

29 March 2023

Legislative Framework Unit
Foreign Investment Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: FIRBStakeholders@treasury.gov.au

Dear Sir / Madam

Register of Foreign Ownership of Australian Assets

1. This submission concerns the Exposure Draft Treasury Laws Amendment (Measures for Future Instruments) Instrument 2023: Register of Foreign Ownership of Australian Assets (Cth) (**Draft Regulation**). The submission is made by the Foreign Investment Committee of the Business Law Section of the Law Council of Australia (**Committee**).

Key Points

2. The Committee supports the broad thrust and intent of the amendments to the *Foreign Acquisitions and Takeovers Regulation 2015* (Cth) (**Regulation**) proposed by the Draft Regulation as a part of the establishment of the Register of Foreign Ownership of Australian Assets (**Register**) under Part 7A of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**).
3. The key concern that the Committee wishes to raise is that the introduction of the Register, and its interaction with the remainder of the FATA, creates a complex reporting environment for investors.
4. While the Committee appreciates that there are attempts to reduce duplication of reporting, there are many nuances and differences in whether a circumstance will be:
 - (a) an action that must be notified under section 81 of the FATA;
 - (b) notifiable under sections 98C, 98D or 98E of the FATA because proposed section 58K will not apply on the basis of the exemption from register notice notification under proposed section 58L of the Register;
 - (c) reportable under a condition to a no objection notification or exemption certificate; and/or
 - (d) something that a register notice will satisfy wholly.
5. This is a complicated matrix to present to investors, particularly when the burden of notification is likely to fall on in-house teams who are not legal practitioners.

6. It is also complicated for The Treasury and the Australian Taxation Office as they will be receiving information separately. In particular, we discuss below a range of circumstances that will not trigger register notice obligations but will trigger notification obligations under sections 98C, 98D or 98E of the FATA. Over time, that may result in The Treasury and the Australian Taxation Office holding very different foreign ownership information about the same Australian asset.
7. The Committee encourages The Treasury to develop a comprehensive set of guidance notes to assist investors in the range of reporting requirements and to take an educational approach to reporting.¹ In addition, the Committee submits that there is a significant cost for investors in navigating the range of reporting obligations—while ultimately a single notification may be accepted, there is significant work that must be done by investors and their advisors in concluding what the right range of notifications is for any particular action.
8. The Committee has the following specific comments on the Draft Regulation as well as concerns about the operation of Part 7A of the FATA that could be addressed through the Draft Regulation. Unless otherwise specified, section references are to current or proposed sections of the Regulation.

Specific submissions

9. Equitable interests

- (a) FATA and the Draft Regulation exclude equitable interests from various aspects of Part 7A of the FATA. In particular:
 - (i) acquisitions of equitable interests in Australian land (other than leases of, or licences to occupy, agricultural land) and exploration tenements will not trigger register notice requirements; and
 - (ii) while triggering register notice requirements, acquisitions of equitable interests in entities and businesses will be disregarded for the purpose of determining whether a registered circumstance exists or has ceased to exist—this has the effect of exempting investors from register notice obligations in response to changes in interests or their ceasing to be foreign persons.
- (b) The exclusion of equitable interests has a number of implications for the Register:
 - (i) The acquisition of an interest in Australian land or an exploration tenement by a foreign person via a custodian corporation will not trigger a register notice requirement because the foreign person will be acquiring an equitable interest only and, even if the custodian corporation is a foreign person, section 30 will exempt the custodian corporation from all register notice requirements.

¹ These changes are significant changes. In the context of other significant changes to the Security of Critical Infrastructure Act 2018 (Cth), the Cyber and Infrastructure Security Centre indicated in a number of publications and awareness sections that:

the first 12 months ... will be considered a learning and familiarisation phase [and] enforcement action will be for egregious and wilful non-compliance only.

We encourage The Treasury and the Australian Taxation Office to take a similar approach to these changes.

