

The new agricultural land register – What foreign investors need to know

As part of the wide-reaching package of reforms to Australia's inbound foreign investment rules scheduled to come into force this year¹, on 11 November 2015, the Australian Parliament passed legislation imposing requirements on all foreign persons with certain interests in agricultural land to register those interests on the Register of Foreign Ownership of Agricultural Land (the **Register**).

This briefing provides an overview of the key reporting obligations that will be imposed on all foreign persons holding certain interests in agricultural land in Australia. The legislation is expected to come into effect on **1 December 2015**.

Overview of the Register

The *Register of Foreign Ownership of Agricultural Land Act 2015* (Cth) (the **Act**) will establish the Register, to be administered by the Australian Taxation Office (**ATO**)². Despite the recent passage of legislation, the Register was established online in July 2015 and, in line with Australia's foreign investment policy, has been open to accept registrations since that time. The purpose of the Register is to promote transparency and scrutiny of foreign interests in Australian agricultural land and allow a stock-take of existing ownership to provide a clear picture of foreign investment in Australia's agriculture sector. Submissions to the Register can be made online through the ATO website³.

The Register will be comprised of two parts:

- the "basic part", which will contain the full records of all foreign persons who have reported interests in agricultural land; and
- the "statistical" part, containing anonymised statistics pertaining to the levels of foreign ownership of agricultural land which are derived from the basic part.

The basic part of the Register will not be available to the public. The Commissioner of Taxation (**Commissioner**), who will carry out administrative functions under the Act, will be required under the Act to make publicly available statistical information in the Register. The first release of statistical information is

Key issues

- On and from **1 December 2015** there will be a legal obligation on foreign persons to register their interests in agricultural land on a register maintained by the ATO.
- Foreign investors holding agricultural land need to take stock of their holdings to ensure they are in a position to comply with the registration requirements.
- Foreign investors must ensure appropriate systems are in place to enable ongoing compliance with the new law.

expected to be released in the first half of 2016.

Who is required to report their interests?

All foreign persons will be required as a matter of law to register all relevant interests in Australian agricultural land which they held on or after 1 July 2015. The Act is intended to have a

retrospective effect and capture all interests held since that date.

Broadly speaking, **foreign persons** include:

- individuals not ordinarily residing in Australia;
- corporations and trusts in which a single foreigner (including a foreign government or its related entity) holds a substantial interest (20%);
- corporations and trusts in which two or more foreigners hold an aggregate substantial interest (40%); and
- foreign governments and their related entities.

Generally, it is the holder of the direct legal interest in the agricultural land who is required to register the interest. Where multiple foreign persons hold interests, each is required to report their interest, although an agent may give notice on a person's behalf.

What is agricultural land?

Agricultural land is land in Australia that *is, or could reasonably be*, used for a primary production business. It is therefore possible for land to be classified as agricultural land although no agricultural activities are presently taking place on it.⁴

The definition of **primary production business** is derived from the *Income Tax Assessment Act 1997* (Cth) and currently includes:

- cultivating or propagating plants;
- maintaining animals for the purpose of selling them or their bodily produce;
- conducting operations relating directly to taking or catching fish and certain other marine animals;

- planting or tending trees in a plantation or forest that are intended to be felled; or
- felling trees in a plantation or forest,

but does not currently include a right to occupy areas of waterways, estuaries and bays for purposes such as fish farming or oyster beds.

Agricultural land will include land partially used for a primary production business as well as land where only part of the land could reasonably be used for a primary production business (for instance where part of the land is under a conservation order).

Whether land could be used for a primary production business may depend on a number of factors and circumstances, including the relevant zoning of the land, the past use of the land, land characteristics and lease or licence conditions or limitations. The Government has published guidance on the factors which would usually be taken into account.⁵

Despite land falling within the definition of agricultural land, it is possible that certain types of land will be exempted by regulation.

What interests in agricultural land must be reported?

There are currently only two types of interests in agricultural land which must be reported, namely:

- freehold interests; and
- rights to occupy agricultural land under a lease (including a sublease) or licence where the term of the lease or licence is reasonably likely to exceed five years.

