

## Australia: Register of Foreign Ownership commences 1 July 2023

### In brief

Australia's new Register of Foreign Ownership of Australian Assets is expected to commence on 1 July 2023. Expanding on the existing registers for water interests and agricultural or residential land, the new Register will record foreign interests in a broader range of Australian land, entities, businesses and assets, with significant penalties for non-compliance.

Foreign persons who acquire relevant Australian interests, as well as some Australian entities that could become "foreign" due to ownership changes, may need to implement additional compliance processes to ensure they satisfy the new requirements.

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### Key takeaways

The Australian Taxation Office (**ATO**) has informally announced that a new Register of Foreign Ownership of Australian Assets (**Register**) will be introduced on 1 July 2023.<sup>1</sup>

From that date, foreign persons must give the ATO notice of a wide range of events relating to Australian interests, generally within 30 days of the event. Registrable events include certain foreign investment actions that are already notifiable to or otherwise known by the Foreign Investment Review Board (**FIRB**), as well as a range of events that are not currently notifiable, including:

- a foreign person acquiring certain legal interests in Australian land regardless of value;
- becoming a foreign person while holding relevant Australian interests; and
- once an event is registered, certain changes to the relevant circumstances.

It currently appears that these new registration obligations will not be retrospective – they will only apply to new events from the commencement date. However, existing obligations to register foreign interests in Australian water, agricultural or residential land and certain other assets (see below) still apply before the new Register commences (and continue afterwards). For other types of assets, interests acquired before the new Register commences will not need to be registered (unless additional regulations are made requiring this).

Information held on the Register can be used for certain government purposes but will not be publicly available.

<sup>1</sup> See <https://www.ato.gov.au/General/Foreign-investment-in-Australia/Contact-us-about-foreign-investment/>.

## In depth

### Background

The Australian federal government already maintains a number of registers of foreign interests in certain Australian assets. For example, foreign persons must currently register with the ATO if they:

- acquire or cease to hold certain interests in Australian agricultural land, within 30 days of the event;
- acquire or cease to hold certain Australian water interests, within 30 days of the end of the financial year; or
- become or cease to be a foreign person while holding such interests, within the same timeframes.

These Registers of Foreign Ownership of Water Entitlements and Agricultural Land will be incorporated into the new broader Register when it commences, with ongoing registration obligations. The ATO also currently maintains a register of foreign owned residential land, which is expected to be similarly incorporated. The Register of Foreign Owners of Media Assets (maintained by the Australian Communications and Media Authority) and the Register of Critical Infrastructure Assets (maintained by the Cyber and Infrastructure Security Centre) will continue separately.

The key legislation governing the new Register has been in place since 2021 – see Part 7A of the Foreign Acquisitions and Takeovers Act (**FATA**) – but does not take effect until the government separately proclaims a commencement date, which is expected to be 1 July 2023 (but has not yet been formally confirmed). Draft regulations clarifying the scope of the Register were released for consultation on 2 March 2023 (and the following discussion assumes the regulations will be made in that form).

### Registration obligations

Following commencement of the Register, a "register notice" must be given to the ATO if:

- a foreign person **takes an action regulated under the FATA** in relation to an entity or business which either:
  - already required FIRB approval before being taken; or
  - does not require approval but was voluntarily notified and/or approved (or covered by an exemption certificate), or if FIRB has decided to review the action;
- a foreign person **acquires**:
  - a legal interest in Australian land which is either a freehold interest, a long-term lease or an interest in a mining or production tenement;
  - an equitable interest in a long-term lease or licence of agricultural land;
  - in some cases, a legal interest in an exploration tenement; or
  - a registrable water interest, which continues to be held at the end of the financial year;
- a person **becomes a foreign person** while:
  - holding an interest in land or an exploration tenement as above;
  - holding an interest in an Australian entity or business, the acquisition of which would have been notifiable to FIRB if acquired by a foreign person;
  - carrying on a "national security business" which would have been notifiable if the person had started doing so as a foreign person; or
  - holding a registrable water interest, which continues to be held at the end of the financial year; or
- after an event is registered, certain **changes occur**, including:
  - a registered circumstance ceases, e.g. the relevant interest is disposed of;
  - the person ceases to be a foreign person (or, if the person was also a "foreign government investor", the person ceases to hold that status); or

- a foreign person's percentage interest in the relevant entity or business increases or decreases by at least 5%.