- (ii) While the acquisition of an interest in an entity or business by a foreign person via a custodian corporation may trigger a register notice requirement, a subsequent disposal of the interest, or it ceasing to be a foreign person, will not trigger a register notice requirement because the foreign person will be acquiring an equitable interest only such that no registered circumstance will exist.
 - (iii) While the acquisition of an interest in an Australian unit trust by a foreign person may trigger a register notice requirement, a subsequent disposal of the interest, or it ceasing to be a foreign person, will not trigger a register notice requirement because the foreign person will be acquiring an equitable interest only such that no registered circumstance will exist.²
- (c) In some of these examples, absent a register notice requirement, a notification obligation under sections 98C, 98D or 98E of the FATA will remain. However, that will not always be the case and, where it is the case, it may result in the Australian Taxation Office and The Treasury having inconsistent information about the same Australian asset.

10. Australian citizens

An Australian citizen, who moves overseas and thereby ceases to ordinarily reside in Australia, becomes a foreign person. This will trigger register notice requirements in respect of his or her then current freehold interests in Australian land³ under section 130ZC of the FATA. It may also trigger register notice requirements for entities in which the now foreign person invests.

It seems incongruous to the Committee that these register notice requirements will be triggered but—on account of the exemption in section 35—not by subsequent acquisitions of freehold interests in Australian land while the Australian citizen remains a foreign person.

Recommendation:

That proposed section 58L be amended (or a new section be proposed) to exclude the operation of section 130ZC of the FATA (and, as a consequence, also section 130ZR of the FATA) in circumstances where the acquisition of an interest in Australian land held by the person would have been exempt under section 35 were the interest to have been acquired by the person at the time of becoming a foreign person.

11. Tenements

Sections 130ZA and 130ZB (as applicable) of the FATA will trigger register notice requirements in respect of the acquisition of a broader range of interests in tenements than section 130ZA will trigger in respect of the acquisition of interests in agricultural land, commercial land or residential land. In particular the acquisition of:

² As a unit trust is a product of the law of equity, interests in a unit trust can only ever be equitable interests.

³ Also certain leasehold interests, and interests in licences to occupy, agricultural land.

- (a) a mortgage over a tenement (where the exemption for moneylending agreements in section 27 does not apply);
- (b) an interest in an agreement involving the sharing of profits or income from the use of, or dealings in a tenement (subject to the length of the agreement term); or
- (c) an interest in an exploration tenement from any of the persons contemplated by subsection 31(1)

by a foreign person will trigger a register notice requirement, whereas the acquisition of an equivalent interest in agricultural land, commercial land or residential land would not.

Recommendation:

That proposed section 58L be extended to exploration tenements and references to “an interest” in an exploration tenement or a mining or production tenement be limited to a registrable interest as holder of the relevant tenement.

That subsection 31(1) be amended to include an acquisition of an interest in an exploration tenement.⁴

12. Water entitlements

Sections 130ZE and 130ZF of the FATA will trigger duplicate register notice requirements in relation to registrable water interests acquired after, and in the same financial year that, the acquirer becomes a foreign person.

Recommendation:

That a new section be proposed to exempt a foreign person from register notice requirements under section 130ZF of the FATA in respect of a registrable water interest if the acquisition of the registrable water interest triggers a register notice requirement under section 130ZE.

13. Becoming or ceasing to be a foreign person

- (a) Knowledge

A number of sections of the FATA recognise that an investor may not always know when a register notice or other information requirement is triggered and defer the time the investor has to comply with the requirement until after the investor “becomes aware, or ought reasonably to have become aware, of” the relevant triggering circumstance.⁵

Similar to these circumstances, investors may not always be aware of circumstances that lead them to becoming, or ceasing to be, foreign persons (or foreign government investors). For example, as a result of the tracing rules

⁴ This will ensure that register notice requirements for foreign persons (other than foreign government investors) are not more onerous when they are granted exploration tenements than when they are granted mining or production tenements.

⁵ FATA ss 98E(1)(d), 130ZD(1)(d) & (4), 130ZH(1)(b)(ii) & (4), 130ZI(1)(b)(ii) & (4)(b)(ii), 130ZN(1)(d) & (3) and 130ZQ(1)(b) & (2).

in section 19 of the FATA magnifying downstream interests, relatively small changes in upstream ownership—changes that could occur many ownership levels above an entity—can result in a change in the status of downstream entities.

