC 2021). A range of water assets are traded, including:

- water entitlements — a permanent right to access a share of a water resource for consumptive uses (including agricultural, industrial and urban uses), often specified as a maximum volume per year
- water allocations — the actual volume of water allocated to each water entitlement in a given year (usually less than the maximum volume specified on the entitlement)
- water delivery rights — a right to have water delivered by an infrastructure operator
- irrigation rights — a permanent right to receive a specific volume of water from an irrigation infrastructure operator.

Outside the Murray-Darling Basin, water markets are less developed but growing. Trade in water entitlements outside the Murray-Darling Basin almost tripled in the decade to 2019-20, but still represents only a small share of the total trade in water assets across the country. By volume, 91 per cent of water allocation trades and 63 per cent of water entitlement trades occurred in the Murray-Darling Basin in 2019-20 (PC 2021g, pp. 7–8).

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## Sources of water market information

Information on water markets is available from a range of sources. The BOM and Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES) provide aggregate information on water resources and markets (ABARES 2020; BOM 2021c). State and Territory water registers hold information about water entitlement ownership and trade activities, often at a granular level of detail (box 2.4). Private brokers and exchanges may also be a source of water trading information for market participants.

### Box 2.4 State and Territory registers of water asset ownership

All State and Territory Governments maintain registers of ownership of water assets, although the types of entitlements captured, details recorded, and availability to the public varies.

Most registers provide detailed, publicly available information about water entitlements, including on the location and characteristics of the entitlement (such as the volume and level of reliability). Some jurisdictions (including Western Australia, Tasmania, the Northern Territory and the ACT) also report the names of owners in online registers, while others restrict this information to users who pay a fee and search for a specific entitlement number.

Register formats vary across jurisdictions. A searchable online table is the most common approach, but some jurisdictions (Queensland and Western Australia) provide interactive maps. Victoria has developed a water information dashboard, which brings together entitlement records, general water market information and some aggregate statistics on water ownership, such as the proportion of water entitlements that are not tied to land.

There is significant variation across the States and Territories in the terminology and frameworks used to record ownership information and the regularity of register updates (chapter 5).

*Sources:* ACCC (2021); ACT Government (nd); NT Government (nd); Queensland Government (2021); SA DEW (nd); Tas DPIPWE (2020); Tasmanian Irrigation (2021); Victorian Government (2021); WA DWER (nd); WaterNSW (nd).

The Australian Competition and Consumer Commission found in a recent inquiry into Murray-Darling Basin water markets that ‘there is a lack of quality, timely and accessible information for water market participants’ (ACCC 2021, p. 2). It concluded that information sources were inadequate for ensuring the efficient and transparent operation of water markets in the Murray-Darling Basin.

The Register is the only source of information on the foreign ownership of water entitlements in Australia (chapter 4). Until 2016, the ABS Agricultural Land and Water Ownership Survey provided information on foreign ownership of water entitlements in the agricultural sector, but the survey was discontinued following the introduction of the Register (chapter 5).<sup>4</sup>

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<sup>4</sup> The 2016 survey found that agricultural businesses with some level of foreign ownership controlled 12.5 per cent of Australia’s agricultural water entitlements (ABS 2017).

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## 3 Rationales for the Register

### Key points

- As a small open economy, foreign investment contributes to Australia's prosperity. Foreign investors will continue to play an important role in providing funds for investment in the agriculture and mining industries.
- There is recognition by the Australian, State and Territory governments as well as agricultural peak bodies and many of those that operate within the sector that foreign investment delivers net benefits.
- However, foreign investment in agriculture — including in water entitlements — can draw negative views from some in the community and media.
  - Polls show that the community — in both regional and urban areas — is particularly opposed to foreign investment in agriculture.
  - There are concerns about foreign investors behaving anti-competitively in water markets or receiving beneficial tax treatment.
- The rationale for the Register is to 'strike a balance between maintaining an attractive and welcoming environment for foreign capital on the one hand while maintaining community confidence in the foreign investment regime.'
- In the absence of the Register or some other transparency mechanism, the Australian Government may be more likely to be pressured to make (small) adverse changes to the foreign investment regime and water policy settings.
- Concerns about foreign investors behaving anti-competitively in water markets or receiving beneficial tax treatment cannot be solved by the Register. These issues can be effectively addressed through other direct policy mechanisms.
  - Given there is some ambiguity about whether foreign owners of water are and should be required to pay capital gains tax under current rules, there would be merit in the ATO and/or Treasury providing further clarification on this issue.
- Information from the Register is intended for use in policy development and administration. However, no compelling use of this information for these purposes has been identified.

This chapter identifies the rationales advanced for the Register and assesses whether they provide a justification for it or an alternative transparency mechanism<sup>1</sup> to inform policy makers and the public on the level of foreign ownership of water entitlements.

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<sup>1</sup> Best practice regulatory evaluation involves identifying a valid rationale for a regulatory instrument (in this case, the Register), assessing whether the instrument would generate net benefits in light of the rationale, and considering whether there are any alternatives that could achieve similar outcomes more efficiently. The Commission examines alternative transparency mechanisms in chapter 5. This chapter focuses on assessing rationales advanced for the Register, but the same rationales, where valid, are also relevant for the assessment of alternatives in chapter 5.

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### 3.1 What is the purpose of the Register?

The Register's creation followed an unconventional route (chapter 1). In 2015, the Government introduced the *Register of Foreign Ownership of Agricultural Land Act 2015* (Cth) to increase scrutiny of investment in agricultural land. The (Water) Register was proposed in an amendment to that Act.

In 2016, the Australian Government Treasury (the Treasury) began consultation on the form of the proposed Water Register. Its consultation paper noted that the Register was intended to increase transparency, but did not clearly identify the purpose of that transparency (Treasury 2016).

The Treasurer at that time, Scott Morrison, articulated the Register's purpose in the second reading speech that introduced the Register of Foreign Ownership of Agricultural Land (Water) Bill 2016 (Cth). He stated that the Register would maintain community confidence in the foreign investment regime by providing transparency.

While acknowledging the value and contribution of foreign investment to our national prosperity, it is important to strike a balance between maintaining an attractive and welcoming environment for foreign capital on the one hand while maintaining community confidence in the foreign investment regime. (Morrison 2016)

In addition to this rationale for the Register, several others have been advanced (sections 3.4 and 3.5), including that the Register can:

- help allay community concerns about matters such as anti-competitive behaviour in water markets and tax treatment that favours foreign investors
- provide information for use in policymaking (such as for foreign investment approval decisions).

### 3.2 How does the community feel about foreign investment in water?

Underlying the rationales advanced for the Register is a need to maintain community confidence in, or allay community concerns about, foreign investment in water entitlements and Australia's foreign investment regime. This section examines the attitudes of different segments of the community toward foreign investment in Australia generally and in water entitlements specifically.

#### **Governments and the agriculture and mining sectors generally welcome foreign investment**

There is widespread acceptance among Australian governments (DFAT 2018; Victorian Government, sub. 10, p. 1) and the policy community that foreign investment has delivered

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large net benefits to the Australian economy. Foreign capital has contributed to the nation's economic development, including the agriculture and mining sectors, and to the high standard of living enjoyed by people in modern Australia (box 3.1).

### **Box 3.1      Benefits of foreign investment**

As a small open economy, foreign investment contributes to Australia's prosperity. Due to a permanent gap between the demand for funding and the amount of savings available in the domestic economy, Australia has been a net recipient of capital inflows. This additional funding has allowed Australia to expand its productive capacity — with machinery, buildings and other assets — beyond what it could have achieved itself (PC 2020a, pp. 53–64).

Foreign direct investment (FDI) can also benefit Australia through positive spillovers, such as transfers of technology and increased competition, innovation and human capital development. These benefits have enabled higher national incomes and living standards (Access Economics 2010; Faeth 2006; Gali and Taplin 2012; Iyer, Rambalidi and Tang 2009; Layton and Makin 1993).

Examples of the benefits of FDI in the agricultural industry abound (PC 2016, p. 536).

- It provided the capital for machinery, livestock and irrigation during the industry's early years (Hooke 1967; Shaw 1967).
- In the 1960s, American investors introduced new technology and expertise for large scale cotton growing.

The agricultural sector will need more capital in the coming years. The National Farmers Federation (NFF) noted that '[f]oreign investment will play an important role in closing the \$8.7 billion shortfall in new investment required to reach the NFF's goal of \$100 billion in farm gate output by 2030' (sub. 11, p. 1). And Port Jackson Partners estimated that Australia will require an additional \$600 billion in agricultural investment between now and 2050 to expand production (Port Jackson Partners 2012, pp. 4, 37–40).

Foreign investment has also been critical for the resources sector. At the peak of the mining investment boom in 2013, foreign investment in the resources industry made up 87 per cent of total capital inflows in Australia (ABS 2018, table 14a). While the resources industry accounted for only 9 per cent of capital inflow in 2019, its stock of inward foreign investment is still large at \$360 billion or 35 per cent of the total stock of inward FDI (ABS 2021, table 14a, table 15a).

These benefits have been recognised by agricultural and mining peak bodies (MCA, sub. 9, p. 2, sub. DR16, p. 1; NFF, sub. 11, p. 1; NIC, sub. DR14, p. 3) and many others that operate within the sectors. In its submission to this inquiry, the National Farmers Federation said that it:

... continues to support foreign investment in Australian agriculture and recognises the importance it has and will continue to play in a vibrant agricultural supply chain, especially as a source of capital. (sub. 11, p. 1)

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Similarly, Riparian Capital Partners, a specialist water, agriculture and food investment firm, submitted that:

... offshore capital is generally welcome in Australian agriculture, including the Australian irrigated sector that encompasses water entitlements. ... As a capital constrained sector, Australian agriculture has also benefited from foreign capital inflows. (sub. 2, pp. 3–4)

Many submissions to the Commission's inquiry into the *Regulation of Australian Agriculture* highlighted similar points (PC 2016, p. 538).

While foreign investment arouses concerns in the broader community (discussed below), the Commission has observed that they are not as common within the agricultural or mining industries. The peak agricultural or resources bodies consulted as part of this inquiry said that foreign ownership of water entitlements is rarely raised with them by their members. Likewise, Riparian Capital Partners noted that it had not encountered specific concerns related to foreign ownership of water entitlements (sub. 2, p. 3).

Where there are pockets of concern about foreign ownership within these sectors, they appear to be mainly in areas where there is strong competition for water (the southern Murray-Darling Basin being the main region), and they ebb and flow with water availability. This is consistent with the ACCC's observation in its Murray-Darling Basin water markets inquiry that concerns about market integrity were more widespread in the southern Basin where water markets are larger and more active (2021, p. 12).

Media reporting can also stir up concerns, including around the time of a foreign acquisition or with the release of the statistical report (chapter 4). There are also specific concerns about other issues related to foreign ownership of water entitlements such as the potential for anti-competitive behaviour by foreign owners or unfair tax advantages (section 3.4).

## **The broader community harbours concerns about foreign investment**

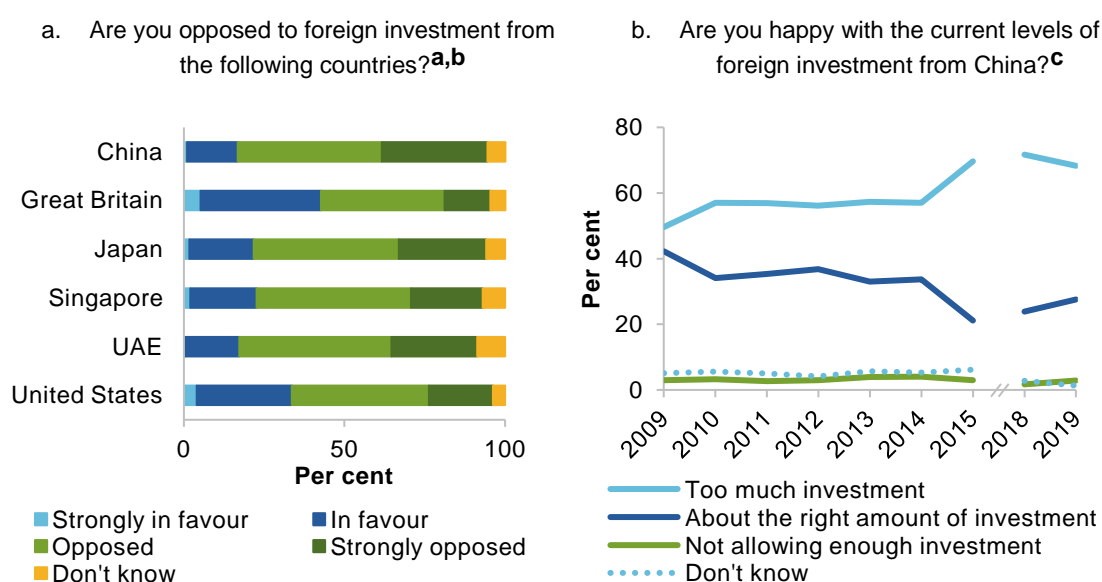
Despite Australia's historical reliance on foreign investment and the large economic benefits it delivers, the general community has persistently been uncomfortable with foreign investment in Australia,<sup>2</sup> particularly in agriculture (chapter 2; PC 2020a). For example, a Lowy Institute survey of 2448 people found that most Australians oppose foreign investment, regardless of the country of origin (figure 3.1, panel a). The same survey series found that most people think there is too much foreign investment from China. These results were relatively stable over the start of the past decade and increased in the second half (figure 3.1, panel b). The results of historical polls also demonstrate opposition among the

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<sup>2</sup> Foreign investment mostly falls into two categories: foreign portfolio investment and foreign direct investment (FDI). Foreign portfolio investment is the purchase of shares and bonds, where the investor does not have a controlling interest, while FDI is in assets or enterprises where the investor has a significant degree of influence. Many surveys of community sentiment tend to focus on questions of control, hence FDI. This section discusses foreign investment generally, however it mostly relates to FDI.

public to foreign investment.<sup>3</sup> For example, in 1989 a poll of 1632 people by AGB:McNair found that about 57 per cent supported discouraging British, American and Japanese investment in agriculture (Goot 1990, p. 263).

**Figure 3.1 Polling shows negative views toward foreign investment**



<sup>a</sup> This question was asked in 2008. <sup>b</sup> UAE is the United Arab Emirates. <sup>c</sup> There was a series break between 2015 and 2018.

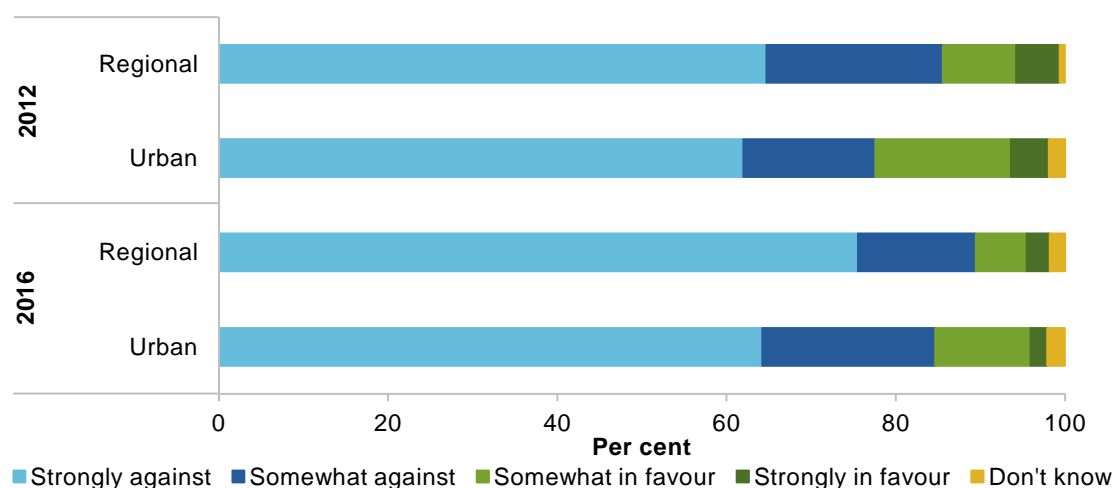
Sources: Hanson (2008); Kassam (2020).

Opinion polls show that Australians — country and city dwellers alike — are particularly opposed to foreign investment in agriculture (including investment in water) (PC 2016, p. 543, 2020a, p. 77). For example:

- a 2016 ABC Vote Compass survey found that 80 per cent of the 212 710 people surveyed were against allowing foreign companies to buy Australian farmland
- an earlier ABC Vote Compass poll, of 1.4 million people in 2013, found that 84 per cent were in favour of more restrictions on foreign investment in agriculture
- a smaller 2016 Lowy Institute poll of 1202 people found a similar sentiment (figure 3.2; Oliver 2016).

<sup>3</sup> At the same time, the Australian public also considers that increasing connections with other economies is beneficial, with 70 per cent of respondents to a Lowy Institute poll agreeing that increasing global connections is mostly good for Australia (Kassam 2020).

**Figure 3.2 Most people are against foreign investment in farms**  
 Survey response to the question: 'Are you in favour or against allowing foreign companies to invest in farms?' (by resident location)



Source: Oliver (2016).

As the Commission discussed in its 2016 report on the *Regulation of Australian Agriculture*, many community members fear that allowing foreign investment in Australian agriculture can damage rural communities, reduce food security, result in a 'land grab' or damage iconic agricultural companies (PC 2016, p. 556). Foreign investment in Australian water entitlements can arouse similar sentiments, often leading to calls for bans on foreign ownership (box 3.2). This is despite the water being used in Australia for agriculture, manufacturing or mining production.



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### Box 3.2      **Some impassioned views on the foreign ownership of water**

A comment submitted in response to the Commission's draft report stated:

... properties which had licenses for large water allocations, appeared to be targeted by foreign owned entities. Water in prime water catchment areas was thus purchased and effectively monopolized which created an environment of inequity and enabled indiscriminate opportunity for ongoing manipulation by policy makers ...

