

REGISTER OF FOREIGN OWNERSHIP OF WATER ENTITLEMENTS (WATER REGISTER)



“THE FIRM PROMOTES A PROFESSIONAL ATTITUDE AT ALL TIMES AND IS ABLE TO PROVIDE QUICK AND SENSIBLE ADVICE.”

Chambers Asia-Pacific 2017

MARCH 2017

SUMMARY

BACKGROUND

In December 2016, the Commonwealth Government passed the Register of Foreign Ownership of Agricultural Land Amendment (Water) Bill 2016 (Cth) (**Bill**) to amend the Register of Foreign Ownership of Water or Agricultural Land Act 2015 (Cth) (**Act**). The amendment established a Register of Foreign Ownership of Water Entitlements (**Water Register**) which requires foreign persons to notify and update their interests in water entitlements with the Australian Taxation Office (ATO).

According to the Bill’s explanatory memorandum, the purpose of the Water Register is to:

- + increase transparency on the levels of foreign ownership of certain Australian registrable water entitlements and contractual water rights;
- + inform the Government and the broader community about emerging investment trends; and
- + enhance the information available to the Government for future policy development.

In addition, increasing transparency about the levels of foreign ownership of registrable water entitlements and contractual water rights will complement the Agricultural Land Register to create a more comprehensive picture of the participation of foreign investors in Australia’s natural resources.

KEY ISSUES

1. How does the Water Register work?

Foreign persons will be required to register their interests in certain water entitlements and contractual water rights, and subsequently notify the ATO if there are any changes to their interests.

2. Who is affected by the Water Register?

2.1 The Water Register will affect:

- a. foreign persons; and
- b. persons entering into transactions with foreign persons involving certain water entitlements and contractual water rights.

2.2 A 'foreign person' is:¹

- a. an individual not ordinarily resident in Australia;
- b. a corporation in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest of at least 20%;
- c. a corporation in which 2 or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest of at least 40%;
- d. the trustee of a trust in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest of at least 20%;
- e. the trustee of a trust in which 2 or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest of at least 40%;
- f. a foreign government; or
- g. any other person, or any other person that meets the conditions, prescribed by the relevant regulations.

Section 18 of the Foreign Acquisitions and Takeovers Regulation 2015 (Cth) provides that a 'foreign person' also includes:

- h. general partners of limited partnership where:
 - an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds at least 20% in the limited partnership; or
 - 2 or more persons each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold aggregate interest of at least 40% in the limited partnership;
- i. foreign government investors who would not otherwise be foreign persons without the regulations providing for this.

3. What type of interests do I need to register?

Foreign persons will be required to register an interest in:²

- a. registrable water entitlements; and
- b. contractual water rights.

See below for interests that may be exempt from registration requirements.

3.1 Registrable water entitlements

A registrable water entitlement is any of the following rights that a foreign person holds (alone or jointly):³

- a. a right against an irrigation infrastructure operator to receive water that relates to a water resource in Australia; and
- b. a right (including an Australian water access entitlement) conferred by or under a law of a State or Territory to do either or both of the following:
 - i. to hold water from a water resource in Australia;
 - ii. to take water from a water resource in Australia.

However, a registrable water entitlement is not:⁴

- a. stock and domestic rights; or
- b. riparian rights; or
- c. water allocations; or
- d. a right of a kind specified in the rules*.

¹ Register of Foreign Ownership of Water or Agricultural Land Act 2015 (Cth), s 4; Foreign Acquisitions and Takeovers Act 1975 (Cth), s 4.

² Ibid s 30H(1).

³ Ibid s 5A(1).

⁴ Ibid s 5A(2).

3.2 Contractual water rights

A contractual water right is a contractual right that the person holds (alone or jointly) to all or part of another person's.⁵

- a. registrable water entitlement; or
- b. water allocation; or
- c. right of a kind specified in the rules*.

*Note: the Government has released for consultation draft rules to support the Act, namely, the Register of Foreign Ownership of Water or Agricultural Land Rules 2017.⁶

4. When do I need to register my water interests?

There will be two phases during which registration of a water interest must occur.

4.1 Stocktake period

The period between 1 July 2017 and 30 November 2017 is a stocktake period that will provide a baseline against which changing levels of ownership can be assessed.

During the stocktake period a foreign person must notify the ATO of existing registrable water entitlements and contractual water rights the foreign person will hold at the end of 30 November 2017.

If a foreign person starts to hold a registrable water entitlement or contractual water right shortly before 1 December 2017, then they must notify the ATO by the later of 30 November 2017 and 30 days after the foreign person started to hold the entitlement or right.⁷

4.2 Stocktake period

From 1 December 2017, foreign persons with holdings in registrable water entitlements and contractual water rights will be required to notify the ATO on an annual basis and within 30 days of the end of the financial year of changes to their entitlements or rights that occurred during the financial year.