The Committee recommends a similar deferral of register notice requirements in these cases.

Recommendation:

That a new section be proposed to defer the time for compliance with register notice requirements under sections 130ZC, 130ZO, 130ZP and 130ZR until such time as the person the subject of the requirement becomes aware, or ought reasonably to have become aware, of the relevant triggering circumstances.

That proposed Items 2(e), 3(d), 4(b) and 5(d) of proposed subsection 58B(1) be amended to similar effect.

(b) Multiple entities

Through the operation of the tracing rules in section 19 of the FATA, a change in status of an investor from or to a foreign person (or foreign government investor) can have a cascading effect on entities in which the investor holds interests, both directly and indirectly. In some cases, a very large number of entities may become subject to register notice requirements. It would be unnecessarily burdensome for both the Registrar and relevant entities if each entity were required to give an individual register notice.

Recommendation:

That, whether through the Regulation or the Data Standard, an entity should be considered to satisfy an obligation to give a register notice in respect of any change in its status as a foreign person or foreign government investor if its change of status has been reported in a register notice given by another entity.

14. **Starting a business**

Proposed subsection 58B(5) provides that the registrable event day for foreign government investors starting Australian businesses is the earlier of when they receive their Australian Business Number (**ABN**) or Australian Company Number (**ACN**). This is not consistent with how businesses operate and presents challenges as:

- (a) a company is allocated an ACN on incorporation, which is before the company starts to carry on business (by definition a company cannot carry on any business before it exists);
- (b) a foreign company that registers to carry on business in Australia is allocated an Australian Registered Body Number (**ARB**), not an ACN—as such, it would receive more favourable regulatory treatment than a company;
- (c) the concept of starting an Australian business is a defined concept under the FATA for which there is already guidance and the proposed registrable event

day in subsection 58B(5) will almost certainly arise before the business has commenced;

- (d) an existing company that later becomes a foreign person and then starts an Australian business will already have an ABN and ACN;
- (e) an entity that has an ABN only because it makes supplies that are “connected with the indirect tax zone” and then later starts to carry on an Australian business will already have an ABN;⁶
- (f) a company registered under the *Corporations Act 2001* (Cth) is entitled to have an ABN regardless of whether it carries on any business;⁷ and
- (g) this approach sets up an inconsistency with section 130ZK of the FATA (starting a national security business) because, in that case, the registrable event day is the day that the business is actually started.

Recommendation:

THAT proposed paragraph 58B(4)(a) and subsection 58B(5) be removed.

15. Exemption certificates

There are number of proposed register notice triggers that capture transactions that are otherwise exempted by an exemption certificate. However, this is not necessary for interests in land (proposed section 58C) and tenements (proposed section 58D), because acquisitions of those interests trigger register notice obligations regardless of whether they are required to be notified under section 81 of the FATA.

Recommendation:

That proposed sections 58C and 58D be removed.

In addition, there are a range of reporting obligations that arise under exemption certificates that will become duplicative of some register notice requirements.

Recommendation:

That either:

- (a) the Treasurer exercise his powers under section 62 of the FATA to vary all exemption certificates to the extent necessary to provide that the giving of a register notice that includes certain information satisfies any condition under the exemption certificate to notify the same information; or
- (b) a new section be proposed to exempt an acquirer under an exemption certificate from register notice requirements that are equivalent to reporting conditions under the exemption certificate if the report under the exemption certificate is given.

⁶ See s 8(1)(b) of the *A New Tax System (Australian Business Number) Act 1999* (Cth).

⁷ See s 8(2) of the *A New Tax System (Australian Business Number) Act 1999* (Cth).

Conclusion and further contact

16. The Committee would be pleased to discuss any aspect of this submission.
17. Please contact the chair or deputy chair of the Committee, Wendy Rae at Wendy.Rae@allens.com.au or Marcus Clark at Marcus.Clark@jws.com.au, if you would like to do so.

Yours faithfully

A handwritten signature in black ink, appearing to read 'P. Argy', with a long, sweeping flourish extending to the right.

**Philip Argy
Chairman
Business Law Section**