Control of our water resources is clearly NOT being facilitated for the good of the river system and arid areas of Australia or its peoples at this time. It appears fair to conclude, the lack of proper transparency in the management of this precious resource has been unscrupulously re-allocated to fill the hip pockets of a few individuals in Canberra and Abroad and also for political gain. (brief comment 1)

Another submission claimed:

In this region, one Chinese company has been buying our lands and our water and owns 40 – 60 farms with water access. They own more closer to Forbes. I am unsure why you would not want full transparency, with exact lands and water foreign ownership. Saying it impacts investment is a lie. (Fletcher, sub. DR13)

Foreign ownership of water has generated commentary in other forums. Submissions to the ACCC *Murray-Darling Basin water markets inquiry* commented:

Water is Australia's rare life sustaining gold. And the fact that it was allowed to be sold to anyone, leaves Australia in a very [vulnerable] position against potential foreign or domestic owners, who don't have Australia's best interests at heart. (Lines 2019)

Under the current system, communities and water users are losing control of their destiny. Ownership of large amounts of 'our' water are now in the hands of foreign enterprises. We have no control of whether it stays in our community from year to year or is moved on. ... There should be restrictions on ownership of our water, particularly by foreign governments and investors — We need to remain in control of Our Public Asset. (Yenda Producers Co-operative 2019, pp. 3–4)

And submission three to the NSW Government community consultation on water market transparency in NSW noted:

No person should own water given freely from God. The only fair charge for water should be cost of storage and transportation to the users.

## 3.3      **Maintaining public confidence in foreign investment in water markets**

As noted above, the main rationale advanced for the Register is to provide transparency to maintain community confidence in foreign investment in water entitlements. This rationale presupposes Government support for an open foreign investment regime. However, it also assumes that, without some degree of transparency, the community might lose confidence in the system and that this could lead to a more stringent (and costly) foreign investment regime and/or retrograde changes to Australia's water policy settings.

In assessing whether this rationale holds water, the Commission has looked at:

- whether a Register can allay community concerns and promote confidence

- 
- to the extent that it can, the likelihood and degree to which the government would change the foreign investment regime or water policy settings in the absence of the Register
  - the benefits of preventing such changes.

There is uncertainty associated with each of these matters. While this calls for both caution and judgement, assessments of each question can help to establish bounds around whether this rationale supports the Register (or some other transparency mechanism).

## **Can a Register allay community concerns and promote confidence?**

The Register seeks to allay community concerns and maintain public confidence by collecting and disseminating accurate and authoritative information. Transparency can provide scrutiny on government decisions, generate trust in processes and improve decision making (box 3.3). However, compared with some government policies, the transparency provided by the Register is narrow in scope.

In principle, improving the public's understanding of the level of foreign ownership of water entitlements should reduce the likelihood of misinformation taking hold and may allay the concerns of some. For example, people who might have been anxious that 'Australia is selling the farm' (or its irrigation system) may be less concerned on learning that the actual level of foreign ownership is about 11 per cent.

A Register may also assure the community that the Government has some oversight of foreign investment in water entitlements, which may in turn instil public trust in the relevant policies and institutions.

The NSW Irrigators' Council (NSWIC) supported the transparency objective:

NSWIC fully supports the objective of the Register to increase transparency about foreign ownership of Australian water assets and maintain community confidence in this regard. NSWIC notes that foreign ownership of water is a topic of significant public interest, and transparency is critically important. (sub. 6, p. 1)

To be most effective, the Register must be seen as credible and its information should be accessible, understandable and meaningful. This calls for the use of clear messaging and presentation, the provision of explanatory and contextual information, and efforts to pre-empt potential misinterpretation. It also requires that community members know about the Register and search for or receive its information.

Even then, simply conveying accurate information may not be sufficient to influence people's views or change attitudes (Grigorieff, Roth and Ubfal 2020; Nyhan 2020; Walter and Murphy 2018). For instance, a study by Hopkins, Sides and Citrin (2019) found that correcting people's overestimates of the prevalence of immigrants did not affect their attitudes toward immigration. In psychology literature, this is referred to as the 'backfire effect'; providing information may not change, or could reinforce the beliefs that the information is intended to counter.

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### Box 3.3      **Transparency and accountability in public policy**

#### **What is the purpose of increased transparency?**

Providing the community with truthful and accurate information can promote trust because it allows the community to scrutinise the processes and outcomes of government actions. And it can provide the community with clarity and reduce the likelihood of disinformation taking hold by providing an authoritative source of data.

Examples of transparency in action include publishing prices of services to assist consumers to make more informed choices, or publishing data on public sector procurement to assess whether due process has been followed.

#### **Benefits and costs of transparency**

The large public benefits to the collection and publication of data are often overlooked. The Commission highlighted some of the benefits of sharing data in its *Data Availability and Use* inquiry.

- Open data policies can enhance transparency of governments, leading to improved policy outcomes and providing the incentives and means for governments to be more efficient.
- Governments can utilise data to generate insights that enable them to reduce the costs of, and improve efficiency and productivity in, the provision of services.
- Data can be used by governments to improve policy and decision making.
- Data can be used to expose government waste or corruption (PC 2017b).

However, providing greater transparency is not without cost and, as with other policy, it should yield a net benefit. In recognition of this, the ABS applies a cost-benefit lens when considering whether to collect and publish information. As highlighted by the former Australian Statistician:

To some extent, national statistical offices benefit from the new and expanding data sources, as some information can be available to us in more timely and cheaper means than our current processes, and available as key inputs to processes of compiling official statistics. However we need to be judicious about the quality of these potential inputs, and a cost-benefit lens is applied in these circumstances. (Kalisch 2016)

Some of the costs of transparency include:

- information can be personally sensitive — the mishandling of data can result in harm to an individual physically, financially or emotionally
- information can be commercially confidential — mishandling can result in economic loss, reputational damage, voided contracts, or competition issues
- information is costly to collect.

Providing a headline figure of foreign ownership could also risk focussing the conversation on whether foreign investment levels are too high or too low (a point that is open to differing interpretations) instead of highlighting important information such as the costs and benefits of foreign investment.

The implication is that there are limits to what a Register can achieve and that the design of the Register will also bear on its effectiveness. (The effectiveness of the Register in addressing community concerns is discussed further in chapter 4.)

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## How could policy settings change?

Regardless of the Register, the Commission considers it unlikely that the Government would significantly tighten its foreign investment regime, for example, by excluding all foreign investors from purchasing water entitlements or investing in agriculture. This is mainly because Australia's current foreign investment regime and water policy settings have delivered significant benefits over many years — a conclusion widely held by governments (box 3.1; box 3.4). Any reversal of these policy settings would likely face a concerted backlash, particularly from business and industry. Further, even with consistently negative public sentiment toward foreign investment, over a period of decades the Government has maintained a largely open foreign investment regime (notwithstanding some changes, discussed below and in chapter 4). It is unlikely, therefore, that the Government would introduce large policy changes even in the face of heightened public concerns.

### Box 3.4 Benefits delivered by the National Water Initiative

The National Water Initiative (chapter 2) has produced large benefits for the agricultural industry and, more broadly, rural Australia. It has also delivered benefits to the environment. Water reforms have led to significant efficiency gains by changing where and how water is used in rural Australia. Across the agricultural sector, market-driven trade in water entitlements has enabled water resources to move to more efficient uses (PC 2021c).

Water trading has become a sizeable economic activity. In 2019-20, Australia's water markets were estimated to have generated about \$7 billion in turnover (BOM 2021a, p. 7). Further, regional GDP in the southern Murray-Darling Basin was estimated to be \$5.2 billion (in 2020-21 dollars) higher over the five years to 2010-11 than it would have been without trading, with gains largest in 2007-08 and 2008-09 (NWC 2012b, p. 103; PC 2021f, p. 6).

Other studies using various models over different time periods have produced estimates of benefits ranging from \$17 million a year in increased returns to producers to \$4.7 billion in increased GDP from 2006-07 (Wheeler et al. 2020, pp. 90–91).

Some of the benefits from the provision of water for the environment include improved native vegetation and wetland condition; protection of rare and threatened biodiversity in groundwater-dependent ecosystems; and the migration and breeding of native fish, frogs and waterbirds (CEWO 2021; Hart and Butcher 2018, p. 2; PC 2021c, pp. 92–93; Thurgate et al. 2019). And increased environmental flows have provided refuges that have been important for maintaining breeding grounds during drought (MDBA 2019) and supporting ecosystem resilience until rain returned.

A more likely scenario is that, in the absence of the Register and in the face of mounting community pressures, the Government would make smaller policy changes. For example, it might introduce screening requirements for all acquisitions of water entitlements. There have previously been calls to include all water entitlements in foreign investment screening processes. The Victorian Government proposed such an approach in its submission on the consultation for the forthcoming Register (nd, p. 7).

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Without the Register, these calls may grow stronger. Indeed, the Register may have already pre-empted a more stringent policy approach. Inquiry participants involved in the introduction of the current Register told the Commission that it was viewed as a light touch policy measure that would combat calls for a more restrictive alternative.

Of course, the Government could make changes even with the Register in place. This has happened in agriculture — since the inception of the Agricultural Land Register in 2015, the Government has introduced tighter foreign investment rules, including by lowering the screening threshold for agribusinesses to \$55 million and enacting rules requiring sales of agricultural land to be advertised and marketed domestically before opening to foreign investors. (These changes have contributed to a broader trend of Australia becoming more restrictive in its approach to foreign investment — chapter 2). It is thus not possible to rule out future changes to foreign investment rules for agriculture — or for water entitlements.

In sum, it is difficult to know what effect the Register has, if any, on the Government's approach to foreign investment and water policy. However, the Commission considers it possible that the absence of a Register would increase the likelihood and pressure on the Government to make smaller adverse changes in the face of mounting community pressures.

## **Would there be benefits from preventing changes to foreign investment and water policy?**

While there is uncertainty around the likelihood and form of such policy changes, it is possible to draw inferences on the benefits of avoiding them, given that the benefits of current policy settings are well established.

Any retrograde changes to the foreign investment regime or water policy settings would have a cost for the agricultural and mining industries in Australia. In its 2020 research paper on *Foreign Investment in Australia*, the Commission evaluated the potential costs of a more stringent foreign investment regime, including tighter restrictions on foreign investment in agriculture.<sup>4</sup> It suggested that:

- if tighter restrictions were introduced to the entire foreign investment regime (an unlikely scenario as discussed above), the costs could be material. The Commission estimated that a 60 per cent increase in Australia's FDI restrictiveness index score (a level akin to New Zealand) would cost between \$0.8 and \$7.1 billion a year in gross national income (PC 2020a, p. 95)

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<sup>4</sup> The Commission used two steps to model changes to FDI policies. In the first step, it estimated capital income changes resulting from a change in FDI policy using OECD estimates of the sensitivity of inward FDI to changes in the restrictiveness of FDI policy regimes (Mistura and Roulet 2019). It then estimated the change in gross national income due to these capital income changes using the Commission's Global Computable General Equilibrium model.

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- the more likely outcome of smaller changes, such as the introduction of screening requirements for water entitlements, could cost between \$0.4 and \$3.5 million a year.<sup>5</sup>

There is no similar estimate of the costs of winding back water reforms. However, there are several estimates of the benefits of water reform, from a range of organisations and researchers (box 3.4). These estimates show significant benefits, often in the order of several billion dollars. Even a very small unwinding of these benefits would come at a cost.

## **Does the rationale hold water?**

The rationale for the Register articulated by the Government is to provide transparency to maintain community confidence in foreign investment in water entitlements. The benefits sought are essentially those arising from avoiding adverse changes to the foreign investment regime and water policy settings.

The path by which these benefits could arise is complicated, requiring:

- the Register to improve community confidence and allay concerns
- this effect to, in turn, lower pressures on the Government to tighten its foreign investment regime or make retrograde changes to water policy settings
- those pressure reductions to be sufficient to prevent the Government from (adversely) adjusting its policies
- those policy adjustments (if made) to affect economic performance.

There are questions at most of these stages about how likely and large the specified effect would be. As noted, the Commission considers that pressure from community members would not lead to the foreign investment regime or water policy settings being significantly altered. However, in the absence of the Register and in the face of mounting community pressures, the Government may be more inclined to make smaller changes to the foreign investment regime or water policy settings, which would incur some cost for industries such as agriculture and mining.

As a result, 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.

Whether the Register can be justified on these grounds also depends on its effectiveness and costs, and on the attractiveness of alternative mechanisms. These matters are discussed in chapters 4 and 5.

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<sup>5</sup> Caution should be exercised in comparing these data, as they model different policies and have adopted differing assumptions. More broadly, the Commission cautions that the estimates are for illustrative purposes and are indicative only.

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#### 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.

### 3.4 The Register cannot address all concerns

As noted above, the Commission has observed few concerns within the agricultural and mining industries directly related to foreign investment in water entitlements. However, the broader community has raised other concerns with foreign investment in water markets. In particular:

- participants are concerned about the potential for large water holders and foreign investors to behave anti-competitively in water markets, for example by manipulating prices
- there is a perception that the taxation system — specifically, capital gains tax (CGT) — disadvantages domestic water holders compared with foreign owners.

Some community members have suggested that the Register could provide a solution to these issues or, at the very least, provide evidence supporting their concerns.

This section outlines these concerns, the issues involved and the role of the Register in addressing them.

#### Anti-competitive conduct in water markets

##### The nature of community concerns

Market power and price manipulation in water markets is a vexed topic in agriculture (especially in the Murray-Darling Basin) and features prominently in media commentary, public forums and government discussions. This is for a good reason. Water is important for agricultural production and price changes can have large effects on agricultural producers' profitability.

During consultation on this inquiry and in submissions to several other inquiries, community members have indicated that the conduct of certain water market participants — including foreign owners, investors and large agribusinesses — is harming water markets (box 3.5). Some claims include that these participants are engaging in water hoarding, using inside information to gain advantage over other participants and using market power to drive up the price of water allocations. At public forums and in submissions to the ACCC's Murray-Darling Basin water markets inquiry, some stakeholders argued for regulatory intervention in the form of restrictions on investment and foreign ownership of water rights.

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### Box 3.5      **Claims of anti-competitive behaviour**

The Victorian Farmers Federation commented:

The community remains uneasy that large corporates and foreign investors are using excessive market power to drive up the price of annual water allocations. (sub. 12, p. 2)

The Victorian Government noted:

[Foreign ownership] has been raised during community consultation on proposals to increase water market information in 2020, when the Victorian Government heard that people felt that a high level of transparency was required for ownership of large holdings of water including foreign ownership. There was particular concern that foreign owners are typically large corporations or investors, often perceived as having an advantage in water markets and an ability to force up the price of water. (sub. 10, p. 1)

The Murray Darling Association referred more broadly to the concern of market manipulation:

There is increasing concern that people with inside knowledge or large water holdings can manipulate markets or hold farmers to ransom. (sub. 8, p. 4)

The manipulation of water markets has also been raised in the context of other studies, including in the Australian Competition and Consumer Commission inquiry into Murray-Darling Basin water markets.

For example, in a submission to the ACCC's Murray Darling Basin water markets inquiry, Robert McGavin, Chief Executive Officer of Boundary Bend commented that:

The conduct of non-water users in water markets is harming not only farmers, but also rural communities and, ultimately consumers by artificially inflating prices in a manner that does not reflect the natural forces of supply and demand. We estimate that during the last 3 irrigation seasons, the conduct of non-irrigators has raised the price of temporary water by \$100/ML to \$500/ML above the price that would otherwise prevail in the current climate, if irrigators were only competing with each other for the available temporary water. (2021, p. 12)

This behaviour — the abuse of market power and other types of anti-competitive conduct — would have a detrimental effect on water markets were it to occur. It could result in financial losses for other market participants, as well as harm market integrity more generally. Such behaviour is prohibited within markets in Australia and regulators are armed with a range of penalties if they find evidence of it.

### What is the role of the Register?

Some participants suggested that providing greater transparency would reveal anti-competitive water market behaviour. For example, the Victorian Farmers Federation noted its concern that foreign investors are misusing market power, before commenting that ‘... increased reporting here would be of benefit to help improve transparency’ (sub. 12, p. 2). And the NSW Government noted that:

... stakeholders suggest that some of these concerns can be addressed by increasing the transparency of market information, including making information on all water holders more easily accessible. Transparency of information is fundamental to resolving both actual and perceived issues in the market, including issues relating to the conduct or influence of some market participants. (sub. 5, p. 2)



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However, while the Register may be useful for providing information about the level of foreign ownership of water entitlements, it does not contain sufficient information to identify anti-competitive conduct by foreign investors.

One piece of information that can help identify market power is a market concentration index. In water markets, a concentration index would likely consist of the size of a market participant's water entitlement as a share of the total water entitlements on offer. Yet, this is not information that would readily be obtained from the basic part of the Register, due to the confidentiality constraints that prevent the ATO from identifying individual water holders (chapter 4).<sup>6</sup> Further, the statistical part of the Register only reports aggregated information of all foreign owners, and does not publicly identify the size of any single investor's water holdings.

Identifying price manipulation of water allocations requires price and quantity data for the trades of individual water market participants. This information can help identify anti-competitive behaviour and its effects on water market prices. However, this information is not currently recorded in the Register. The Register only records foreign ownership of water *entitlements* (that is, long term water rights), and not *allocations* (box 2.1). And it only records entitlements at a point in time — 30 June of each year — not every trade that occurs throughout the year.

Even if foreign investors were to engage in anti-competitive conduct (and the evidence of this is slim as discussed in box 3.6), the Register could not — nor is it intended to — identify or address the underlying problem of anti-competitive behaviour. The information collected on the Register is intended for other purposes, as discussed above. The NFF noted that:

... if these are material concerns [about anti-competitive conduct], the Register would not be the appropriate place to make such determinations — the information is aggregated and insufficient for meaningful analysis on this issue. (sub. 11, p. 3)

While there is limited evidence to suggest that foreign investors engage in anti-competitive conduct, any concerns are best dealt with directly through competition or water market policy.

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**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.

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<sup>6</sup> Under the forthcoming Register, data may be accessed for the purposes of administering the *Competition and Consumer Act 2001* (Cth) (box 4.4).

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### Box 3.6      **Limited evidence of anti-competitive conduct in water markets**

Some recent research has examined the extent to which anti-competitive conduct occurs in water markets and found limited evidence to indicate that market participants (including foreign investors) have acted in this way.

