

# Major reforms to the Foreign Investment Review Framework

*Submission on the Exposure Draft of the  
Foreign Investment Reform (Protecting  
Australia's National Security) Bill 2020:  
Register of Foreign Ownership*

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**Submission on the Exposure Draft of the Foreign Investment Reform (Protecting Australia's National Security) Bill 2020: Register of Foreign Ownership**

Thank you for the opportunity to comment on the *Foreign Investment Reform (Protecting Australia's National Security) Bill 2020* (the **Bill**) as part of the consultation process relating to the Government's proposed major reforms to Australia's foreign investment review framework.

As part of these reforms, the Government is considering a new Register of Foreign Ownership (the **Register**) that will merge and expand the existing agricultural land, water and residential land registers, in order to increase the Government's visibility of foreign investments made in Australia.

Under the *Foreign Investment Reform (Protecting Australia's National Security) Bill 2020: Register of Foreign Ownership* (the **Register Bill**), foreign persons will be required to notify the Registrar of the Register of the occurrence of certain prescribed events, which among others include acquisitions or disposals of a "registrable land or water interest".

Our comments and submissions relate to the practical implications of the Register Bill, in particular the use and meaning of the terms "registrable land" and "registrable land or water interest" (defined in the Register Bill) which arguably has broader scope and application than the concept of "interest in Australian land" in section 12 of the current *Foreign Acquisitions and Takeovers Act 1975* (Cth) (the **FATA**).

Our detailed comments and submissions are set out in the Schedule.

We would welcome the opportunity to discuss our views. Please contact me on (02) 8266 6401.

Yours sincerely



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## Schedule: PwC's comments and submissions to the specific proposals raised in the Register Bill

### 1. "Australian Land" and "Interest in Australian Land" under the FATA

Under section 4 of the FATA: "Australian Land" means agricultural land, commercial land, residential land or a mining or production tenement.

Further, section 12 of the FATA sets out the meaning of "interest in Australian land" which, among other interests, includes:

- legal or equitable interests in Australian land;
- residential or commercial leasing arrangements by foreign persons giving rights to occupy Australian land for a term (including any extension or renewal) that is reasonably likely to exceed five years (section 15(c) of the FATA), but excludes such residential or commercial leasing arrangements of or less than five years;
- profits or income sharing arrangements by foreign persons in respect of the use of, or dealings in, Australian land if the term of the agreement (including any extension or renewal) is reasonably likely, at the time the interest in the agreement is acquired, to exceed 5 years, but excludes such arrangements of or less than five years.

If a foreign person acquires an "interest in Australian land" above the applicable screening threshold at the time, such an action constitutes both a notifiable action and a significant action under the FATA.

### 2. "Registrable Land" and "Registrable Land or Water Interest" under the Register Bill

Under item 2 of the Register Bill, "registrable land" and "registrable land or water interest" have the following proposed meanings (emphasis added):

**registrable land** means:

- (a) **land in Australia** or the seabed of the offshore area; or
- (b) a mining or production tenement; or
- (c) an exploration tenement.

**registrable land or water interest** means:

- (a) **an interest (other than an equitable interest) in registrable land;** or
- (b) an interest (other than an equitable interest) in an exploration tenement; or
- (c) a registrable water entitlement (within the meaning of the *Register of Foreign Ownership of Water or Agricultural Land Act 2015*); or
- (d) a contractual water right (within the meaning of the Register of Foreign Ownership of Water or Agricultural Land Act 2015) under a contract whose term (including any extension or renewal) after the person starts to hold the right is reasonably likely to exceed 5 years.

The occurrence of the following events, among others, require notification to the Registrar under the Register Bill:

- a foreign person starts to hold or ceases to hold a registrable land or water interest (proposed sections 130J and 130K)
- a person becomes a foreign person (or vice versa) while holding registrable land or water interest (proposed sections 130L and 130M)

- a registrable land or water interest changes to another kind (e.g. agricultural land becomes residential land) (proposed section 130N).

Further, there seems to be no threshold that applies to the requirement of foreign persons to notify the Registrar in relation to the occurrence of the above events.

### 3. Implications of the Register Bill

Based on our analysis, it seems that the meaning of “registrable land” and “registrable land or water interest” proposed under the Register Bill is broader in scope and application than the concept of “interest in Australian land” in the current FATA. Therefore, certain acquisitions by foreign persons of a “registrable land or water interest” may be required to be notified to the Registrar under the Registered Bill even if such acquisitions may not be notifiable actions nor significant actions under FATA.

We set out the following examples for consideration (all on the assumption the \$0 Covid-19 threshold was not applicable).

- First example - commercial lease less than five years

A small private foreign controlled proprietary company (being a foreign person under FATA) enters into a commercial lease for a small office with an annual rental of \$60,000. The term of the commercial lease is two years with no options and the lease is unlikely to be extended.

This action is not a notifiable action and not a significant action, on the basis no “interest in Australian land” was acquired by the foreign person tenant. However, under the Register Bill, the two year commercial lease arguably constitutes a “registrable land or water interest” (being an **interest** in land in Australia) and the foreign person would be required to notify the Registrar at the time of the execution of the lease and again at the same of the cessation of the lease.

- Second example - a profit sharing arrangement for a term of more than five years

A foreign person (as lender) enters into a loan agreement with a large Australian property development group (as borrower). The loan amount funds a wide-scale residential property development and has a term of seven years. In addition to interest, the foreign person lender is entitled to a share of the profit derived from the development.

The execution of this loan agreement would be a notifiable action and a significant action under the FATA as it is deemed to be an “interest in Australian land” (specifically, residential land) under section 12(e) of the FATA. However, because the FATA and the Register Bill uses different concepts of “interest in Australian land” and “registrable land or water interest”, it is unclear whether the execution of the loan agreement in this example by the foreign person requires notification to the Registrar (i.e. whether or not a profit sharing arrangement in respect of residential land for a term of more than five years constitutes an **interest** in land in Australia).

- Third example - short-term residential lease by foreign person

A foreign exchange student (who is a foreign person and not entitled to the benefit of s38 of FATA) enters into a three month residential lease for an apartment in the Melbourne CBD. The student will return home at the end of the exchange program and the lease will not be renewed.

This action is not a notifiable action and not a significant action, on the basis no “interest in Australian land” was acquired by the foreign exchange student. However, under the Register Bill, the short-term residential lease arguably constitutes a “registrable land or water interest” (being an interest in land in Australia) and the foreign student would be required to notify the Registrar at the time of the execution of the lease and again at the same of the cessation of the lease.

- Fourth example - acquisition of industrial strata unit

A private foreign company registered to do business in Australia acquires a 200 square metre industrial strata unit to store goods. The purchase price is \$1m.

The action is not a notifiable action and not a significant action as it is below the (non-Covid) applicable commercial property threshold of \$275m for developed commercial land, however under the Register Bill the foreign company would be required to notify the Registrar of the acquisition as there is no monetary threshold applicable for registration purposes.

#### *4. Comments and submissions*

We request clarification and commentary from the Treasury on whether the use of “registrable land or water interest” in the Register Bill is intended, such that the requirement for foreign persons to notify the Registrar in respect of acquisition of land interests would include a broader set of transactions than those that would require notification to the Foreign Investment Review Board (as the result of being notifiable and significant actions).

We submit that if it is the intention for the concepts of “interest in Australian land” under FATA and “registrable land or water interest” in the Register Bill to have different meanings and apply in different situations as noted above, there is a clear statement made to this effect in the final wording (possibly in notes to the relevant sections) of the Register Bill.