

23 March 2023

Ms Hellen Gold
Law & Policy Manager
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Australian Taxation Office
Genge Street
CANBERRA ACT 2601

By email: FIRBATOCOMMS@ato.gov.au

Dear Ms Gold

Submission—Draft Data Standard for Register of Foreign Ownership of Australian Assets

1. This public submission concerning the draft *Foreign Acquisitions and Takeovers (Register Notices) Data Standard 2023* published by the Commissioner of Taxation on 20 February 2023 (**Draft Data Standard**) is made by the Foreign Investment Committee of the Business Law Section of the Law Council of Australia (the **Committee**).
2. The Committee also proposes to comment to The Treasury on the Exposure Draft Treasury Laws Amendment (Measures for Future Instruments) Instrument 2023: Register of Foreign Ownership of Australian Assets (Cth) (**Draft Regulation**). As the Draft Data Standard is closely related to the Draft Regulation, we anticipate that our submissions on the Draft Regulation will include recommendations that could be addressed by changes to the Draft Data Standard. We recommend that the Australian Taxation Office consider our and other parties' submissions on the Draft Regulations as they are likely to include submissions relevant to the Draft Data Standard.

Key Points

3. The Committee supports the Commissioner of Taxation's proposal¹ to articulate data standard requirements in connection with 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**). Having a clear set of requirements will assist in the Australian Taxation Office's administration of the Register and relevant foreign persons in complying with their notification requirements.

¹ In the Commissioner's capacity as the "Registrar" appointed pursuant to section 130R of the FATA.

4. However, the Committee has two overarching concerns with the Draft Data Standard:
 - (a) in some cases information requirements are too imprecise; and
 - (b) section 130ZZ of the FATA (and section 13 of the *Commonwealth Registers Act 2020* (Cth)) only authorises determination of data standards “by legislative instrument”—to the extent that the Draft Data Standard proposes to grant a discretion to the Registrar to request information or documents not described in the Draft Data Standard, the Registrar’s exercise of that discretion would occur other than by legislative instrument and, therefore, be beyond the scope of the Registrar’s delegated powers.
5. These concerns and other submissions are reflected in the comments set out below. Section references are to those in the Draft Data Standard.

Specific submissions

6. Subsection 4—In light of the definition of ‘interest’ in section 4 of the FATA, we recommend replacing “registrable interest” with “registered circumstance” (which is defined in section 4 of the FATA) throughout the Draft Data Standard so as to better describe the range of circumstances that trigger register notice requirements and ensure consistency with the FATA.
7. Subsections 6(2) & (3)—
 - (a) For the reason discussed in paragraph 4(b) above, the information or documents that the Registrar may request should be limited to those set out in the Draft Data Standard. It is beyond the power of the Registrar to adopt a legislative instrument that empowers him or her to require information or documents other than those enumerated within the legislative instrument. Also, as a practical matter, investors with notification obligations should be informed ahead of time about the nature of the information that they may be required to provide—the most appropriate means by which to do this is via a published legislative instrument.
 - (b) In contrast to the Draft Data Standard, section 5 of the *Director Identification Number Laws (Application) Data Standard 2022* (Cth) adopted by the Commissioner of Taxation on 22 February 2022 clearly sets out all of the information that the Registrar may require and collect.
8. Paragraph 6(3)(c)—We recommend replacing “date the registrable interest was acquired” with “date the registrable circumstance came to exist or ceased to exist (as applicable)”.
9. Paragraph 6(3)(f)—Reference to “interest in Australian land” should exclude mining or production tenements as they are dealt with separately in paragraph 6(3)(h).
10. Subparagraph 6(3)(f)(viii)—For a data standard the reference to “any relevant lease information” should be replaced with a precise description so that investors know exactly what lease information to provide.
11. Subparagraphs 6(3)(g)(iii) and 6(3)(h)(v)—Reference to “any relevant lease information” does not seem appropriate for a registrable water interest or tenement.

12. Subparagraph 6(3)(h)(ii)—Reference to “ANZSIC code” does not seem appropriate for a tenement.
13. Subparagraph 6(3)(i)(iv)—“Business structure” and “industry sector” should be particularised.
14. Subparagraph 6(3)(i)(vii)—Replace “ANZSIC code” with “ANZSIC code of the Australian business”.
15. Paragraph 6(3)(j)—For the reason discussed in paragraph 4(b) above, the reference to “any other matter the Registrar considers to be relevant” should be removed and (if desired) replaced by a specific list of additional information and documents. After the Data Standard is adopted, the Registrar will have the power to specify additional information and documents by adopting and promulgating an amending legislative instrument.
16. Subsection 6(3)—We recommend adding “FIRB reference number (if applicable)” in an additional paragraph in subsection 6(3).
17. Subsection 8(2)—The requirement that “a person” must inform the Registrar of errors etc is broader than contemplated in the explanatory statement, which refers only to “a person who has given a register notice”. Consistent with the explanatory statement, we recommend the same requirement as that set out in subsection 8(3) of the *Director Identification Number Laws (Application) Data Standard 2022* (Cth).
18. Section 10—This section should allow for an agent that may be submitting a register notice.

Conclusion and further contact

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

Yours faithfully



Philip Argy
Chairman
Business Law Section