In its 2021 inquiry into Murray-Darling Basin water markets, the ACCC analysed the behaviours of different types of water market participants, including agribusinesses and water market investors. The report did not find evidence of market manipulation or other anti-competitive conduct in Basin water markets during the period it analysed: 1 July 2017 to 31 December 2019. The factors that contributed to this finding included that:

- water investors tended to hold water for shorter periods of time while prices were high, and there was no evidence of large investors withholding water to increase prices. Further, the investors examined did not exhibit other behaviours that would artificially inflate prices (ACCC 2021, pp. 203–210)
- agribusinesses are large water users. They employ a range of strategies to manage their water and financial risk. Some own sufficient water entitlements to cover their needs while others rely on water allocation purchases. The overwhelming number of trades made by agribusinesses during the period were purchases and not sales, suggesting that these businesses predominately use water for their own production activities (ACCC 2021, p. 213).

Further, the ACCC noted that:

... rising prices over the 2018-19 water year and the first half of the 2019-20 water year [were] due to limited inflows and increasing water scarcity, and the level of water demand over this period. (2021, p. 191)

Other analysis by Loch et al. (2021) reached similar conclusions. The authors found no evidence of hoarding behaviour in market price or volume trends. They noted that it was more plausible that agricultural water users had themselves driven price increases given the requirement to access water at any cost during periods of low supply.

## **Beneficial treatment for capital gains taxation**

### **The nature of community concerns**

During consultations, the Commission heard from some participants that foreign owners of water entitlements receive beneficial treatment in water markets because they are exempt from paying CGT on water entitlements. Likewise, in a submission to the inquiry, the Communist Party of Australia (Marxist-Leninist) noted:

... there must be an immediate change to their [foreign owners] exemption from paying capital gains tax on the profits they make out of those entitlements. ... It is simply unacceptable that Australian farmers must compete with giant multinational corporations who are given tax breaks that cannot be enjoyed by Australians. (sub. 1, p. 3)

This point was also expressed in an article about a recent ATO private ruling. In a comment for the article, the NSW Shadow Minister for the Environment noted that ‘if thousands of gigalitres of foreign-owned water is being traded with unfair tax advantages, that could skew the market even more to the detriment of local farmers and our environment’ (Foote 2021).

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## Are foreign investors subject to capital gains tax on water entitlements?

In 2006, the Howard Government introduced an amendment to the *Income Tax Assessment Act 1997* (Cth) to reduce CGT for foreign residents. The change allowed foreign residents to disregard capital gains or losses on capital gains assets, however it prevented them from doing so on assets considered ‘taxable Australian real property’<sup>7</sup> (such as agricultural land). The purpose was to encourage foreign investment by increasing the after-tax return on Australian assets by reducing the tax paid on disposal of those assets.

Until recently there was greater uncertainty about whether water entitlements were considered real Australian property. In April 2020, the ATO made a private ruling that a foreign entity may disregard a capital gain or loss from the sale of water allocation rights. The ruling highlighted three points:

- the sale of water rights, such as licences and water allocations, are CGT assets
- water rights are not taxable Australian real property under Subdivision 855 of the *Income Tax Assessment Act 1997* (Cth)
- a foreign resident may disregard a capital gain or loss from a CGT event if the event happens in relation to a CGT asset that is not taxable Australian real property.

The private ruling indicated that the ATO did not consider water rights as real Australian property in this particular case, but it does not rule out the ATO making a different decision in the future. Private rulings are specific to the entity that applies for them and cannot be relied on by another entity (CAANZ 2021). As a result, the issue has not been entirely settled. A public ruling or change of law could alter whether water is considered real Australian property or not.

## What is the role of the Register?

The issue of whether foreign residents must pay CGT on water entitlements is important for some members of the community. However, it is not an issue that the Register can solve or provide evidence on to support a change of taxation policy.

The Register does not collect information that would identify the amount of CGT that foreign residents pay. To understand the extent of CGT paid by foreign investors, the Register would need to collect the price of water entitlements on acquisition and disposal for each transaction that occurs (as noted above, the Register only collects information at a point in time). Even then, detailed information about foreign owners’ tax affairs would be required to establish the amount of tax paid. The capital gain on the water entitlement is only one part of the

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<sup>7</sup> Subsection 855–20 of the *Income Tax Assessment Act 1997* (Cth) defines a CGT asset as taxable Australian real property if it is:

- (a) real property situated in Australia (including a lease of land, if the land is situated in Australia); or
- (b) a mining, quarrying or prospecting right (to the extent that the right is not real property), if the minerals, petroleum or quarry materials are situated in Australia.

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resident's tax and many other factors, such as, other income, deductions, offsets and carried-forward losses will determine how much tax they pay.

This is not information that the Register should collect. It would be highly costly and would not support the government's objective for the Register.

Governments have long-standing cooperation arrangements on taxation policy and have agreed principles and rules that allow for investment incentives through capital gains exemptions (box 3.7). However, given there is some ambiguity about whether foreign owners of water are and should be required to pay CGT under current rules, there would be merit in the ATO and/or Treasury providing further clarification on this issue.

### **Box 3.7      International cooperation on capital income taxation**

Whether or not foreign held water entitlements are exempt from capital gains tax (CGT), there is a broader policy question of whether governments can discriminate in favour of foreign residents.

In the explanatory memorandum for subsection 855–5 of the *Income Tax Assessment Act 1997* (Cth), the Government noted that the amendment was intended to improve the attractiveness of Australia for foreign investment while bringing CGT in line with international taxation practice (Australian Government 2006, p. 32). This was in reference to Article 13 of the OECD's Model Tax Convention on Income and Capital:

Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in Article 6 and situated in the other Contracting State may be taxed in that other State. (OECD 2017a)

However, as noted in the commentary to Article 13, this rule allows a country to tax a resident of another contracting state (a party to the convention) but does not require them to tax capital gains (OECD 2017a, p. 291).

Another principle that could apply to differential tax treatment of foreign and domestic residents is the National Treatment principle. The National Treatment principle relates to the treatment of foreign-controlled enterprises after establishment and is enshrined in the Declaration on International Investment and Multinational Enterprises, adopted in 1976.

'National Treatment' is the commitment by a country to treat enterprises operating on its territory, but controlled by the nationals of another country, no less favourably than domestic enterprises in like situations. (OECD 2017b, p. 5)

However, the National Treatment principle (as defined in the OECD Declaration) only precludes treatment that would disadvantage foreign investors; it does not prevent governments from providing beneficial tax treatment to foreign investors.

## **3.5 Information for policymakers**

Another rationale put forward for the Register — and particularly the forthcoming Register to commence in 2024 — is that it can inform policy development and administration, especially for foreign investment screening decisions (box 3.8).

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### **Box 3.8      Changes to the forthcoming Register to support policy**

The Government has announced funding for a new IT platform to support foreign investment application processing and compliance activities across Government and a new consolidated Register of Foreign Ownership of Australian Assets (Treasury 2020; pers. comm., 15 January 2021). It is proposed that Registrants will have access to a portal that will allow for self-management of registration details on an ongoing basis (ATO, pers. comm., 19 January 2021).

In addition, new platforms from the broader Foreign Investment Digital Transformation program will integrate with the forthcoming Register. These platforms are expected to deliver 'real-time intelligence insights to case officers and investigators' and 'improve the timeliness of data access and the integrity of decision making' (Chanthadavong 2021).

A few participants acknowledged the potential of the Register for policy purposes during the Commission's consultation process. For example, the National Irrigators' Council noted:

NIC appreciates that the information captured in the Registers is valuable and is used to support development of government policy in relation to foreign ownership. This assists governments when seeking to access data and analytical capability to monitor and assess applications to the [Foreign Investment Review Board] in the national interest. (sub. 6, p. 4)

And the NFF noted that:

... there are potential uses for a Register of Foreign Water Entitlements for policymakers and public policy purposes but if this is to be pursued, it would require greater granularity of data. (sub. 11, p. 3)

However, collecting information for policy comes with a cost that should be weighed up against the potential benefits (section 3.3). And while several submissions highlighted that information can be used to inform policy decisions, none provided detailed suggestions on what this would look like. Indeed, during consultation, several participants questioned whether the information in the Register could be used for any decision making.

For example, it is unclear how Treasury would use Register information for policy administration. While it has been suggested that the Register could assist the Foreign Investment Review Board (FIRB) with approving and monitoring foreign investment transactions, Register information is not used in the foreign investment approval process. Registrants notify the ATO only after a transaction takes place (or as details change). Further, investments in water entitlements are generally not screened, unless they are tied to other acquisitions that meet screening criteria.

State and Territory governments have indicated that they would be unlikely to use the information collected in the Register for policy administration or development. They 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. There would also be issues associated with information sharing (chapter 4).

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One suggestion is that the Register's information could be used to support broader policy objectives (including both the development and administration of policy) outside of foreign investment policy as will be possible under the recent changes to the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (chapter 4, box 4.4). However, the Register will still only provide information on foreign ownership levels. This information will not of itself address broader policy issues associated with decisions on who may invest in Australian water entitlements, how much they may acquire, or the conduct of parties who own water entitlements.

On balance, the Commission considers that there is little rationale for collecting the information contained in the Register for policy use. Collecting information is costly and is unlikely to provide any benefit for decision making.

**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.

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## 4 How is the Register performing?

### Key points

- The Register of Foreign Ownership of Water Entitlements provides the community with an authoritative source of information on foreign ownership of water entitlements in Australia. There is no other source for this information.
  - Governments, peak bodies and the media draw upon the Register to inform public discussion about foreign ownership of water assets. Register data are often framed and interpreted negatively in the media.
- The data collected and published by the Register are appropriate for its limited purpose, covering foreign ownership of water entitlements across industry sectors and all States and Territories.
- There is low awareness of the Register among communities, water market participants and government agencies. This limits its effectiveness.
- Access to unpublished Register information is limited by legislated confidentiality provisions, but this does not impair the ability of the Register to achieve its policy objectives.
- The statistical reports are simple to navigate, but Register data could be misinterpreted without prior knowledge of key water market concepts.
  - While reporting has been subject to delays, Register information is not time-sensitive.
- The cost of administering the Register is low, estimated at no more than \$0.5 million a year. Included in this cost are activities that help ensure the integrity of Register data.
- The ATO's compliance and enforcement activities have been targeted towards raising awareness of the Register. This reflects the low risks associated with non-compliance.
- Direct compliance costs to foreign water owners are low — it takes about an hour to complete the registration process for a single entitlement.
  - However, registration requirements add to a complex set of other regulatory requirements that water owners must comply with.
  - The Register marginally contributes to the incremental tightening of Australia's foreign investment regime.

This chapter examines the performance of the Register and whether it delivers on its intended policy objective — to increase transparency on the level of foreign ownership of water entitlements.

Understanding the Register's benefits and costs is part of assessing its effectiveness. As noted in chapter 1, these benefits and costs are both tangible and intangible, and can be difficult to quantify. In the absence of appropriate data or clearly measurable outcomes, the Commission has largely relied on qualitative analysis.

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The Commission has examined five questions.

- To what extent does the Register fill a gap in information (section 4.1)?
- Is the level of access to Register information appropriate (section 4.2)?
- How easily understood and timely are the statistical reports (section 4.3)?
- What is the cost of administering the Register, and is the scope of compliance and enforcement activities appropriate (section 4.4)?
- What are the direct and indirect costs of complying with registration obligations (section 4.5)?

## **4.1 Filling an information gap**

At a fundamental level, the Register provides transparency about the level of foreign ownership of water entitlements. It provides the public with information on:

- the proportion of water entitlements in Australia that are held by foreign entities, with a breakdown by the top 10 countries of origin
- the characteristics of foreign-held water entitlements, such as industry use, type of water right and water resource
- State and Murray-Darling Basin-level aggregates of foreign-held water entitlements.

There are no alternative sources for this information — while States and Territories have water registers of their own, none collect information on the nationality or country of origin of registrants. As noted by the Victorian Government (sub. 10, p. 1), the Register is the ‘key source of information’ for responding to community interest on these matters.

Inquiry participants generally supported the Register’s ability to provide transparency. For example, the NSW Irrigators’ Council (sub. 6, p. 1) noted that it has ‘improved the extent of information on foreign ownership’. It is telling that where participants offered suggestions for improvements, they have requested additions to reported data (NSW Irrigators’ Council, sub. 6; Victorian Farmers Federation (VFF), sub. 12; Victorian Government, sub. 10, sub. DR17), rather than suggesting a complete overhaul. Possible options for reform are considered in chapter 5.

### **Information provided by the Register suits its purpose**

The information collected and published by the Register is appropriate for maintaining support for the current foreign investment regime.

The Commission has heard reports that the information provided in the first statistical report was sufficient to persuade some members of the community that there was little cause for concern with foreign investment in water assets. This was because the level of foreign

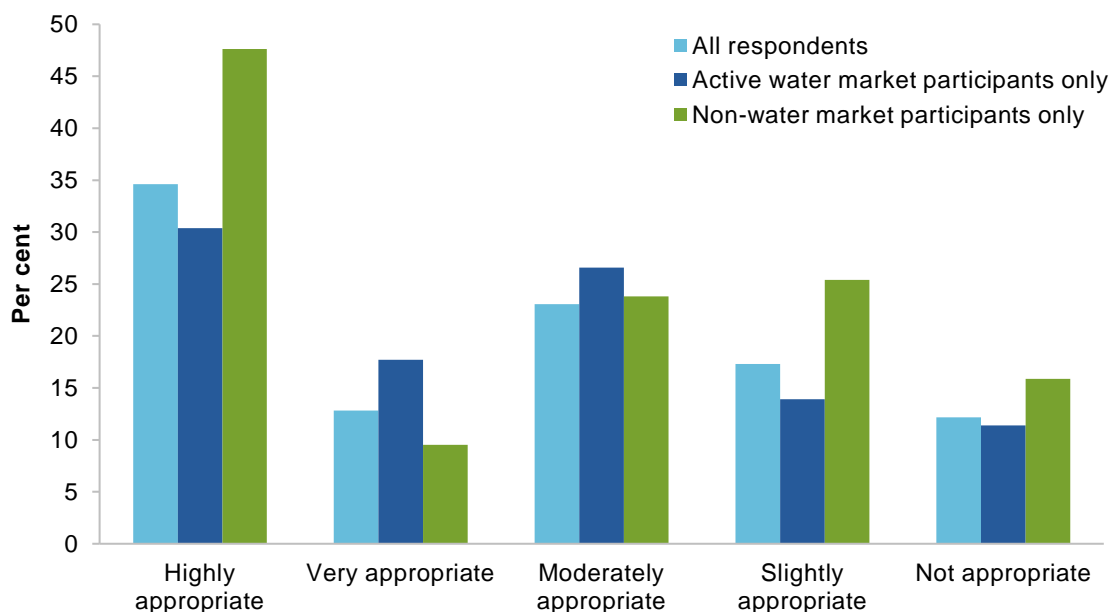


ownership — 10.4 per cent at that time — was lower than imagined. For example, the then-CEO of the National Irrigators' Council commented in 2019 that the statistical reports showed that 'we've got no particular domination by any country or company' in water entitlements (Schremmer and Nadia 2019). In the same year, the VFF issued a fact sheet that stated 'in Victoria *only* 2.7 per cent [of water entitlements are] foreign owned' (emphasis added) (VFF 2019, p. 2).

In addition, the NSW Government (sub. 5, pp. 2–3) recently surveyed water users, interested community members and government agencies on the accessibility and transparency of its water market information, and included questions on the Register (figure 4.1). Half of the respondents indicated that the information within the statistical reports was 'highly' or 'very' appropriate to 'address concerns relating to transparency of foreign ownership', with only about 12 per cent suggesting that it was inappropriate.

**Figure 4.1 Most survey respondents considered information on foreign ownership appropriate**

Responses to the NSW Government's survey question: Is the ATO's information on foreign ownership of water entitlements appropriate to address concerns?<sup>a,b</sup>



<sup>a</sup> There were 156 survey responses from active water market participants and non-water market participants. <sup>b</sup> Caution should be exercised interpreting these figures, as some respondents reported not having any awareness of the Register or its reports.

Source: NSW DPIE (pers. comm., 15 April 2021).

The Commission has also heard a number of cases where stakeholders have used Register information to respond to community concerns with foreign ownership of water entitlements. Peak bodies and government agencies have drawn upon Register data to inform

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stakeholders and dispel misinformation. It is difficult to gauge whether these uses have supported community confidence in foreign investment, given views are often held privately.

## **Register information is little used**

Despite general support from inquiry participants, the Register has rarely been used since its introduction in 2017. For example, the 2019-20 statistical report received just over 700 unique views for the PDF version and over 100 unique views for the DOCX version, all mostly from Australian readers, in the six month period from its release on 1 March 2021 (Treasury, pers. comm., 18 October 2021).<sup>1</sup>

Public citations of Register information have been minimal since the release of the first report in March 2018.

- Government agencies intermittently used Register information to respond to ministerial correspondence. For example, in 2020, the Australian Government Department of Agriculture, Water and Environment (DAWE) drew on Register data in responding to over 20 items of ministerial correspondence that raised concerns specifically about foreign ownership of water assets, and a larger number that raised foreign ownership of water along with other issues (pers. comm., 19 January 2021). The Commission understands that State and Territory Governments, particularly those outside the southern Murray-Darling Basin, rarely receive correspondence on these specific concerns.
- Individual businesses, peak bodies, and other service providers drew on Register information about 12 times in publications that increased awareness of foreign ownership levels or reminded stakeholders about registration obligations.
- Media organisations referred to Register information in at least 35 news articles and other commentary.<sup>2</sup>
- Social media users occasionally shared Register information as part of online discussions about foreign investment in Australia, usually coinciding with media coverage or the release of the statistical report.
- Members of parliament — both federal and state — made at least 6 mentions of the Register in parliamentary debates or speeches.
- Academics cited the Register about 5 times while discussing the distribution of water entitlements in Australia or foreign investment registration obligations.

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<sup>1</sup> The PDF and DOCX versions of the statistical reports have identical content, but it is not known how many readers viewed both versions.

<sup>2</sup> This figure does not include syndicated reports.

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Low engagement with the Register is partly due to its narrow scope and niche subject area. However, the Register also seems to be little used by water market participants (NIC, sub. 4, sub. DR14). As noted by the National Irrigators' Council (sub. 4, p. 2):

The existence of the Register provides no benefit or disbenefit to entitlement holders (except for the compliance costs involved), whether they are foreign or domestic.