Interests such as easements are not currently reportable interests for the purpose of the Register.

Large agricultural properties often have multiple titles. Under the Act, each title over which the freehold or leasehold interest is held constitutes a separate reporting event. The online registration form provided by the ATO is relatively simple and does not currently cater for property with multiple titles. For foreign persons looking to register against multiple titles, the ATO has indicated a willingness to accept registration by means other than the online form (such as by the provision to the ATO of an electronic file containing the relevant information).

What events must be reported?

The Act creates two distinct reporting obligations. First, those foreign persons with interests in agricultural land held on 1 July 2015 are required to register those interests by 31 December 2015. Second, the Act refers to three types of events that give rise to additional reporting obligations if they occur after 1 July 2015.

- **Acquisition or disposal of an interest:** If a foreign person *starts* to hold a relevant interest in agricultural land, or if a foreign person *ceases* to hold such an interest, the foreign person must notify the acquisition or disposal.
- **Becoming or ceasing to be a foreign person:** If a person or entity holds a relevant interest in agricultural land and then becomes a foreign person, they must report their interest. Similarly, if a foreign person ceases to be a foreign person, they must report this at the time

of the change they held interests in agricultural land.

- **Land becoming or ceasing to be agricultural land:** If a foreign person holds an interest in land which was originally not agricultural land, but subsequently becomes agricultural land (such as remediated land formerly used for mining operations), then the foreign person must report the change in status of that land. Similarly, if a foreign person holds agricultural land and that land then ceases to have the necessary characteristics to be agricultural land, the foreign person must notify that change.

The reporting requirements may therefore be quite onerous, especially for foreign persons with significant agricultural landholdings, the use and classification of which may change over time. Additionally, entities whose securities are liquid (such as listed entities) and in which foreign investment levels may regularly fluctuate above and below the relevant thresholds may need to maintain internal records of agricultural landholdings to ensure that, in the event they change status to be a foreign person, they are able to comply with their reporting requirements within the time frames imposed by the Act.

When must the ATO be notified?

All relevant interests in agricultural land held by foreign persons on 1 July 2015 must be reported before 31 December 2015. Any reportable event related occurring after 1 July 2015 must be reported before the later of 31 December 2015 or generally within 30 days of the relevant event occurring.

What information needs to be provided?

The online form to be completed to notify interests on the Register requires information to be provided regarding:

- the foreign person's details (including the reason the entity is considered a foreign person);
- the Foreign Investment Review Board (**FIRB**) approval number (if obtained in connection with the acquisition);
- details of the land (including land location, size and usage details, land title information, the percentage of the interest held in the land by the registrant and the percentage of the land that is used for different agricultural activities, including crops, livestock, intensive horticulture and forestry);
- reasons for registration (whether the transfer of an interest, or a change in foreign person status or change in the nature of the land).

The Act contains provisions that prohibit the statistical part of the Register revealing information that could be used to identify a person.

Fees

There is currently no fee payable for making registrations on the Register.

However, as part of the broader package of reforms the Government has passed legislation to impose substantial filing fees for all foreign investment notifications on and from **1 December 2015** (and accordingly, parties may be incentivised to file prior to that date).⁶ In the event that an acquisition of agricultural land is notifiable under the new foreign investment regime, a filing fee will be

payable in relation to making the notification, although no additional fee would be payable on registration of the interest on the Register.⁷

Administration of the Act

As the Commissioner has general administration of the Act, the Act is considered a taxation law for Australian law purposes. The effect of the Act being a taxation law is that existing provisions in the *Tax Administration Act 1953* (Cth) will apply for the purposes of the Act. This includes, among other things:

- powers to obtain information and evidence (including information for the purpose of determining whether there is an obligation to report interests in agricultural land), powers to require a person to attend to give evidence and to access property;
- administrative penalties; and
- offence provisions (such as for failure to comply with the reporting requirements and failure to provide documents requested by the Commissioner).

The ATO has indicated that it may use data-matching and other information available to the ATO and other government departments to identify foreign persons holding agricultural land who have not reported their interests.