Foreign persons must notify the ATO of their entitlements or rights by submitting a water registration form. The form is currently in draft form and will be available on the ATO website (ato.gov.au) from 1 July 2017.⁸

5. Which events will trigger notification to the ATO?

Foreign persons must notify the ATO when any of the following events occur:⁹

- a foreign person starts or ceases to hold a registrable water entitlement or contractual water right;
- a foreign person becomes or ceases to be a foreign person while holding a registrable water entitlement or contractual water right;
- a foreign person holds a registrable water entitlement or contractual water right that experiences a change to the volume of water or the share of a water resource to which the registrable water entitlement or contractual water right applies.

6. Exemptions from the requirement to give notice

The Act provides that rules (which are currently in draft form) may exempt:

- certain water rights from the definition of 'registrable water entitlement'; or
- certain foreign persons.¹⁰

Currently, the Government is seeking submissions from interested parties in respect of the draft rules and a draft water registration form, which outlines the proposed data fields for water registration. The closing date for submissions is Friday 3 March 2017.¹¹ Please contact us if you are interested in making a submission.

⁵ Ibid s 4

⁶ The Treasury, Australian Government, Register of Foreign Ownership of Water or Agricultural Land Rules 2017, 25 January 2017 (<http://treasury.gov.au/ConsultationsandReviews/Consultations/2017/Register-of-Foreign-Ownership-of-Water-or-Agricultural-Land-Rules-2017>).

⁷ Register of Foreign Ownership of Water or Agricultural Land Act 2015 (Cth), ss 30H-30J. See also, The Treasury, Australian Government, Guidance Note: Foreign Ownership of Water Entitlements Register (https://www.treasury.gov.au/~media/Treasury/Consultations%20and%20Reviews/Consultations/2016/Register%20of%20foreign%20ownership%20of%20water%20entitlements/Key%20Documents/PDF/EM_Water_entitlements_register.ashx).

⁸ Register of Foreign Ownership of Water or Agricultural Land Act 2015 (Cth), s 30K. See also, The Treasury, Australian Government, Register of Foreign Ownership of Water or Agricultural Land Rules 2017, 25 January 2017 (<http://treasury.gov.au/ConsultationsandReviews/Consultations/2017/Register-of-Foreign-Ownership-of-Water-or-Agricultural-Land-Rules-2017>).

⁹ Ibid ss 30L-30Q.

¹⁰ Register of Foreign Ownership of Water or Agricultural Land Rules 2017 (exposure draft).

¹¹ The Treasury, Australian Government, Register of Foreign Ownership of Water or Agricultural Land Rules 2017, 25 January 2017 (<http://treasury.gov.au/ConsultationsandReviews/Consultations/2017/Register-of-Foreign-Ownership-of-Water-or-Agricultural-Land-Rules-2017>).

7. What happens if I don't comply with registration and notification obligations?

Under the *Income Tax Assessment Act 1936* (Cth) and the *Taxation Administration Act 1953* (Cth) the Commissioner of Taxation has the power to assess a foreign person's compliance with registration obligations by compelling information or documents.

Also, under the *Taxation Administration Act 1953* (Cth), non-compliance with registration and notification requirements attracts a penalty, with 1 penalty unit for each 28 days that registration is delayed.¹² One penalty unit is \$180,¹³ although this amount can increase depending on the foreign person's income.¹⁴

8. Will I need to get approval from the Foreign Investment Review Board (FIRB) before purchasing an interest in water?

There is no requirement for a foreign person to obtain FIRB approval before purchasing an interest in water, and there are currently no proposals for legislative change in this respect.

¹² Register of Foreign Ownership of Water or Agricultural Land Act 2015 (Cth), ss 19, 20, 30H, 30K; Taxation Administration Act 1953 (Cth), sch 1, s 286-C.

¹³ Crimes Act 1914 (Cth) s 4AA.

¹⁴ Taxation Administration Act 1953 (Cth), sch 1, s 286-80.

RECOMMENDATIONS

We recommend foreign persons and those entering into a transaction with foreign persons become familiar with the new registration requirements of water interests, which will commence on 1 July 2017, and the relevant timeframes in which the ATO will need to be notified. We also note the ongoing annual reporting obligations, which will be subject to certain exceptions once the draft Register of Foreign Ownership of Water or Agricultural Land Rules 2017 come into effect.

Please do not hesitate to contact us if you would like further information about the Water Register and registration requirements.

FOR FURTHER INFORMATION, PLEASE CONTACT



AMANDA HEMPEL

Partner
Real Estate and Projects

T +61 2 9263 4017
E ahempel@gtlaw.com.au



DILARA REZNIKAS

Graduate

T +61 2 9263 4357
E dreznikas@gtlaw.com.au

SYDNEY

Level 35 International Towers Sydney
200 Barangaroo Avenue
Barangaroo NSW 2000
Australia

T +61 2 9263 4000
F +61 2 9263 4111

MELBOURNE

Level 22
101 Collins Street
Melbourne VIC 3000
Australia

T +61 3 8656 3300
F +61 3 8656 3400

PERTH

1202 Hay Street
West Perth WA 6005
Australia

T +61 8 9413 8400
F +61 8 9413 8444