The value of the Register is in the collection of data that can inform any public debate ...

The way in which the Register informs the public debate varies with the motivation of its users.

### Register information is sometimes portrayed negatively

In some cases, Register data have been used to heighten concerns about foreign investment.

Of the 35 available news articles that cited Register statistics (noted above), 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 to raise concerns about foreign ownership of water entitlements (Squires 2020; Stevens 2020). Indeed, government agencies suggested that some news articles led to increased ministerial correspondence expressing concerns about foreign investment in water.

On social media, Register statistics have been cited by a variety of community members and political groups opposed to foreign ownership of Australian assets. Of 15 social media posts using statistical report information, some have reached a large audience, receiving over 100 000 views.<sup>3</sup> They have been cumulatively reposted or shared with other users over 20 000 times.

News reporting and social media discussions can provide channels for genuine informed debate about foreign investment and the interpretation of Register data. However, at times, these reports and discussions can facilitate the spread of toxic sentiments, which can contribute to an impression that foreign investors are not welcome in Australia.

For example, in late 2020, anger on social media erupted into harassment of wineries suspected to be under foreign ownership. And in the late 1980s, toxic sentiments were reported to have influenced the decisions of some Japanese companies to avoid investing in developments in Queensland (box 4.1).

These examples illustrate that while the release of information on foreign ownership can help address some concerns, it is not necessarily a panacea to strongly held or broader

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<sup>3</sup> For example, a video of a speech in NSW Parliament by MP Helen Dalton that cited Register statistics (without mentioning the Register itself) has received over 100 000 views (Dalton 2019).

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misgivings with foreign investment or the operation of water markets and it can jeopardise Australia's attractiveness for foreign investment (chapters 3 and 5).

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#### **Box 4.1      There can be impacts on foreign investors**

##### **Harassment of wineries in late 2020**

In November 2020, the Chinese Government announced tariffs ranging from 107 to 212 per cent on all imports of Australian wine (PC 2021d, p. 59). Soon after, a list purporting to show Australian wineries and brands that were affiliated with Chinese investors circulated on social media and was published by some news outlets, accompanied by calls to boycott their products. These wineries subsequently experienced disruptions as staff received discriminatory and abusive phone calls, requests to cancel orders and bookings, and messages from previous customers who pledged to never return (Claughton and Pritchard 2020; Upper Yarra Star Mail 2020).

##### **Opposition to Japanese investment in the 1980s**

During the 1980s, Australia experienced an increase in foreign investment from Japan, notably in the form of large-scale property transactions and tourism developments in Queensland. These investments were fiercely resisted by some community members, with one Japanese journalist describing the tone of opposition as resembling a 'nation at war' with Japan (Morris 2004, p. 118). Towards the late 1980s, these negative sentiments were reported as affecting real estate investment decisions by Japanese life insurance companies, who held off large investments due to 'fear of an anti-Japanese backlash' — one fund manager stated that 'we are not planning to invest where we are not welcome' (Ries 1989).

### **Awareness of the Register is limited**

One explanation for the minimal use of the statistical reports is the very limited awareness of the Register across governments, community and industry groups in Australia, as noted by participants throughout this inquiry (box 4.2).

The NSW Government's (sub. 5, p. 3) survey (noted above) found that only half of respondents were aware of the need to register foreign ownership, and only 30 per cent were aware of the annual statistical reports (figure 4.2). Comments by survey respondents displayed a lack of awareness of the Register and the information conveyed by the statistical reports (box 4.2).

Along with the niche nature of the Register (noted above), there are other possible reasons for why the Register is so little known. One potential reason is that most water entitlement holders are Australian entities and are not required to register with the ATO. Another reason may be that concerns about foreign ownership have dissipated as drought conditions have eased. Or it may indicate broader issues about how water market information can be difficult to find, particularly when it is dispersed across multiple sources (box 5.1; PC 2021a, pp. 36-39).

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#### **Box 4.2 Inquiry participants have raised concerns about the low awareness of the Register**

Inquiry participants have observed low awareness of the Register throughout their organisations and communities.

The National Farmers Federation commented:

There appears to be limited awareness of the Register itself, partly due to the infrequent and sporadic releases of annual reports. (sub. 11, p. 2)

The Victorian Farmers Federation stated:

The VFF do not believe there is widespread awareness of the Register of Foreign Ownership and the Annual Report. (sub. 12, p. 1)

The NSW irrigators' Council commented:

... despite significant public interest [in foreign ownership of water], the Register is not widely known to exist, and people generally are not aware of the actual level of foreign ownership of water. (sub. 6, p. 1)

The Murray Darling Association, a peak body representing local governments in the Murray-Darling Basin, noted that:

... most members and stakeholders are unaware about the existence of the Register of Foreign-owned Water Entitlements. (sub. 8, p. 7)

The NSW Government's survey asked respondents to provide details on what information from the Register would be useful to them. Comments from respondents included (NSW DPIE, pers. comm., 15 April 2021):

Not sure as I am obviously not aware of this. But more detail would be better here as it would make it more difficult to hide foreign ownership. (survey respondent 130)

I can't say that I have ever been made aware that this information is freely available to the general public or contains the full extent of foreign ownership of OUR water. (survey respondent 152)

How should I know, I didn't know this existed. (survey respondent 158)

There should also be publicly available information on how much of the total water is foreign owned. (survey respondent 161)

Low awareness could also reflect the Register's success in alleviating concerns held by some community members at the time of its introduction, as noted above. Having been satisfied by this information, they may have little need to consult future reports.

Whatever the case may be, the effectiveness of the Register may be limited if large segments of its target audience do not know that it exists.

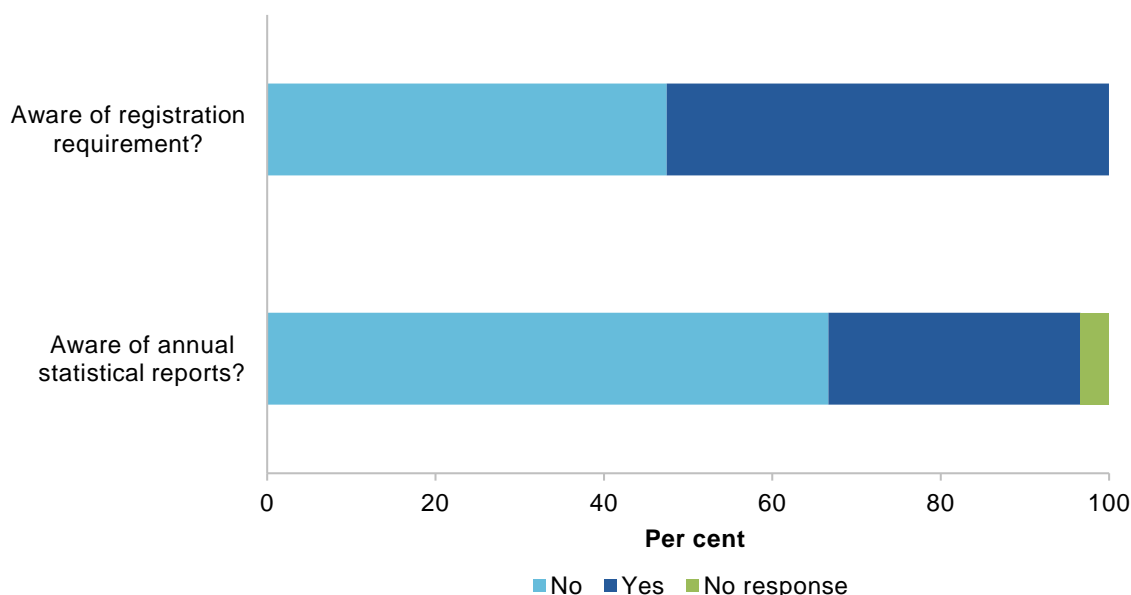
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#### **FINDING 4.1 THE REGISTER PROVIDES TRANSPARENCY BUT IS LITTLE KNOWN**

The information contained in the Register and published in the statistical reports prepared by the ATO 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.

**Figure 4.2 Low awareness of the Register**

Responses to the NSW Government's survey questions about awareness of the requirement to register foreign water entitlement ownership, and of the ATO's annual statistical reports



Source: NSW DPIE (pers. comm., 15 April 2021).

## 4.2 Access to Register information

### What are the Register's confidentiality provisions?

The Register is subject to legislated confidentiality provisions that restrict what data can be published or shared with government agencies. These provisions have been designed according to:

... the principle that disclosure of information should be permitted only if the public benefit derived from the disclosure outweighs the entity's privacy. (*Taxation Administration Act 1953* (Cth), s. 355-1)

The confidentiality provisions require that information published or shared from the Register must not be able to identify a registrant, with few exceptions (box 4.3). The ATO 'deidentifies' the data it publishes and shares by aggregating to a national, state and Murray-Darling Basin level. As a result, the confidentiality provisions limit the granularity of information published (chapter 5).

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### Box 4.3 Confidentiality provisions for the Register

Register information is subject to confidentiality protections contained within two Acts: the *Taxation Administration Act 1953* (Cth) (TAA) and the *Register of Foreign Ownership of Water or Agricultural Land Act 2015* (Cth) (the Register Act).

- Under the TAA, information in the Register that individually identifies (or is reasonably capable of being used to identify) registrants is regarded as ‘protected information’.<sup>4</sup>
- The Register Act provides that information in the ‘statistical part’ must not identify (or be reasonably capable of being used to identify) an entity (s. 30C(4)).

The TAA stipulates that protected information can only be disclosed under certain circumstances. These circumstances include enabling officers of the ATO to perform their duties and for authorised law enforcement officers investigating a serious offence. Information may also be disclosed to ‘a person appointed by the Commonwealth for the purposes of the *Foreign Acquisitions and Takeovers Act 1975*’ if the disclosure ‘is for the purpose of advising the Treasurer’ in administering that Act (TAA, s. 355-65 table 1 item 7A). Disclosing information outside the specified circumstances is a criminal offence, with a penalty of two years imprisonment (TAA, s. 355-25(1)).

There are two Register-specific exceptions within the TAA — protected information from the Register can be disclosed, without deidentification, to federal ministers or to their department secretaries (TAA, ss. 355-55 table item 6, 355-65 table 7 item 7). This is limited to the agriculture, water and foreign investment portfolios, among others, and is intended to allow them to discharge their ministerial responsibilities.

For all other disclosures, such as to other officers of federal and state-level departments, Register data are required to be deidentified.

Sources: *Taxation Administration Act 1953* (Cth); *Register of Foreign Ownership of Water or Agricultural Land Act 2015* (Cth).

## Why are confidentiality provisions in place?

Confidentiality provisions play a crucial role in securing the integrity of Register information because they help maintain trust in the ATO and its processes. This trust gives foreign investors the confidence to comply with Register requirements and provide accurate information, lending the Register credibility. In addition, if foreign investors trust the ATO, it can provide confidence in Australia’s institutional environment, which may influence their investment decisions.

Trust can be maintained, in part, by ensuring that the information provided by foreign investors receives the same or equivalent protections as other data collected by the ATO. This necessarily involves limiting access to Register data. Indeed, the ATO regularly

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<sup>4</sup> The *Register of Foreign Ownership of Water or Agricultural Land Act 2015* (Cth) (the Register Act) provides the Commissioner of Taxation with responsibilities for the general administration of the Register (s. 32). Consequently, the Register Act is a taxation law for the purposes of the TAA, under which data from the ‘basic part’ may be considered ‘protected information’ (TAA, s. 355-30(1)(a)-(c)).

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receives enquiries from foreign investors seeking clarification on who has access to their registration details (pers. comm., 18 June 2021).

The confidentiality provisions for the Register also reflect the sensitive and identifiable nature of registrant information and the potential for harm if data, such as the country of origin of foreign investors, are mishandled. These potential harms include reputational damage, inappropriate targeting and other forms of misconduct (ACCC 2021, pp. 347–348; PC 2017b, p. 56), which are material risks due in part to the apprehension of the broader community towards foreign investment (chapter 3).

### **Managing requests for information on the ‘basic’ part of the Register**

Currently, the ATO assesses requests for information on a case-by-case basis, taking into account these legal restrictions (ATO, pers. comm., 6 May 2021). The ATO has received a small number of requests for information from the ‘basic’ part of the Register from federal and state government agencies. In some cases, information was deidentified and shared. But in others, access was withheld as the ATO determined that the information requested could not be deidentified, and hence disclosure would violate confidentiality provisions.

The Commission considers that the confidentiality provisions and ATO’s management of data requests do not inhibit the Register’s ability to meet its objectives — rather, they help ensure its integrity. They reflect the Register’s objectives in providing transparency while ensuring that Australia remains an attractive and welcoming, yet non-discriminatory environment for foreign investment.

While access to information will change under the forthcoming Register, similar restrictions on accessing identifiable information will remain in place (box 4.4).

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#### **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.

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#### Box 4.4      **Changes to the protection of Register information**

The *Foreign Investment Reform Act 2020* (Cth) (FIRA) will abolish the current Register Act and replace it with new provisions within the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (FATA) to create the forthcoming Register.

The forthcoming Register will therefore be subject to the FATA's information protection regime, which will change the accessibility of Register information.

##### **Definition of 'protected information'**

Under the FATA (s. 120(1)), 'protected information' is defined as all information collected under (or for the purposes of) the Act, including information on the Register of Foreign Owned Australian Assets. In contrast, the definition of 'protected information' under the *Taxation Administration Act 1953* (Cth) (TAA) is information that can individually identify (or is reasonably capable of being used to identify) entities.

Similar to the TAA, there are limits on the use or disclosure of protected information. Penalties for unauthorised uses or disclosures are two years of imprisonment, a 120 penalty unit fine (\$26 640 as at October 2021), or both (FATA, s. 128).

##### **Information sharing under the FATA**

The FIRA also changes several provisions in the FATA to enable sharing of protected information (including identifiable data from the forthcoming Register) with a variety of government users for foreign investment screening and other select federal legislation. These users include:

- relevant government officials and employees for the purposes of administering the FATA (ss. 121(1), 126A, 130V) — for example, Treasury case officers assessing foreign investment applications
- a federal minister, officer or employee of an Australian Government department or agency for use in administering its legislation (FATA, s. 122) — for example, the *Competition and Consumer Act 2010* (Cth) or the *Corporations Act 2001* (Cth). Similar to the TAA, information can also be shared with federal ministers responsible for broad matters, including in agriculture, water and foreign investment.
- foreign governments under certain circumstances (FATA, s. 123B).

Requests for deidentified information from other government agencies will continue to be assessed on a case-by-case basis. For example, identifiable information cannot be disclosed for water policy purposes.

*Source:* Australian Government (2020b).

### **4.3      Clarity and timeliness of the statistical reports**

Inquiry participants have generally noted the ease of accessing information in the statistical reports. The reports provide an upfront summary section, with the most recent report using visual tools such as graphs, infographics and maps to illustrate the geographic spread of foreign-held water entitlements and trends over time. These figures are accompanied by short descriptions of key statistics, such as the headline figure of the proportion of foreign-held water entitlements.

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Compared with prior reports, these visual additions have helped to improve the clarity of information. And for readers seeking more data, detailed tables and figures are provided throughout the rest of the report. Moreover, all of the reports contain attachments with further information, such as definitions of terms used in the *Register of Foreign Ownership of Water or Agricultural Land Act 2015* (Cth) and the Register of Foreign Ownership of Water or Agricultural Land Rules 2017.

The ATO is transparent with its methodology, disclosing how it calculates the proportion of foreign-held water entitlements. It also notes the limitations in its approach, such as the discrepancies encountered when reconciling Register data with the Bureau of Meteorology's (BOM) data (box 2.3).

The Commission has found that the Register's information tends to be simpler to understand than most data on State and Territory water entitlement registers. This is due, in part, to the Register's singular purpose in providing transparency on the level of foreign ownership of water entitlements. In contrast, State and Territory water entitlement registers contain individual records of ownership that are difficult to comprehend without prior knowledge of operations taking place in specific water systems.

## **Nuances in statistical report terminology can be easily missed**

Nevertheless, there is some scope for misinterpretation of Register data, a concern raised by a small number of inquiry participants (NSW Irrigators' Council, sub. 6, p. 2). For example, some news articles — including some articles in response to the Commission's draft report — have described Register statistics as referring to foreign ownership of 'the nation's available water' or 'Australia's water' (Armstrong 2020; Sullivan 2021), a concept that can be much broader than water entitlements on issue. There is also occasional confusion around the difference between water entitlements and water allocations.

It is not surprising that these concepts can be misunderstood. Water markets are highly technical in nature and can use complex terminology. As noted by the Central Irrigation Trust (2019, p. 2):

... water is very complex, some of which is caused by history and the resulting development of irrigation across the Murray Darling Basin; some of which results from the jurisdictional control over water; and some of which results from the delivery of that water through a complex hydrological system of rivers, creeks, dams, lakes and streams ... there are very few people that have sufficient information or understanding to be considered informed on the water resource and markets.

Some readers of the statistical reports may have little background in water markets but nonetheless take an interest in the level of foreign ownership of water entitlements. And the Commission has heard that some of those interested in foreign ownership, such as community leaders, 'may not have the skills or time' to fully absorb the details from the reports and effectively convey the information to the communities they serve (Murray Darling Association, sub. 8, p. 7).

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While the definitions provided in the report outline the rights captured by the Register, the language used in the explanations can still be highly technical. Options for giving more prominence to some of the concepts in the report are considered in chapter 5.

## **Timeliness of the statistical reports**

The ATO undertakes a number of activities after the closing date for registrations (one month following the end of the financial year) and prior to the tabling of the statistical report in parliament.<sup>5</sup> These activities include quality assurance through data validation (box 2.3), data extraction, using Register data and BOM's national data to estimate foreign ownership, and preparing the report and its attachments. The time taken for some aspects of this process is outside the ATO's control, such as the lags in receiving data from other sources. But generally, this process has taken about 7–10 months for each of the three statistical reports published to date.