What investors need to do now

The new laws mean that foreign investors holding freehold and occupational rights over agricultural land need to now take stock of their holdings as at and from 1 July 2015 to ensure they are in a position to comply with the impending registration requirements.

Those investors with changeable levels of foreign investment or who hold multiple agricultural landholdings will need to ensure appropriate internal systems are in place to enable them to monitor and report changes on an ongoing basis as required by the Act.

Those investors contemplating an acquisition (including in the agriculture sector) may be incentivised to lodge an application for approval with FIRB prior to the introduction of application fees on 1 December 2015.

Further information

Further information on the Register and the broader package of Australian inbound foreign investment reforms can be accessed through the ATO, FIRB and Treasury websites.

reform package legislation (which definition required land to be used wholly and exclusively for a primary production purpose). The change of terminology means that investors may need to revisit the classification accorded to the land in which they have interests. For instance, it may be that land classified under pre-reform package legislation as vacant commercial land could be reclassified agricultural land post 1 December 2015.

⁵ See the Explanatory Memorandum accompanying the *Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015*, the *Foreign Acquisitions and Takeovers Fees Imposition Bill 2015* and the *Register of Foreign Ownership of Agricultural Land Bill 2015* accessible at http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5519.

⁶ At the time of writing, the *Foreign Acquisitions and Takeovers Fees Imposition Bill 2015* (which imposes the new filing fees for foreign investment notifications) had been passed by both Houses of Parliament, but is required to be presented to the Governor-General for assent before it takes effect. This briefing note assumes the bill is enacted in its present form.

⁷ For further information regarding the broader package of reforms and filing fees affecting foreign investment in the agriculture sector, see FIRB guidance at: http://firb.gov.au/content/strengthening_FF/downloads/Agriculture-FIRB-Fact-Sheet.pdf.

¹ This briefing note focuses only on the registration requirements relating to agricultural land and does not address the broader package of legislative reforms. For information on the other changes please see:

http://www.cliffordchance.com/briefings/2015/11/imminent_changestoaustralianforeigninvestmentmen.html and www.firb.com.au.

² At the time of writing, the *Register of Foreign Ownership of Agricultural Land Bill 2015* had been passed by both Houses of Parliament, but is required to be presented to the Governor-General for assent before it takes effect. This briefing note assumes the bill is enacted in its present form.

³ Submissions to the Register can be made at: <https://www.ato.gov.au/general/Foreign-investment-in-Australia/agricultural-land-register/>.

⁴ The definition is accordingly broader than the concept of rural land used in the pre-

Contacts

Sydney

Mark Pistilli

Partner

T: +61 2 8922 8001

E: mark.pistilli@cliffordchance.com

Richard Graham

Partner

T: +61 2 8922 8017

E: richard.graham@cliffordchance.com

Lance Sacks

Partner

T: +61 2 8922 8005

E: lance.sacks@cliffordchance.com

Danny Simmons

Partner

T: +61 2 8922 8007

E: danny.simmons@cliffordchance.com

Joni Henry

Counsel

T: +61 2 8922 8090

E: joni.henry@cliffordchance.com

Amelia Horvath

Counsel

T: +61 2 8922 8023

E: amelia.horvath@cliffordchance.com

Perth

Paul Vinci

Partner

T: +61 8 9262 5504

E: paul.vinci@cliffordchance.com

Jon Carson

Partner

T: +61 8 9262 5510

E: jon.carson@cliffordchance.com

Justin Harris

Partner

T: +61 8 9262 5503

E: justin.harris@cliffordchance.com

Paul Lingard

Partner

T: +61 8 9262 5575

E: paul.lingard@cliffordchance.com

Tracey Renshaw

Partner

T: +61 8 9262 5505

E: tracey.renshaw@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

SYD#7831807

www.cliffordchance.com

Clifford Chance, Level 16, No. 1 O'Connell Street,
Sydney, NSW 2000, Australia

© Clifford Chance 2015

Liability limited by a scheme approved under professional standards legislation

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Jakarta* ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

*Linda Widyati & Partners in association with Clifford Chance.