Broadly, "foreign persons" include individuals not resident in Australia, foreign government investors, and corporations and other entities with substantial foreign ownership. Importantly, this can include an Australian entity if it has sufficient direct or indirect foreign ownership.

As noted above, it currently appears that these new registration obligations for most types of assets will only apply to events taking place on or after the commencement date (unless additional regulations are made requiring registration of existing interests). However, current obligations to register foreign interests in Australian water, agricultural or residential land and certain other assets (see above) still apply before the new Register commences (and continue afterwards).

Many exemptions that currently relieve foreign persons from approval and other requirements under the FATA will also provide an exemption from the above registration obligations – for example, in some circumstances there are exemptions for security interests taken by financiers, acquisitions from government, acquisitions by foreign custodian corporations, compulsory acquisitions, and passive investments of less than 10% in a land-rich entity.

## How and when to register

In general, a register notice must be given within 30 days of the event.

There will be no fee for registration, which will be done through a new ATO online service to be launched on 26 June 2023. The ATO has released a draft standard for the information to be provided in a register notice – this will allow the ATO to request details regarding the foreign person, the transaction, the target entity or asset, amounts paid, the intended use of land, the structure of the target business, and so on.

The penalty for failing to give a register notice on time in the correct form will be 250 penalty units per day (currently equal to \$68,750, but this will increase on 1 July 2023).

## Implications

In many cases, lodging a notice on the new Register will be a simple (albeit additional) administrative task that does not significantly add to the current burden of seeking FIRB approval for a transaction. For most business acquisitions that do not involve a direct or significant indirect investment in land, there will be no obligation to disclose a transaction that is not already notifiable to or otherwise known by FIRB.

However, the Register will create a number of new obligations which will require careful attention by foreign investors and some local entities, including the following:

- Although some land acquisitions only require FIRB approval above a certain value, no such thresholds apply to the new requirement to notify land acquisitions to the ATO. Therefore, many land acquisitions that would not otherwise be notifiable (particularly developed commercial land up to AUD310 million) will soon need to be registered.
- Foreign persons who have registered an interest will have ongoing obligations to give notice of certain changes, including where they cease to be a "foreign person" or their interest-holding decreases. Some of these requirements only apply where the foreign person is or ought reasonably to be aware of the change, but foreign persons may need to implement new internal processes to monitor their interest-holdings and/or "foreign" status to ensure they comply with these requirements.
- Australian entities that could become "foreign" due to ownership changes should consider whether their Australian holdings (including, in particular, relevant interests in land) are sufficient to trigger a requirement to register if they do become foreign. This may involve implementing new internal monitoring and compliance processes, particularly as these requirements apply whether or not the entity is "aware" of the change. Again, certain transactions that would not otherwise be notifiable to FIRB (such as a small foreign acquisition resulting in an Australian entity meeting the aggregate threshold to be considered "foreign") will soon need to be registered with the ATO.

## Next steps

We will be carefully monitoring this area, and foreign persons with current or proposed investments in Australia should do the same, as well as continuing to comply with their current registration obligations in relation to interests in Australian water, agricultural or residential land and certain other assets (see above).

The proposed 1 July 2023 commencement date will be confirmed by a formal proclamation, and the regulations recently released in draft will be finalised some time after the consultation period ends on 31 March 2023.

In the meantime, foreign persons with current or proposed investments in Australia, and Australian entities that could become "foreign" due to ownership changes, should begin to consider whether their internal processes may require any updates to ensure that relevant investment activities or changes in ownership will be noted for possible registration purposes once the new Register commences.

Australia's foreign investment laws, including these imminent registration requirements, are technical and complex. Legal advice should always be sought on the requirements that apply in your circumstances, particularly given the significant penalties for non-compliance. We would be happy to assist.

## Contact Us



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