Inquiry participants and community members have raised concerns with this length of time (National Farmers Federation (NFF), sub. 11, p. 2; NSW Irrigators' Council, sub. 6, p. 1; VFF, sub. 12, p. 2). The Victorian Government noted that:

Typically reports from the Register of Foreign-owned Water Entitlements are not made public for many months following the end of the reporting year. This makes it difficult for the public to meaningfully engage with the information, and to make sense of it in relation to other public reporting. (sub. 10, p. 1)

Some commentators have used the delays to cast doubt on the efficacy of the Register, for example, by claiming that 'the Federal Government is relying on years-old data to gauge the level of foreign investment' (Wagstaff and Kotsios 2020).

The release of a timelier report may reduce some confusion within the community. However, the Register's statistics are not time sensitive. There have only been small changes to the headline figures since the first statistical report in 2017-18.<sup>6</sup> And unlike other water market information, Register data are little used to inform decisions by landholders (NFF, sub. 11, p. 3).

Further, time is required to ensure the data published in the statistical reports are robust. This lends the Register integrity and means that it provides authoritative information for stakeholders, as previously outlined. A timeframe of 7–10 months is not unusual relative to other reports that involve the processing and validation of data.

While the Commission does not consider reporting delays to be of significant concern, approaches to improve timeliness of reporting are assessed in chapter 5.

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<sup>5</sup> Reporting requirements for both the current and forthcoming Registers state that statistical reports must be given to the Treasurer 'as soon as practicable' after 30 June in each year.

<sup>6</sup> For example, the proportion of foreign-held water entitlements only increased by 0.5 percentage points between 2018 and 2020 (ATO 2021, p. 6).

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#### 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.

## 4.4 Register administration and compliance

### Register administration is time intensive, but rigorous and low cost

The ATO has overseen the administration of the Register from its development in 2017 and will also deliver and maintain the forthcoming Register of Foreign Ownership of Australian Assets.<sup>7</sup> The ATO incurs a range of ongoing administration costs in managing the Register, including costs associated with:

- maintaining the registration form
- quality assurance and data validation
- maintaining and preparing data (including de-identifying it) to share with authorised users
- preparing the annual statistical reports for publication
- compliance and enforcement, including raising awareness of Register requirements.

There are also minimal administration costs incurred by BOM, the Australian Government Treasury and DAWE. All three agencies are consulted by the ATO during the development of the statistical reports (ATO 2021, p. 4).

- BOM provides assistance to the ATO during the preparation of the statistical reports by clarifying water entitlement concepts, helping reconcile discrepancies between the Register and BOM's dataset, and providing other feedback on the reports (BOM, pers. comm., 5 February 2021).
- Treasury briefs the Treasurer about the report, before it is then tabled in the Parliament and uploaded onto the Foreign Investment Review Board (FIRB) website (Treasury, pers. comm., 18 June 2021).
- DAWE provides feedback during consultations for the preparation of the reports.

Overall, the costs of administering the Register are low. Register administration is conducted by a small team of seven full-time equivalent staff within the ATO that maintains the (Water) Register along with the Residential Property and Agricultural Land Registers.

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<sup>7</sup> The ATO received \$24.4 million over four years in the 2020-21 Budget to deliver and maintain the forthcoming Register (Australian Government 2020a, p. 23).

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Around two (full-time equivalent) staff work on the (Water) Register, supplemented by other ATO staff expertise, including for activities such as report publishing. The Commission estimates that the ongoing administration costs of the (Water) Register are \$0.4–\$0.5 million a year. This is about 2–2.5 per cent of the \$19.7 million of total operational costs incurred to administer the foreign investment regime in 2019-20 (Treasury 2021, p. 11).<sup>8</sup>

One of the most time-intensive — and therefore costly — activities associated with the Register is the quality assurance process to validate and clean Register data (box 2.3). The ATO validates all data, taking on average 20 to 30 minutes per registration (pers. comm., 18 June 2021). This means that in 2019-20, the ATO spent approximately 335 hours validating the 803 water entitlement registrations that took place that year.

As processes around the Register have become established, the time spent on various administration activities has also changed. For example, when the Register was established in 2017, significant effort went into understanding water markets, including the complex terminology, data collection and registration processes that differ between States and Territories. The ATO also conducted a stocktake to populate the Register (ATO 2021, p. 26), which resulted in the registration of over 3000 entitlements. More recently, the ATO has shifted its focus towards ongoing compliance activities centred on raising awareness of registration obligations (discussed further below) and working with agencies to improve the usefulness of the data that it presents in the statistical reports.

**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.

## **Compliance and enforcement activities**

The approach of a regulator — in this case, the ATO — to compliance and enforcement activities affects whether and how a policy objective is achieved. A well-designed approach can lower costs for both business and the regulator while maintaining or increasing compliance. Such an approach requires regulators to assess the potential risks associated with activities and take a proportionate response to identifying and acting on potential non-compliance (box 4.5).

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<sup>8</sup> These total operational costs do not include ‘the costs associated with the operations of consultation partners assisting Treasury and the ATO in providing advice to decision makers’ (Treasury 2021, p. 11).

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#### **Box 4.5      A risk-based approach to compliance and enforcement**

One characteristic of an efficient and effective regulatory regime is the use of a risk-based approach, where decisions of the regulator are taken based on the likely risks of an activity, not solely on the rules that need to be enforced. When the severity of potential harms and their likelihood of occurrence are understood, regulators can then target their enforcement work and adopt a proportionate response.

In many cases, non-compliance may be inadvertent and can be mitigated through education-based initiatives to increase awareness of compliance obligations. However, in some circumstances, more punitive enforcement sanctions may be required — for example, when non-compliance is continuous, or when an instance of non-compliance risks severe harm to public safety.

Some regulators assessing risk may adopt a formal risk-based framework. Others may only consider risk as part of an informal attempt to target limited regulatory resources at activities likely to yield the greatest possible improvement in overall regulatory outcomes.

*Sources:* PC (2011, 2013a, 2013b, 2017a, 2020b).

To date, the ATO has focused on initiatives to prevent non-compliance, raise awareness of registration obligations and improve the ease of the registration process (ATO, pers. comm., 9 April 2021). These activities have included:

- conducting annual prevention campaigns that notify existing registrants of their obligation to maintain up-to-date registration details
- incorporating water registration into the same online form for registering agricultural and residential land
- providing webinars and undertaking speaking opportunities during the development of the Register
- promoting the Register by notifying stakeholders of the statistical report releases. This includes all registrants, the ATO’s Foreign Investment Stakeholder Group and more than 2000 solicitors, conveyancers and other intermediaries who subscribe to the ATO’s Tax Professionals Newsletter (ATO, pers comm., 18 June 2021).

These activities have generally provided small increases in registrations. The transition to the forthcoming register presents an opportunity for the ATO to engage more proactively with foreign investors and raise awareness of their obligations to register their water entitlements.

#### **Concerns with non-compliance**

Some participants have expressed a concern that the Register is seen as ‘voluntary’ because foreign water holders self report to the Register (box 4.6). They noted that this would lead to non-compliance and have questioned whether the ATO undertakes sufficient compliance and enforcement activities.

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#### **Box 4.6      Some community members perceive registration obligations as voluntary**

The NSW Government's consultation on water market transparency received feedback indicating that some participants misunderstood registration obligations to be voluntary. Survey responses and submissions from participants included:

It's my understanding that the register is optional. Foreign ownership of land register is optional so how can the ATO or indeed any other statutory body check up on foreign water ownership. They can't. Make the land register compulsory for any and all sized land parcels and the foreign owned water register might be valid. (survey respondent 28)

My understanding is that the ATO process is a voluntary one. Therefore, there are issues in understanding the completeness of that dataset. (survey respondent 168)

The ATO's foreign ownership register is voluntary, and not publicly available. [Inland Rivers Network] supports the foreign ownership registry being made compulsory for listing the water holdings by overseas investors ... (Inland Rivers Network 2021, p. 5)

Listing water entitlements on the foreign ownership register administered by the ATO should be compulsory ... (Healthy Rivers Dubbo 2021, p. 2)

Sources: NSW Government (sub. 5); NSW DPIE (pers. comm., 15 April 2021).

For example, the Victorian Government (sub. 10, p. 2) observed that 'current settings can give the impression that it is voluntary for foreign persons to report their water holdings'. The former Interim Inspector-General of Murray-Darling Basin Water Resources Mick Keelty described the Register as a 'voluntary ... honour system', and suggested that the lack of FIRB screening for water entitlements has created risks of criminal activity in water markets (Farrell and McDonald 2020; Murphy 2020).<sup>9</sup>

#### **Most non-compliance is likely inadvertent**

The extent of compliance with the Register cannot be readily determined because information on foreign ownership of water is not collected through any other source (such as State and Territory water registers), which would allow for a comparison. As noted by the ATO (pers. comm., 9 April 2021):

... unlike land rights where the national land titles system has created uniformity and the collection of foreign identity fields, there is a lack of uniformity in the way water entitlements operate in Australia and no national dataset which could identify foreign persons who are not registered.

Nonetheless, the Commission considers that rates of non-compliance are likely low.

One factor contributing to this is the design of the registration form. Many foreign investors complete the (Water) Register at the same time as the Agricultural Land Register, making it relatively simple to meet compliance obligations for both Registers.

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<sup>9</sup> The Senate Economics References Committee is currently undertaking an inquiry into foreign investment. Its terms of reference requires an examination of the extent to which there is a risk that foreign investment proposals are being used for money laundering, with a report due by August 2021.

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In addition, large firms participating in water markets — including those with foreign ownership — typically have processes in place to comply with registration obligations. These larger firms face a range of regulatory requirements, in addition to the Register, that they manage and factor into their costs of operation (section 4.5). In many cases this ‘necessitates the employment of multiple, full time dedicated staff’ (National Irrigators’ Council, sub. 4, p. 2). Further, the Commission understands that over 90 per cent of registrants on both the (Water) Register and Agricultural Land Register are represented by intermediaries such as specialised in-house employees, farm management organisations, solicitors and conveyancers (ATO, pers. comm., 18 June 2021).

Businesses also face incentives to comply with their obligations. For these firms, the risks of non-compliance with foreign investment reporting obligations are more than mere monetary penalties<sup>10</sup> — they may also include:

- reputational damage, both to the company and their country of origin
- increased scrutiny from regulators
- harm to their social licence to operate
- embarrassment through unwanted public scrutiny.

As a result, any non-compliance is likely to be inadvertent and may be due to the low awareness of the Register. In particular, it is more likely to be from smaller water market participants (such as individuals) who are unfamiliar with their legal obligations. Individuals currently comprise only 3.8 per cent of all registrants (ATO, pers. comm., 9 April 2021).

### Non-compliance has low risks, but may compromise the Register’s integrity

Even if there is some non-compliance, it poses a relatively low risk. It may lead to a small undercounting of foreign investors and their total holdings of water entitlements, which would have little effect on the overall trends in foreign ownership. The ATO’s current approach of information-based enforcement activities reflects the inadvertent nature of possible non-compliance and its connection to low awareness of the Register. The Commission considers that this is consistent with a risk-based regulatory approach (box 4.5).

That said, there is a broader risk that the approach to compliance and enforcement affects confidence in Register data and how registration obligations are perceived. As noted above, there is a misperception among some community members that registration obligations are voluntary (box 4.6). These misperceptions can mitigate the ability of the Register to fulfill its purpose (chapter 3). Accordingly, chapter 5 outlines a way forward to address this issue.

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<sup>10</sup> The current maximum penalty for non-compliance is a \$1100 fine (TAA, s. 286-80). Penalties for non-compliance are expected to increase with the forthcoming Register, reaching a maximum of \$55 000 (FATA, s. 130ZV).



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#### 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.

## 4.5 Regulatory compliance burdens

Compliance costs are those faced by a business or individual in meeting their regulatory obligations. In the case of the Register, the main compliance cost for foreign owners of water is the registration process required when either notifying the ATO for the first time or when updating an existing registration (chapter 2).

### Costs of compliance are low

The costs of complying with the Register are small. The registration process is relatively simple — unlike some of the State water registers, there is no requirement for identification checks, statutory declarations or fee payments. The ATO did not receive any queries in 2019-20 about how to complete the registration form (pers. comm., 9 April 2021).

Inquiry participants have indicated that it takes about one hour to register one entitlement (noting that many foreign water owners hold more than one entitlement). The Commission estimates that the total annual cost of compliance in 2019-20 was under \$60 000, based on the 803 registrations received by the ATO in 2019-20 and using standard hourly labour costs provided by the Office of Best Practice Regulation.<sup>11</sup>

Compliance costs for foreign water owners may have been slightly higher during the Register's implementation phase in 2017 when all entitlements were required to be registered (rather than just changes) and as they developed new internal processes for compliance. Those costs are still unlikely to have been substantial. The Commission understands that most registrants (97.3 per cent as of 2019-20) also comply with the ATO's Agricultural Land Register, which commenced in 2015, and therefore would already have had near-identical registration processes in place.

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.

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<sup>11</sup> A labour cost of \$73.05 per hour has been assumed, which accounts for tax, wage labour on-costs and overhead costs (OBPR 2020, p. 11).

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Costs of compliance may be reduced when new IT platforms provide streamlined registration processes for the forthcoming Register. Current processes require registrants to re-input personal information and water entitlement details with every sale, transfer or other registrable change in status. This is not the case with the forthcoming Register, which seeks to attach personal information and entitlement details to a user record, allowing for more streamlined self-management of registration details (ATO, pers. comm., 21 July 2021; box 3.8). Plans for these changes are yet to be finalised.

## **No reason to be complacent**

While the costs of complying with the current and forthcoming Registers may be low, this is no reason to be complacent. There is a risk — albeit small — that compliance costs could disincentivise foreign investment.

Register compliance is only a small part of a broader set of registration obligations and approval requirements for owners of water entitlements. While the burden of the Register may be relatively minor when considered in isolation, some water owners have argued that when taken together, they must comply with a costly and complex bundle of regulatory requirements. As noted by the National Irrigators' Council (sub. 4, p. 2):

Reporting obligations include multiple state and federal requirements, many of which are duplicative and involve a complex process of data collection, collation, analysis and presentation.

For agricultural firms in particular, the Commission has previously noted that:

The cumulative burden of regulation reflects the diversity of farm activities and the degree to which these activities are regulated. The time and effort required to keep track of regulation also expands when activities or issues are regulated by multiple agencies in different jurisdictions, and when regulations are subject to ongoing change. What this suggests is that reducing even relatively small regulatory burdens could make a difference to farmers. (PC 2016, p. 59)

While there is no duplication with the Register per se (as noted above), some of the complexity for water owners stems from differences in the method of data collection by the ATO and State water register forms. For example, a water owner might report the location of an entitlement at a 'water body' level to a State water register, but at a 'water system' level to the (Water) Register. Such differences can increase the risk of errors, and impose costs for foreign investors and the ATO during data validation processes.

Further, concerns associated with the sources of foreign investment change over time, as foreign investment from particular countries rises and falls with the currents of global economic forces. Policy responses should be appraised and adjusted by governments to ensure that businesses are not subject to unnecessary costs from redundant regulation.

However, recent history indicates that this is not always the case. Queensland's foreign ownership of land register was established in 1988 amid concerns about large property acquisitions by Japanese investors (box 4.7). Despite the dissipation of these concerns, the

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register remains in place, collecting information that has been rarely used or accessed (SDNRAIDC 2019, p. 21) and the statistical reports have not been published since 2018.

#### **Box 4.7      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 (Morris 2004, pp. 109–110). According to Pokarier (2004, p. 223):

The lack of clear information on the scale of foreign ownership of real estate in itself became an issue, both because it allowed wild claims to be made about its extent and because it was prone to be represented as evidence of government indifference to the issue.

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 data on the extent of foreign ownership. Media reporting suggested that the Queensland Government enacted the register:

... on a belief that [it would] reveal that there are 'no problems' associated with foreign land ownership in Queensland ... [with the intended] effect of answering critics of foreign land ownership ... and [to] be seen to be monitoring the situation. (Massey 1988)

Starting in the early 1990s, large investments by Japanese companies in Queensland land became less frequent. This was due in part to divestment by Japanese investors following downturns in global financial markets, and an extended slowdown of the Japanese economy referred to as the 'lost decade' (Austrade 2017, p. 22; Hewett 2017). It may also have been due to investors avoiding Australia for fear of prompting further anti-Japanese backlash (box 4.1). Regardless of the cause, community concerns eventually dissipated.

Nevertheless, Queensland's register has remained in place, despite the Australian Government's introduction of the Agricultural Land Register and Residential Land Register. Foreign investors with interests in Queensland land must continue to register, despite the information rarely being used or accessed (SDNRAIDC 2019, p. 21) — statistical reports have not been published since 2018.

## **Rising regulatory requirements for foreign investors**

Finally, as noted in chapter 2, the Register is part of a broader landscape of foreign investment regulation in Australia. On its own, the registration process does not create significant burdens — by comparison, the FIRB administration fee for agricultural land acquisitions can be up to \$503 000 (FIRB 2021, p. 5). And it does not impose the costly delays and uncertainty that are sometimes associated with other foreign investment regulatory requirements (Kirchner and Mondschein 2018, p. 9).

Nevertheless, it does add to the cumulative burden of the foreign investment regime. As noted by the Commission previously, the Government has responded to perceived 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

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of origin (PC 2020a). The forthcoming Register of Foreign Ownership of Australian Assets, which expands registration requirements to a wider range of assets, is an example of this.

The accumulation of regulatory requirements for foreign investors has led to Australia's foreign investment regime being among the most restrictive in the OECD (chapter 2). This has potentially had a significant effect on Australia's attractiveness as a destination for foreign investment (Kirchner and Mondschein 2018). Cross-country analysis indicates that increases in the restrictiveness of foreign investment regulations are associated with less inward foreign investment (Mistura and Roulet 2019). And the American Chamber of Commerce has suggested that, by introducing uncertainty and sovereign risk (especially through the Treasurer's new national security powers), Australia's foreign investment regime is likely to be a significant deterrent to foreign investment (PricewaterhouseCoopers Australia and American Chamber of Commerce in Australia 2021, pp. 24–25).

Increasing regulatory burdens on foreign investors — for example, by introducing additional registration requirements — contributes to an environment that may be viewed as less welcoming to foreign investment. Given the role of foreign investment in raising Australia's living standards, this incremental tightening has potentially expansive costs that are borne not only by businesses, but also the broader Australian community.

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

The direct compliance costs created by 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.

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## 5 Reconsidering the Register

### Key points

- There remains a small, yet useful, role for the Register of Foreign Ownership of Water Entitlements to provide transparency and to reduce pressures for a potentially more restrictive approach to foreign investment screening and retrograde changes to water policy settings.
- There are no alternatives to the Register that would provide the necessary transparency at a lower cost.
  - State and Territory water registers vary significantly in coverage, terminology and the frameworks used to record ownership information. Simply adding requirements for these registers to hold foreign ownership information would entail costs and be less effective than retaining the Register as is. The necessary adaptations to align, extend and integrate these registration systems would be prohibitively expensive.
  - The previous Agricultural Land and Water Ownership Survey provided data on the foreign ownership of water assets, but at a less granular level than the current Register. The Survey was relatively expensive to run.
  - ABS agricultural and foreign investment surveys, and ABARES farm surveys, are limited in scope, too small or have other features that make them unsuitable for adaption and use in place of the Register.
- There is limited scope to improve the Register. Policymakers need to keep a tight check on its scope and associated costs, and guard against its misuse.
  - The Register should continue to use the threshold for demarcating foreign owners of water entitlements drawn from the Foreign Acquisitions and Takeovers Act.
  - The Register's comprehensive coverage of water entitlements adds to its credibility and should be retained. Exemptions for water used in mining would not be warranted.
  - There is no 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 decreasing Australia's attractiveness as a destination for foreign investment.
  - There may, however, be scope for the ATO to present more geographically granular information on foreign ownership in the southern Murray-Darling Basin.
- The ATO should revise the statistical reports or develop release materials to clarify that registration is mandatory and explain some of the terminology used in the reports. The statistical reports should also present data on the proportion of foreign owners of water entitlements that also hold agricultural land.

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This chapter examines whether there is an ongoing need for a Register of Foreign Ownership of Water Entitlements (the Register) (section 5.1) and explores whether there are lower cost or more effective ways of achieving the Register’s objective.

The options explored range from major reforms, such as using State and Territory water registers in place of the Register (section 5.2), to fine-tuning the Register’s content and format (section 5.3). Many of these options were analysed when the Register was established, and the chapter draws on those analyses along with more recent developments and evidence.

One significant development since receipt of the terms of reference is that a new Register of Foreign Ownership of Australian Assets has been legislated to commence before 11 December 2024 (chapter 2). While the existing arrangements will largely continue under this new guise, some will differ. The Commission looked at how reform options could impact both the current and foreshadowed versions of the Register.

## **5.1 Is a Register still needed?**

While acknowledging that few people know of or have used the Register, several inquiry participants supported maintaining (and ideally improving) it. For example, the NSW Irrigators’ Council said:

NSWIC fully supports the objective of the Register to increase transparency about foreign ownership of Australian water assets and maintain community confidence in this regard. NSWIC notes that foreign ownership of water is a topic of significant public interest, and transparency is critically important. ... NSWIC notes that despite significant public interest, the Register is not widely known to exist, and people generally are not aware of the actual level of foreign ownership of water. (sub. 6, p. 1)

Similarly, the National Farmers Federation said:

The NFF continues to support mechanisms to build transparency in the level of foreign control over agricultural land and water assets, acknowledging that both [the agricultural land and water] registers respond to community concerns around investment in Australia agriculture. (sub. 11, p. 1)

Other participants saw little reason for the Register or were ambivalent, while recognising that the Australian Government has already foreshadowed that the Register will continue, as a component of the new Register of Foreign Ownership of Australian Assets.

The Commission has drawn on the findings of earlier chapters to check that there is sufficient reason to retain, rather than discontinue, the (Water) Register.

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## Reasons for discontinuing

Chapter 3 found that most of the arguments advanced for providing information on the level of the foreign ownership of water entitlements are not compelling. Many of the rationales suggested for the Register, such as addressing concerns about the effects of competition in water markets and informing policy development, are weak in principle or practice. These concerns or objectives, where relevant, are better addressed by other means.

The strongest argument for the Register is that the transparency it provides can allay many community concerns and misconceptions about the level of foreign investment in water entitlements, and reduce any community pressure for a more restrictive approach to foreign investment screening and/or retrograde changes to water policy settings.

However, chapter 3 raised questions about how significant these effects might be in practice, and chapter 4 found that there is low awareness and limited uses of Register information. These uses are split between informing community members about foreign ownership levels and arousing concerns about foreign ownership. It is also possible that, for some, the very existence of the Register gives a sense that there is something intrinsically problematic about foreign ownership of water entitlements.

Further, the Register may have generated the bulk of its benefits when the first statistical report was released (chapter 4). By providing a credible, headline figure that only about 10 per cent of water entitlements were foreign owned, that first report may have effectively made foreign ownership of water entitlements a non-issue, or much less of an issue, for people who otherwise might have harboured concerns.

If this is so, and with those concerns having faded further with the passage of time, there may be little downside — at least in the near or medium term — in discontinuing the Register.

## The case for retention

The counterview is that the Register still has a useful role to play. While the Register has not been actively used much, it does provide a means of responding to specific queries and complaints that arise. And its ongoing existence provides a form of ‘insurance’ against the possibility that foreign ownership could be reignited as a concern or become a scapegoat for other matters related to water markets in the future (for example, if water shortages emerge during a drought). Indeed, the very act of abolishing the Register might be used by some to aggravate concerns about Australia’s foreign investment regime.

Further, while the benefits of maintaining the Register are limited, so are its measurable costs. Chapter 4 calculates that, with its set-up costs having already been incurred, the marginal annual costs of continuing the Register are no more than \$0.5 million a year. The low costs of the Register arguably reflect that it was not ‘over-engineered’ for the job at hand. The water component of the forthcoming Register of Foreign Ownership of Australian

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Assets will have similar qualities, and indeed may involve even smaller costs for registrants with the IT improvements being sought in the shift to the new version (chapter 4).

Other considerations that would favour retaining the Register are that:

- the Commission has not found a superior alternative means of providing information on the foreign ownership of water entitlements (section 5.2)
- some modest improvements could be made to the design of the Register which would marginally lift its benefits (section 5.3).

## **The Commission's view**

The Register can play a small, yet useful, role in providing transparency and reducing pressures for a more restrictive approach to foreign investment screening and retrograde changes to water policy settings. While it is not possible to estimate the value of these benefits with any precision, they plausibly exceed the very small, measured costs of continuing with the Register. With the Australian Government having already legislated the introduction of a new form of the Register, the Commission does not see cause to recommend a different course of action.

As discussed in chapter 4, the information currently published in the Register's statistical reports is largely sufficient for its limited purpose. To help ensure that the Register continues to deliver net benefits, policymakers need to keep a tight check on its scope and associated costs, and look for ways to guard against its misuse.

### **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.

## **5.2 Are there better alternatives?**

In assessing whether there are alternatives to the Register that would achieve similar ends at a lower cost, the options the Commission has explored are:

- for the States to collect information on foreign ownership and publish it in their water registers
- aligning the existing State registers and combining information from them, including on foreign ownership, into a national register



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- reinstating the ABS Agricultural Land and Water Ownership Survey (ALWOS), or using other measures such as ABS agricultural or foreign investment data sources or ABARES farm surveys.

## Using State and Territory registers to monitor foreign ownership

All State and Territory governments maintain registers of ownership of water assets, although the types of entitlements captured, details recorded, and information provided to the public vary across jurisdictions. Most of the registers make public the location and characteristics of the entitlement (such as the volume and level of reliability), and some jurisdictions also report the names of owners in online registers (chapter 2).

None of these registers capture the foreign status of the owners: only the Australian Government's Register has this information. However, the information in the Australian Government's Register is not linked to, or directly comparable with, the information contained on the State and Territory registers.

Several inquiry participants advocated integrating the *presentation* of information on foreign ownership with other water market information, reflecting concern that this information can often be fragmented (box 5.1). For example, the NSW Government said:

Feedback from various consultation forums demonstrates that water users want to be able to access all water information from one location. ... The NSW Government encourages the Productivity Commission to consider how information within the Register could be better integrated into existing or proposed platforms to aid accessibility ... (sub. 5, p. 4)

And the Murray Darling Association referred to its 2016 resolution calling for:

... a National Water Registry, to monitor and report on all rainfall, surface and groundwater storage, evaporation and capacity or movement, including flow rate and interstate or intervalley trade, extraction, unaccounted activity, licenses and allocation in real time, *and inform the public in relation to foreign ownership of water assets and infrastructure.* (emphasis added) (sub. 8, p. 3)

As well as the potential benefits of a 'single source of truth' (NSWIC, sub. 6, p. 1) for users of water market information, there could be efficiencies (for entitlement owners and government administration) were the information on the foreign status of owners to be *collected* in conjunction with other information from them. That is, leveraging off the existing registers maintained by the States and Territories could reduce duplication and lessen the need for foreign water entitlement owners to interact with the Australian Government as well as State and Territory registration schemes.

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### **Box 5.1      The lack of a single source of information**

One issue raised in multiple water market inquiries is the fragmented nature of information. While state water registers capture details about water entitlement ownership, some states have additional water market information platforms that may be spread across multiple websites. At times, these resources can be difficult to navigate and can create challenges for water market participants seeking to make informed decisions (PC 2021a, pp. 36–39).

Several studies have recommended more centralised sources of water market information, both within and between states (DELWP (VIC) 2021, p. 14; NSW DPI 2018, p. 9; NSW Government 2021, p. 2). One example is the ACCC’s recommendation to create a Water Market Information Platform to bring together information collected by Murray-Darling Basin states in a single location (ACCC 2021, p. 381).

Considered from this perspective, the Register’s statistical report is the single authoritative source of information about the foreign ownership of water entitlements. However, it also represents yet another water market information source that is separate to state water registers — managed by the ATO and published by FIRB, neither of which are responsible for water management.

Despite the benefits from centralised foreign ownership information, the disconnection of the Register from other water market information may have contributed to its low visibility.

### **A national Register drawing on State and Territory information?**

One option to achieve this would be to recalibrate and align the existing State registers of water entitlements and combine information from them, including on foreign ownership, in a national register. This would enable the Australian Government to publish a consistent and comprehensive national report on foreign ownership levels.

The option requires alterations to existing State and Territory data collection systems to enable collection of additional information on foreign ownership status — a new function which would incur some costs, discussed in the next subsection.

It also requires that the State and Territory systems be made compatible, but these differ substantially in the coverage, terminology and frameworks used to record ownership information (chapter 4). Accordingly, this option would require significant harmonisation among the systems. For example, permanent water entitlements are known as water access licences, water shares, water licences, water allocations and water entitlements across different jurisdictions. These terms can also have other meanings in other jurisdictions, adding to the confusion and difficulty of harmonisation efforts (ACCC 2021).

A reform of this nature was attempted — unsuccessfully — through a National Water Market System initiative that commenced in 2009. It sought to enable seamless data transfer between water registers (interoperability) and to provide up-to-date water market information that was easily accessible. More than \$30 million was invested in this system, but the project was terminated in 2014 without achieving its goal. The National Water Commission reported that ‘it is unclear which actions have been implemented and what, if any, objectives have been achieved’ (NWC 2014, p. 41).

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This reform option was revisited in the 2016 Regulation Impact Statement that accompanied the bill for the current Register. It reported:

Modifying existing state and territory registers requires a level of harmonisation of systems that are not currently compatible including agreement on terminology and aligning different laws. ... On the basis of the costs faced during the National Water Management System exercise, the DAWR estimates that the cost to harmonise and develop a national register based on state and territory registers would cost between \$86 million and \$106 million.<sup>1</sup> (Australian Government 2016, pp. 48–49)

The very high governmental costs of this option<sup>2</sup> would mean that it could not be warranted purely as an alternative to the existing Register. Rather, it would only be feasible were governments to decide for other reasons to bring about a national water register. However, such a development seems unlikely. The ACCC, in its *Murray-Darling Basin water markets inquiry*,<sup>3</sup> said:

... implementation of a single register system is not likely to receive traction given this past attempt [the National Water Market System initiative] demonstrates the benefits do not outweigh the complexities and costs, and it is not as simple as lifting all state registers and combining into one register. (ACCC 2021, p. 364)

### Adding foreign ownership information to State and Territory registers?

A less ambitious (and less costly) option in place of a national Register would be for the States and Territories to collect and publish information on foreign ownership in their own jurisdictions, without seeking to make it compatible with information on other registers or centralising it on one national register.

This option would require the States and Territories to expand their existing systems to include information on the foreign status of water entitlement owners. Capturing, validating and aggregating these data would be a new function for most jurisdictions. (Any move to a national register would also require the collection of this information.)

States and Territories would incur expenses in updating their registration systems and, in some cases, may need to change legislation to enable the collection of the relevant data. State

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<sup>1</sup> The Commission has been unable to test the veracity of this large estimate.

<sup>2</sup> There would also be some time costs for water entitlement owners in meeting the additional requirements when registering their entitlements with the State and Territory registrars. This would be offset to some degree by the reduced requirements on foreign water entitlement holders to register their entitlements with the ATO. This class of costs, however, would be swamped by the costs to government of the option.

<sup>3</sup> The ACCC made other recommendations to improve the availability of water market information, including the creation of a Water Market Information Platform to provide water market participants with consolidated information about the *flow* of water allocations and entitlements, including trade data, market rules and processes, and water announcements. It would not provide a complete snapshot of the ownership of all water allocations and entitlements — the *stock*. This means that the portal, unlike the Register, could not provide a summary of foreign ownership of water entitlements at a point in time. Further, the recommendations were limited to the basin states, and would not apply across Australia.

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officials have indicated a reticence towards this option, although funding from the Australian Government would likely reduce this.

While this option would remove the need for foreign investors to undertake a separate Australian Government registration process, it would mean there would be no ‘national’ and consistent data available. The different measures of foreign ownership across jurisdictions could also create some confusion. The Commission does not see this option as superior to retaining the Register.

**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.

## Linking to the Australian Government’s Register

While the Commission does not support utilising State and Territory registers to report on foreign ownership, a simple reform to help meet the desire for ‘one-stop shop’ access to water market information would be for the States and Territories to provide a link from their registers or related portals and websites to the (national) Register.

State and Territory water licence application forms or associated advice should also inform applicants that it is mandatory for successful applicants who are foreign persons to register with the ATO. Among other benefits, this would help address the misperception among some in the community, noted in chapter 4, that registration obligations are voluntary, which risks compromising the integrity of the Register.

Some jurisdictions, for example the ACT and Western Australia, already provide such links.

**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.

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## Using ABS or ABARES surveys

### Reinstating the Agricultural Land and Water Ownership Survey?

The ALWOS was effectively the forerunner to the Register. Undertaken by the ABS in 2010, 2013 and 2016, it estimated the:

- level of foreign ownership of businesses with agricultural land holdings or water entitlements in Australia
- area of agricultural land and volume of water entitlements owned by these businesses.

The Australian Government established the Agricultural Land Register in 2015 (with the Water Register following in 2017) to supersede the ALWOS because, according to the Government in 2015:

While the ABS ALWOS provides a periodic (three yearly) estimate of agricultural land ownership derived from business self-reporting, in addition to five yearly Agricultural Census data, political and community stakeholders have raised concerns with the frequency of information collection and the sample-based methodology. While statistically robust, the ABS's collections have not been sufficient to appease community concerns regarding foreign ownership. (Australian Government 2015, p. 195)

As part of assessing the case for retaining the Register, the Commission has explored whether it would now be possible — and more cost-effective — to provide the required information through an ALWOS-style survey, undertaken once every three or even five years. The question arises because:

- the Register has shown that foreign ownership levels vary little from year to year
- there may be less concern about the foreign ownership of water entitlements today than when the Register was created.

However, data provided by the ABS show that the ALWOS was relatively expensive to run. This is principally due to the large number of agricultural businesses — 11 000 in 2016 — that needed to be surveyed to obtain a sufficient sample of foreign owners. The Commission estimates that the administrative and business compliance costs of the 2016 survey totalled more than \$2.2 million (box 5.2). Moreover, the ABS has indicated that the costs of running the ALWOS would be greater today, reflecting changed data acquisition processes and higher collection costs caused by a trend of lower survey response rates (ABS, pers. comm., 18 June 2021). Compared to chapter 4's estimates of running the Register (no more than \$0.5 million per year), reinstating the ALWOS would not save costs.

Further, the ALWOS obtained less detailed information on the level of foreign ownership of water assets than the current Register. The ALWOS did not identify the nationality of foreign owners, and the survey was restricted to the agricultural sector, which meant there were no data available on competing uses of water, such as mining and industry. Although more detailed questions could be added to a future ALWOS on owners' nationality and some other matters, this would add to the ATO's and respondents' time costs and could further reduce response rates.

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A move back to the ALWOS might only make sense if the foreign land register were abolished too. This does not appear likely, not least given that the forthcoming Register of Foreign-Ownership of Australian Assets will cover land. Accordingly, the Commission does not see reviving the ALWOS as a viable or cost-effective alternative to the Register.

### **Box 5.2      Estimating the costs of running the ALWOS**

The ABS has indicated that the administrative costs of running the three editions of ALWOS totalled around \$4 million (in 2015-16 dollars), or an average of around \$1.5 million per edition in current dollars.

For the 2016 edition, the ABS surveyed 11 000 businesses that owned or operated land, or water entitlements, used for agricultural activity. It used a paper survey form and phone-based follow-up.

Respondents' compliance costs for the 2016 edition are estimated to have totalled at least \$850 000 (in current dollars). This figure has been derived by multiplying the number of businesses surveyed (11 000) by the final response rate (83 per cent), the estimated average number of hours taken to complete the survey (1.27) and an hourly business compliance cost estimate (\$73.05, using OBPR (2020, p. 11)).

Actual compliance costs would exceed this figure because it does not account for the time survey respondents spent answering follow-up queries from the ABS. To enhance the sample of foreign owners of water entitlements covered by the ALWOS, a 'screening question' was also included in the 2015-16 Agricultural Census, which covered some 90 000 businesses. These associated costs are not included (ABS, pers. comm., 29 June 2021).

### **Adapting other agricultural surveys?**

Similarly, the Commission does not see other existing agricultural surveys — notably the ABS Agricultural Census and ABARES farm surveys — as suitable bases for gauging the foreign-ownership of water entitlements.

Farm businesses are the most frequently surveyed group, and the ABS seeks to limit the number of questions asked in these surveys, both to limit compliance costs for the businesses and to improve response rates and accuracy. Indeed, the ABS together with ABARES are currently seeking to streamline their agricultural surveys (ABS 2021a; ABARES, pers. comm., 1 July 2021). Accordingly, survey questions need to 'earn' their place, in competition with other possible questions of interest to policymakers and other uses of the data. The content of the Agricultural Census, for example, is intended to reflect 'key national information priorities relevant to a wide range of data users' and potential questions are filtered against several criteria (ABS 2021a). Against these criteria, the Commission understands that the nationality of the owners of water entitlements would not be a priority.

The agricultural surveys also have other limitations:

- they cover only agricultural industries, and so would not be able to capture the full range of water entitlement holders

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- the Agricultural Census has been conducted only twice per decade, which might be seen as a limitation by some — although, as noted earlier, experience with the Register shows that the level of foreign ownership of water entitlements varies little from year to year<sup>4</sup>
  - the farm surveys' sample sizes are relatively small — ABARES usually interviews around 2400 agricultural businesses each year.<sup>5</sup> This compares with the 11 000 agricultural businesses surveyed in the 2016 ALWOS, which the ABS deemed necessary to obtain a sufficient sample of foreign-owned agricultural businesses.

### Adapting existing ABS foreign investment data sources?

The Commission has also examined whether other data sources on foreign investment, such as the ABS Survey of International Investment (SII), could be a feasible substitute for the Register.

The SII is the key data source for most ABS foreign investment data releases, including the quarterly *Balance of Payments and International Investment Position, Australia*. Unlike the agricultural surveys, it has a sample that covers all major industries in Australia.

However, the SII is designed to collect data to estimate foreign investment activity, not to collect fine details about the ownership of non-financial assets (such as water entitlements) by foreign-owned businesses. For example, while the SII gathers nationally representative data for foreign investors active in the manufacturing sector, its sample may not represent the small subset of foreign-owned manufacturing firms that also own water entitlements (ABS, pers. comm., 19 July 2021). Further, adapting the SII to replace the Register would impose costs on all firms surveyed without providing material improvements in the quality of data on the foreign ownership of water entitlements.

Another foreign investment data source is the *Economic Activity of Foreign Owned Businesses in Australia* release, which was most recently derived using administrative tax data and linked surveys from the Business Longitudinal Analysis Data Environment (BLADE). There have been only two releases to date — for 2000–01 and 2014–15. This data release cannot substitute for the Register as BLADE does not contain water entitlement ownership data, which would have to be collected through a separate survey.

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<sup>4</sup> The Commission understands that the 2020-21 Agricultural Census is intended to be the last, with the ABS moving towards reliance on smaller annual surveys supplemented by other data. However, these surveys have their own limitations for collecting data on foreign ownership of water entitlements (ABS, pers. comm., 19 July 2021).

<sup>5</sup> ABARES conducts three main farm surveys each year. It interviews about 1600 business for its Australian Agricultural and Grazing Industries Survey, about 300 for the Australian Dairy Industry Survey, and about 400-500 for the Murray–Darling Basin Irrigation Survey (ABARES 2021).

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#### 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 Australian Government's objective at a lower cost than the Register.

Other existing government information sources, 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.

### 5.3 Can the Register be improved?

While there is no superior alternative to the Register, there may be scope to fine tune its design and administration (in its current form or in its forthcoming guise). Inquiry participants suggested changes in several areas, including:

- the measurement of foreign ownership
- the breadth of the entitlements captured in the Register
- the geographic granularity of the data published
- the information published about owners and entitlements
- moving towards real-time reporting.

These matters were considered when the Register was established, and this together with the costs of change (box 5.3) puts a higher onus on proponents of changes. Accordingly, the Commission has assessed potential modifications to the Register based on whether they offer a clear and material improvement and are consistent with the aims of the Register. Where a modification is low cost and sufficiently beneficial, the question becomes whether the change should be made now, rather than waiting until the forthcoming Register is established.

#### Box 5.3 Small tweaks can have material costs

The ATO said that even ostensibly simple changes to the Register can entail material administrative costs. For example, reporting of granular information already collected by the Register would require the ATO to conduct further reconciling of Register data with the BOM dataset — resolving any misalignments in granular data can be time intensive and require the efforts of multiple government agencies.

Introducing new fields to collect more data from the Register's forms would be even more costly — both to government agencies and foreign investors. This would require the ATO to change its website, modify its Register database, and contact all registrants to ensure they provide new data (potentially for all their entitlements). The ATO would then have to manually validate each registration, clean, and then reconcile the data for reporting. This would be a relatively large and costly undertaking, given that as at 30 June 2020, the Register contained 586 registrants with a total of 4958 entitlements (ATO, pers. comms., 9 April 2021; 18 June 2021).



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## Accounting for foreign ownership

The Register uses the definition of ‘foreign person’ specified in the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (the FATA). It covers:

- non-resident individuals and entities with ownership of 20 per cent or more
- multiple such individuals and entities who own 40 per cent or more in total.

All registrable water entitlements with an owner (or owners) that meets this definition are summed to calculate the level of ‘foreign-held water entitlements’ in Australia. This is the concept captured in the Register’s headline figure — 10.9 per cent in 2020 (chapter 2).

The Communist Party of Australia (Marxist–Leninist) argued that the 20 per cent foreign-ownership threshold is twice the threshold used for foreign direct investment statistics, and causes the Register to understate the actual level of foreign ownership of Australian water entitlements:

Any foreign water entitlement holder with less than 20 per cent investment in an entitlement is not captured in the data.<sup>[6]</sup> This is not conducive to greater transparency and must be changed. (sub. 1, p. 3)

On the other hand, the 20 per cent threshold means that a water entitlement can be up to 80 per cent owned by Australians and still be considered to be foreign held, and thus be counted as part of the Register’s headline figure. Indeed, this aspect of the Register led the NSW Irrigators’ Council to express the concern that:

... a significant portion of Australian equity in a water entitlement may be considered ‘foreign-owned’. The effective amount of foreign ownership in water can be consequently overstated, particularly in headline figures that do not account for data nuances and technicalities. For this reason, it is important that the Register continues to capture the share of Australian investors’ equity in a water entitlement. (sub. 6. pp. 1–2)

## The purposes and effects of foreign ownership thresholds

Different statistical bodies and datasets related to foreign ownership or foreign investment use different thresholds. For example, the ABS national accounts and balance of payments data use a threshold of 10 per cent foreign ownership to distinguish foreign ‘direct’ investment from foreign ‘portfolio’ investment (ABS 2021c). The Register has a different audience and purpose, and technically measures a different concept — foreign-held water entitlements — and so it need not use the same threshold.

One effect of using the 20 per cent minimum threshold for the Register is that it simplifies data collection and processing, and reduces the associated regulatory burdens and government costs. The threshold (for individuals) means that businesses with relatively minor levels of foreign ownership need not register.

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<sup>6</sup> Some foreign owners with a stake of less than 20 per cent will be captured if they are one of multiple foreign owners with holdings in total of 40 per cent or more.

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Determining the level at which a threshold should be set is a matter for judgement and will depend in part on how important it is to have complete and precise data on foreign ownership. This is not critical for the uses of the Register. Its statistics are not used to determine access to government (or private) finance, tax liabilities, or individual FIRB registration decisions. Rather, the Register's intended purpose is simply to provide users with a reasonable understanding of the level of foreign-owned water entitlements.<sup>7</sup>

The appropriate threshold will also depend on the concept that the statistical measure is trying to illuminate. For instance, if what most concerns community members is the ability of foreigners to exercise (majority) *control* over Australian water entitlements, rather than the level of foreign *ownership* per se, a threshold of 50 per cent of foreign ownership (or more where multiple, unaligned foreign owners are involved) could arguably be more appropriate. Adopting this 'majority controlling interest' threshold would of course reduce the Register's headline figure.

That said, the threshold adopted in the FATA, and used for the Register's estimates of foreign-held water entitlements, reflects a view that an entity with just 20 per cent ownership will be able to exercise a degree of control or influence over the operation of a business. What level of foreign ownership provides some control is debatable. As noted, the ABS — in line with international standards — uses a threshold of 10 per cent for its foreign investment statistics. International comparability is not as important for the purposes of the Register.

### No need to change the Register's threshold

The Register's present threshold, while somewhat arbitrary, has been adopted from the FATA and is the threshold accepted for FIRB assessments. While having a non-zero threshold inevitably means the Register does not capture water entitlements with small levels of foreign ownership, the 20 per cent (individual) threshold for determining if water entitlements are 'foreign held' strikes a reasonable balance between the costs and benefits of different level thresholds.

The Commission is therefore not recommending changing the current threshold although, as discussed below, improvements should be made to the statistical reports to clarify what the Register's results imply about foreign ownership and foreign control.

#### 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).

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<sup>7</sup> The Register does not give an exact picture of foreign-ownership for other reasons. For example, some entitlements are not captured in BOM data which may lead to an overstatement of the relevant level of foreign ownership of water entitlements (box 2.3).

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## Breadth of entitlements captured

The Register captures a broad range of water entitlements. These include irrigation rights, rights under State or Territory law to hold or take water from a water resource, and contractual water rights to all or part of another person's registrable water entitlement or water allocation. The entitlements captured are not limited to agricultural or domestic use but apply to all uses. There are limited exclusions, including for stock, domestic or riparian rights (box 2.1).

While few participants commented on the breadth of the rights covered, the Minerals Council of Australia (MCA, sub. 9) called for some exemptions, to account for the special nature of water usage in mining operations. Examples include the extraction, treatment and use of water from deep and highly saline aquifers — waters that would be unsuitable for other purposes — and 'dewatering activities' undertaken for mine safety, where waters extracted from the ore body are often returned to the environment or for other uses, such as agriculture (box 5.4).

### Box 5.4      **Some distinctive features of water use in mining**

The MCA (sub. 9, p. 3) nominated the following two types of water in mining for exemption from registrable water entitlements, and explained why it considers their current inclusion problematic.

- **Saline or hypersaline water.** This water is extracted from aquifers, and can have a salinity 'up to ten times saltier than seawater'. It is therefore unsuitable for purposes other than uses in mining and minerals processing, and cannot be readily transferred to other users after its use.
- **'Associated water' taken from dewatering activities.** This water is extracted incidentally during mining activities and is typically not used by the industry, though it is often discharged into the environment as part of state-based licence conditions or treated for uses in other sectors. These volumes vary based on rainfall and other climatic factors. As a result, these water licences often contain a large contingency volume that can be much higher than the actual annual water take.

The MCA argued that:

- these water rights have very different characteristics and purposes than the rights of most interest to people concerned about foreign ownership of water assets
- users of the Register could wrongly assume that all the water entitlements captured are 'owned', tradable, consumed and of a type suitable for agriculture or even domestic purposes, when those in the mining sector often are not
- licensing requirements associated with mining mean that mine operators often hold rights for volumes of water they rarely use, which results in the Register giving a misleading sense of the share of water truly 'owned' by foreign entities in the mining sector.

The MCA put these arguments to the Australian Government when the Register was being developed, and again to the Economics Legislation Committee as part of its review of the *Foreign Investment Reform (Protecting Australia's National Security) Bill 2020* (Cth). However, the Government has not provided exemptions for these matters in the new version of the Register.

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A key question is whether the inclusion of these rights in the Register's scope is misleading and, if so, how best to address this — by exempting the relevant rights from the Register's scope, or by providing clarity around these rights in the statistical reports and related documentation?

## The scope of the Register and its credibility

On the one hand, the Commission agrees that most interest in the foreign ownership of water in Australia is in relation to water that is or can be used in agriculture. There may also be less concern in some quarters about the ownership of entitlements for water that is obtained as a by-product of mining processes and is returned to the environment or reused elsewhere, or which is so saline that it effectively has no alternative use. If so, it may seem less essential to include entitlements for water of this type in the Register.

On the other hand, the comprehensive scope of the Register may add to its credibility. Moves to narrow its scope could raise suspicions and distrust among some in the community. Removing registration requirements for certain mining activities would reduce the estimated overall level of foreign ownership of water entitlements, given that the mining industry has a higher degree of foreign ownership than other sectors.<sup>8</sup> Water entitlements held for dewatering also make up a large proportion of all mining-related water entitlements, particularly in Western Australia (WA Department of Water and Environmental Regulation (DEWR), pers. comms., 7 July 2021; 15 July 2021).

Further, exempting 'associated water' would be inconsistent with the direction of broader water reform initiatives, particularly those that aim to bring mining and petroleum water uses under state planning frameworks (box 5.5). These reforms have been proposed to encourage greater transparency and incentivise more efficient uses of water by the mining and petroleum sectors. They are of particular relevance for regions where these industries are seen as directly competing with other water users in agriculture and other sectors.

In this context, the Commission notes that the extent of competition for water between mining and other uses will vary across the country. The Western Australia DEWR (pers. comm., 15 July 2021) indicated that there is limited competition in some rangeland areas in the north of that state, but that competition does exist in the state's southern agricultural areas. The NSW Department of Planning, Industry and Environment (DPIE) (pers. comm., 28 July 2021) indicated that water used in mining, including water extracted from ore bodies, often has alternative uses. It also indicated that lower quality water can sometimes be treated and/or used in domestic and agricultural applications — for example, as a supplementary source in years of severe shortage. And it is possible that technological advances will enhance the viability of desalinating water over time.

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<sup>8</sup> For example, in 2020, the level of foreign direct investment in mining was estimated at \$360.4 billion, compared to \$3.7 billion for agriculture, forestry and fishing (ABS 2021b, table 15a). And in 2014-15, 5.9 per cent of mining businesses had foreign ownership greater than 50 per cent, compared to only 0.1 per cent of agricultural, forestry and fishing businesses (ABS 2018b, table 4a).

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### Box 5.5      **‘Associated water’ and state planning frameworks**

Under the National Water Initiative, there are special provisions that permit exemptions for water used by minerals and petroleum sectors from water access entitlement and State planning frameworks. However, the Commission has recommended that these exemptions be removed (PC 2017, pp. 86–89, 2021c, p. 15), in order to:

- promote greater transparency of water allocations and industry uses, which is needed to instil confidence among other water users that water rights are robust and adequately address risks to entitlement holders and the environment
- incentivise trade where it can occur, allowing for water to be allocated to higher value uses, particularly when there is excess water supply during mining operations.

In New South Wales, minerals and petroleum companies must hold water entitlements to take associated water, irrespective of whether that water is used in their operations (unless subject to an exemption). These are identical to other water entitlements and can be traded between different water users. For example, when there is excess water supply during mining operations, those resources may be sold to other mining operations with water scarcity (NSW DPIE, pers. comm., 28 July 2021). The value of groundwater encountered by mining operations may also increase during drought periods.

While most States and Territories have incorporated minerals and petroleum industries under their entitlement and planning frameworks, Queensland remains an exception, where rights for associated water are exempted (PC 2021e, pp. 11–12). Although a licence is required to take associated water, the volume of water that can be taken is not determined by water allocations. For example, under the associated water licence granted to the Carmichael coal mine, the operator is permitted to extract an unspecified volume of water until 2077 (Queensland Government 2017, pp. 1–2). On the other hand, the extraction of ‘non-associated water’ — which is used in operations — requires both a licence and water allocation under the state planning framework.

### Practical considerations

Even if there were an appetite to exempt the relevant entitlements from registration, there are challenges and costs to identifying the specific entitlements that should be exempted. State and Territory water registers typically distinguish between ground and surface water entitlements, but do not all distinguish between entitlements held for mining and non-mining purposes, let alone identify dewatering activities or water salinity. For example, while the WA Government has internal systems that can identify entitlements held for mining (and dewatering) purposes, the NSW Government’s water register does not collect this information (WA DEWR, pers. comm., 15 July 2021; NSW DPIE, pers. comm., 28 July 2021).

The cost of changing data management processes across State governments to collect information on dewatering and groundwater salinity would likely exceed any benefits from excluding these entitlements from registration. While a blanket exemption for water entitlements held by mining companies could bypass these challenges, it would mean that entitlements used for mining that could alternatively be used for agriculture, domestic or other uses would also be excluded.

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A further problem is that the BOM data, which provides the ‘denominator’ for the ATO’s estimates of the share of foreign ownership of water entitlements, does not distinguish between entitlements used for mining and those used for other purposes.

### The Commission’s approach

In the draft report, the Commission said that it did not see sufficient cause to exempt these rights, but was recommending that the statistical reports and related documentation provide some additional information on the usage of water entitlements in mining (as per recommendation 5.3 below). Following the draft report, the Queensland Farmers’ Federation gave support for the Commission’s approach, stating:

Foreign-owned water entitlements require greater transparency, and as outlined in the report there are some low-cost options to achieve this ... The level of control and issues surrounding the different uses of water entitlements, such as those in the mining sector or future hydrogen sector, should not be exempted from the register. (sub. DR15, p. 3)

The MCA reiterated its preference that certain water entitlements for mining operations be excluded from the Register, but said it supported recommendation 5.3, stating:

At a minimum, there needs to be clear contextual information provided alongside the register reports. This will avoid creating confusion for register users by giving the impression the water is always tradeable, of high quality and consumed. (sub. DR16, p. 2)

The Commission has not changed its finding and recommendation on this matter.

#### 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.

### More granular geographical data?

At present, as well as a headline national figure, the ATO statistical reports provide foreign ownership data at the State and Territory level. They do not disaggregate the data to the level of individual entitlements, water sources, or water systems — other than in the case of the statistics presented on the level of foreign ownership of water entitlements in the (very large) northern and southern segments of the Murray-Darling Basin (chapter 2).

As noted in chapter 4, several inquiry participants have called for publication of more granular foreign ownership data at the water source, catchment or valley scale (NSW Government, sub. 5, pp. 3–4; NSWIC, sub. 6; p. 1; Victorian Government, sub. 10, p. 1; sub DR17, p. 2); VFF, sub. 12, pp. 1–2). They argued that the current level of aggregation in the statistical

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reports limits their usefulness for prospective users. For example, the NSW Government stated that current reporting:

... does not enable policy makers or stakeholders ... to understand whether the presence of foreign companies is having an impact on a particular market. ... For this reporting to be useful, it must provide information at the equivalent water source or catchment scale. (sub. 5, p. 3)

The Victorian Farmers Federation said that it:

... does not believe that providing a breakdown by State of Foreign ownership is sufficient. There are many different types of water entitlements across Australia, all with varying levels of reliability and accessibility. Therefore to ensure the public have a greater understanding of the level of foreign water ownership it is important this is broken down by water system/valley to ensure foreign ownership are not controlling certain water entitlements products. (sub. 12, pp. 1-2)

And the Victorian Government said:

Information must be presented at a more local scale to respond to community questions about foreign ownership, balancing the needs to maintain privacy of foreign investors. Victoria welcomes the publication of data on foreign-held water entitlement in the Northern and Southern Murray-Darling Basin in the most recent annual report as a step in the right direction. However, we believe that the Inquiry could go further in recommending publication of information on a more meaningful geographic scale to address community interest. (sub. DR17, p. 1)

These views contrast with that presented in the 2015 Regulation Impact Statement that accompanied the original Agricultural Land Register (which was complemented in 2017 by the Water Register)<sup>9</sup>:

The community concerns about the lack of transparency appear to be focused on the need to improve transparency around the *aggregate levels of foreign ownership* of agricultural land and the lack of scrutiny around agricultural investments (although there may be members of the community who would like to see greater transparency at the individual transaction level) (emphasis added). (Australian Government 2015, p. 197)

## Privacy considerations

The current level of information reported in the Register's 'statistical' part, or shared with other government agencies, has been largely limited by strict restrictions from legislated confidentiality and privacy provisions (box 4.3). In determining what information to publish or share, the ATO balances public interest in the levels of foreign ownership — a stated objective of the Register — with privacy and commercial sensitivities (ATO, pers. comm., 6 May 2021). This is an ongoing process for both the 'statistical' and 'basic' parts of the Register. The same confidentiality provisions will apply to the forthcoming version of the Register.

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<sup>9</sup> The 2017 Regulation Impact Statement for the water Register did not explicitly address this issue.

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The National Farmers Federation recognised that:

... there are trade-offs between the need for transparency and the granularity of data provided to the public. NFF supports the Australian Taxation Office making statistical information as granular as possible without it being able to breach individual growers' privacy requirements. (sub. 11, p. 2)

However, the NSW Government opined that the way in which the Australian Government is managing the confidentiality of investor information is hindering the effectiveness of the Register, and that data could be aggregated at the water source scale without compromising privacy. It said that, in comparison to the Australian Government's approach:

The NSW Government provides much greater public access to information about water entitlements while still ensuring the privacy of water users is protected. For example, the NSW Water Register provides public access to information about water licences (e.g. share components (volume), extraction component, water source, and conditions), water user and works approvals, trade, environmental water and other matters related to water entitlements in NSW. This is complemented by the Water Access Licence (WAL) Register which provides more detailed information about every water access licence in NSW, including the name of the licence holder. (sub. 5, p. 4)

The Commission notes that the privacy strictures of the Taxation Administration Act and the Register of Foreign Ownership of Water or Agricultural Land Act are greater than the legislation under which state departments operate.

The ATO indicated that, reflecting the low number of registrants (586 in 2021) and that many areas may have few total participants in the water market, catchment or water system-level statistics could be used to individually identify foreign owners (ATO, pers. comm., 9 April 2021).

Moreover, the risks associated with identification are greater with respect to the nationality of owners than for other attributes of owners. Publishing information that enables the identification of foreign investors may lead to inappropriate targeting by those with an aversion to foreign investment or investors from particular countries (box 4.1). This could lead to reputational damage or harm to employees — risks that are likely to increase if structural adjustments from water markets accelerate, or if geopolitical tensions escalate. Ultimately, this could discourage foreign investment. The ATO told the Commission that many registrants already seek assurance that their information will not be made public (ATO, pers. comm., 18 June 2021).

These concerns rule out the geographical disaggregation of data in the statistical reports to anything other than very large areas with sufficiently high number of entitlement holders.

## Other considerations

A further constraint on the publication of more granular geographic data is the need to maintain integrity with data from the BOM. Register data at lower levels of aggregation do not always align with data in the BOM national dataset, preventing the calculation of a



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proportion of foreign ownership. For example, the Register may report entitlements with small volumes in one water system, but the BOM dataset may report these same entitlements as having zero volumes (ATO, pers. comm., 6 May 2021). These disparities in small volumes can be time-consuming to reconcile and correct, but are mitigated through higher levels of aggregation.

In any case, it is not clear that publishing more geographically granular data on the foreign ownership of water entitlements would be a good means of informing genuine policy matters. As noted in chapter 3, concerns around water speculation and market manipulation have been conflated with foreign ownership concerns, when the nationality of the entitlement holders engaging in any such behaviour is not relevant for identifying and rectifying that behaviour. If there is a need to analyse ownership structures to help determine the extent and drivers of any such behaviour, the greater detail and more comprehensive scope of State and Territories registers — which capture all entitlement owners, not just the small share that is foreign — would provide a better basis for this task.

### The Commission's view

Given the Register's role, the extent of publicly available information should support the maintenance of, and confidence in, Australia's foreign investment policy settings. In the Commission's view, the information published in the ATO statistical reports is already sufficiently granular for this purpose, providing confidence to most people across Australia.

Publishing more detailed information that may discourage or otherwise lower the attractiveness of Australia's water markets to foreign investors would contradict and undermine these aims. The privacy strictures in the Register's governing legislation are intended to safeguard against this. Accordingly, the Commission is not recommending that the ATO publish more geographically disaggregated information on the foreign ownership of water entitlements.

Nevertheless, the Commission recognises that the southern Murray-Darling Basin is unique in terms of the value of its water entitlements (more than \$26 billion in 2018-19) and the extent to which trade in water entitlements occurs (PC 2021b). Both the NSW Government (sub. 5, p. 1) and Victorian Government officials (pers. comm., 23 September 2021) have noted concerns from communities within this region and have advocated for further information on foreign ownership. In future statistical reports the southern Murray-Darling Basin could be split in two, with data shown for the NSW and Victorian parts of that basin, along with the rest of Victoria. These zones may well be sufficiently large that privacy issues would not be triggered, and matching BOM data are available. It remains unclear to the Commission that this option would illuminate any genuine issues around the operation of those water markets. However, the ATO could conduct further work with relevant state and federal government agencies to explore the feasibility, cost and merit of this proposal as part of the development of the forthcoming Register.

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#### FINDING 5.6 GEOGRAPHIC INFORMATION IN THE STATISTICAL REPORTS

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 policy settings.

There could be scope for the ATO to provide further geographic information on foreign ownership in the southern Murray-Darling Basin. The ATO, in consultation with relevant federal and state government agencies, could conduct further work to explore the feasibility, cost and merit of this proposal as part of the development of the forthcoming Register of Foreign-Owned Assets.

### **Additional information on owners and entitlements?**

At present, the ATO collects and publishes information on some of the characteristics of entitlements held by foreigners, including:

- their volume
- the nature of the resource (groundwater versus surface water)
- whether it is applied to a regulated or unregulated water resource
- the broad industry of use (agriculture, mining, industry and other)
- whether it is an irrigation right, lease and water access entitlement.

Half of the respondents to a NSW Government survey (chapter 4) indicated that the information published in the statistical reports was 'highly' or 'very' appropriate to address concerns relating to transparency of foreign ownership, with only 12 per cent indicating that it was inappropriate.

Nevertheless, several inquiry participants suggested transparency could be improved through the collection and/or publication of a broader range of information. Box 5.6 presents some of their suggestions. In summary, the suggestions were for data on:

- the value of the entitlements
- the size or structure of foreign businesses that hold water entitlements
- whether entitlement holders also hold agricultural land
- the extent to which foreign entitlement holders had an effective controlling interest in their entitlements
- the reliability or security of water entitlements
- conditions attached to entitlements associated with FIRB approvals.

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## **Box 5.6      Participant comments and suggestions on additional information for the statistical reports**

The National Farmers Federation said of the statistical reports:

Information provided to date has been high-level. The third report appears to further breakdown foreign owned water entitlements by 'type' including leases and water access entitlements. The NFF welcomes this approach. (sub. 11, p. 2)

The NFF went on to nominate, as a candidate for further information in the statistical reports:

the extent to which water assets or corporations are effectively 'foreign-controlled', noting that it may require understanding foreign interests as shareholders. NFF recommends the Commission consider whether this information is readily available and/or the feasibility in acquiring this data. (sub. 11, p. 3)

The Victorian Government stated:

... the very different nature of water entitlements means that reporting entitlement volumes can be misleading. The ATO could work with jurisdictions to consider other meaningful reporting approaches, such as reporting long-term average yield of various entitlement types, alongside the current reporting of entitlement volumes. (sub. 10, p. 2)

And the Victorian Farmers Federation said:

The VFF believes the register and annual report could also be enhanced by monitoring and recording the size foreigners participate in the water allocation market. The community remains uneasy that large corporates and foreign investors are using excessive market power to drive up the price of annual water allocations. The VFF believe increased reporting here would be of benefit to help improve transparency. (sub. 12, p. 2)

Riparian Capital Partners submitted:

RCP does not believe the identification of ownership of holdings of individual water entitlements (whether they be landholders or non-landholder investors) is necessary and does not support this due to privacy considerations amongst other reasons.

However, RCP acknowledges that a level of reporting may be required to increase the confidence of certain stakeholders as to which type of market participants control water in a particular region. For that matter, RCP would recommend the following approach to reporting of ownership of water entitlements and water allocations, noting this approach is similar to that employed by many commodity futures exchanges:

- ownership split in aggregate (between landholders and non-landholder investors) for water entitlements for each water entitlement type.
- holdings in aggregate for landholders and non-landholder investors of water allocations in each water trading zone. (sub 2, p. 7)

Collecting and publishing information on most of these items would be unlikely to add to the effectiveness of the Register and could have other drawbacks.

- The desire for some of the items (for example, the size, structure and degree of control of foreign owners) appears premised on addressing matters that are unrelated to foreign ownership. As noted earlier, where information about entitlement owners is required to help assess matters such as market power in particular water markets, the more comprehensive State and Territory registers — which capture all entitlement owners, not just the small share that is foreign — would be a better basis for this task.

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- Adopting many of the suggested items (for example, the value and reliability of entitlements) would require additions to the current registration form, the checking and revision of data collected in prior years to ensure its quality, or integrating information from State and Territory registers, and would add to the ATO's collection, verification and analysis costs.

One suggested item that the Commission sees merit in reporting on (at the aggregate level) is the share of water registrants that also hold agricultural land (and are therefore on the Agricultural Land Register), as suggested by Riparian Capital Partners (box 5.6). This information is already collected by the ATO. Publishing this figure in the statistical reports may help to avoid misconstruing the activities of foreign investors in water markets. Several participants who commented on the draft report saw merit in this proposal (for example, NIC, sub. DR14; p. 3; QFF, sub. DR15, p. 3).

#### FINDING 5.7 THE 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.

#### 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.

## Moving to a real-time online format?

Many States and Territories have online dashboards that present information on water licences, trades and/or market conditions and that are updated in real time (or close to it). A question is whether the Register should adopt a similar format.

Moving the statistical reports towards a real-time online dashboard format would give users access to more up-to-date data (although, as noted in chapter 4, the Register's statistics are not time sensitive). It would also remove the basis for any suggestion that the Australian Government is relying on years-old data to gauge the level of foreign investment — a claim made in the media in 2020 (chapter 4). And if the online dashboard were to replace (rather than just augment) the annual statistical reports (which would require legislative change), this could remove a trigger for the pernicious media commentary that has sometimes accompanied the release of the statistical reports (chapter 4).

A key difficulty in moving to a real-time online dashboard is that the registration process is not currently set up to enable real-time reporting. Registrants have until 30 days after the end

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of a financial year to update any acquisitions, sales or leases of entitlements made during that financial year. As owners may negotiate multiple sales or trades in a year, this feature allows them to complete their registrations in one sitting, reducing compliance burdens. Most registrations and changes are notified at around the end of the financial year (ATO, pers. comm., 18 June 2021). A shift to real-time registration would lose these benefits.

It would also require the ATO to revise its registration processes and administration. The ATO's data validation processes take significant time, and it would not be possible to report in 'real time', or quarterly, with current resources (ATO, pers. comms, 18 June 2021). There would also be difficulties in reconciling real-time data on foreign-owned entitlements with the BOM data that the ATO uses to determine total water entitlements in Australia. The BOM data are updated only annually.

Even if these difficulties could be addressed, it would be difficult to justify a switch unless the other components of the forthcoming Register of Foreign Ownership of Australian Assets were to also adopt that format. This is a matter for the new Registrar or the Australian Government as it finalises the design on the new combined register. The Commission understands, however, that such a change is not on the cards.

For all these reasons, the Commission is not recommending a change of format for the (Water) Register.

#### 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.

## Other presentation and messaging issues

The statistical 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 more detailed presentation of the statistics. They also include various technical attachments. They are presented clearly and, in the Commission's view, are simpler to understand than many of the State water registers, even those presented as dashboards or interactive maps (noting the Register's singular purpose of providing transparency on the level of foreign ownership of water entitlements).

Even so, to understand the reports, readers must have some prior understanding of water markets and the distinction between water entitlements, available water resources, and ideally other water rights such as allocations (chapter 4). The bodies of the statistical reports do not explain these matters (although there is some explanatory material in attachments and/or on linked websites). These are fine details that many non-water market participants may not fully understand, creating risks of misinterpretation.

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These concepts could be given more prominence in the statistical reports themselves and/or the ATO or FIRB could provide fact sheets or other release documentation that cover the concepts when publishing the statistical reports.

Some matters that the Commission considers may need more prominence or explanation are:

- that registering is mandatory, rather than voluntary, and that penalties apply for non-compliance
- the relationship between foreign ownership and foreign control, and the issues associated with determining what level of ownership provides ‘control’
- that the statistics are about the ownership of water entitlements on issue rather than water allocations or the nation’s available water resources (see chapter 4)
- the issues around the different uses of water entitlements in the mining sector raised by the MCA (discussed above).

These changes are low cost and could be implemented when the next statistical report is released.

The NFF (sub. 11, p. 3) advocated for the Australian Government to issue a media release when the statistical reports are published. The Treasurer issued a media release with the first statistical report, but not for subsequent editions. Drawing additional attention to the statistical reports can be a double-edged sword, given the adverse commentary that has followed some of the releases. Nevertheless, a media release from the Treasurer would lift the Register’s profile. It would also be an opportunity to shape the community narrative around the benefits of foreign investment and the Australian Government’s foreign ownership scrutiny measures.

#### 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.

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# A Consultation

During the inquiry, the Commission received 12 submissions (table A.1) from inquiry participants prior to the release of the draft report. The Commission received 5 submissions (table A.1) and 2 brief comments (table A.2) prior to the release of the final report. These submissions and brief comments are available on the inquiry website: [www.pc.gov.au/inquiries/completed/foreign-water-entitlements](http://www.pc.gov.au/inquiries/completed/foreign-water-entitlements).

The Commission also met or spoke with a range of individuals, industry bodies and government agencies (table A.3), including with its Water Stakeholder Working Group (table A.4), which was established in accordance with section 89 of the *Water Act 2007* (Cth).

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**Table A.1 Submissions**

<i>Participant</i>	<i>Submission number</i>
Communist Party of Australia (Marxist-Leninist)	1
Fletcher, Mark	DR13
Minerals Council of Australia (MCA)	9, DR16
Murray Darling Association (MDA)	8
National Farmers Federation (NFF)	11
National Irrigators' Council (NIC)	4, DR14
Newell, Deborah	3
NSW Government	5
NSW Irrigators' Council (NSWIC)	6
Queensland Farmers' Federation (QFF)	7, DR15
Riparian Capital Partners (RCP)	2
Victorian Farmers Federation (VFF)	12
Victorian Government	10, DR17

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**Table A.2 Number of brief comments**

<i>Pre-draft</i>	<i>Post-draft<sup>a</sup></i>	<i>Total</i>
0	2	2

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<sup>a</sup> One brief comment contained confidential material not available to the public.

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**Table A.3      Discussions**

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*Participant*

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Adamson, David  
AgForce Queensland  
Almond Board of Australia  
Association of Mining and Exploration Companies (AMEC)  
Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES)  
Australian Bureau of Statistics (ABS)  
Australian Competition and Consumer Commission (ACCC)  
Australian Grape and Wine (AGW)  
Australian Taxation Office (ATO)  
Australian Water Brokers Association (AWBA)  
Brennan, Malcolm  
Bureau of Meteorology (BOM)  
Chamber of Minerals and Energy Western Australia (CMEWA)  
Crase, Lin  
Department for Environment and Water, South Australia  
Department of Agriculture, Water and the Environment  
Department of Environment, Parks and Water Security, Northern Territory  
Department of Home Affairs  
Department of Planning, Industry and Environment, New South Wales  
Department of Prime Minister and Cabinet  
Department of Regional Development, Manufacturing and Water, Queensland  
Hancock Natural Resources Group  
Kirchner, Stephen  
Law Society of NSW, Rural Issues Committee  
Loch, Adam  
Minerals Council of Australia (MCA)  
Mondschein, Jared  
Murray Darling Association (MDA)  
Murray-Darling Basin Authority (MDBA)  
National Farmers Federation (NFF)  
National Irrigators' Council (NIC)  
Nicoll, Geoff  
NSW Irrigators' Council (NSWIC)  
Primary Producers South Australia (PPSA)  
Queensland Farmers' Federation (QFF)  
Seidl, Constantin  
Tasmanian Irrigation  
The Treasury  
University of Adelaide, Centre for Global Food and Resources  
Victorian Farmers Federation (VFF)  
Water Stakeholder Working Group (table A.3)  
Wheeler, Sarah  
Zuo, Alec

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Table A.4	<b>Meeting with the Productivity Commission's Water Stakeholder Working Group</b>
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Thursday 4 March 2021

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*Participants*

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Australian Academy of Technology and Engineering  
Australian Conservation Foundation  
Australian Local Government Association  
Australian Petroleum Production & Exploration Association  
Australian Water Association  
Community Council for Australia  
Environmental Defenders Office  
Minerals Council of Australia  
National Aboriginal Community Controlled Health Organisation/Coalition of Peaks  
National Farmers Federation  
National Health & Medical Research Council  
National Irrigators' Council  
Water Services Association of Australia

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