

# Guidance Note: Foreign Ownership of Water Entitlements Register

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From 1 July 2017, foreign persons will be required to register their legal interests in registrable water entitlements and contractual water rights with the Australian Taxation Office.

A stocktake period will be conducted between 1 July 2017 and 1 December 2017. A foreign person who holds a 'registrable water entitlement' or a 'contractual water right' on 1 July 2017, will have until 1 December 2017 to register that entitlement or right with the ATO.

A person who holds a 'registrable water entitlement' or a 'contractual water right' on 1 July 2017 but disposes of it before 1 December 2017 will not need to register that interest.

## Who needs to register?

Foreign persons as defined in the *Foreign Acquisitions and Takeovers Act 1975* and the *Foreign Acquisitions and Takeovers Regulation 2015* are required to register their interests in 'registrable water entitlements' or 'contractual water rights'. A foreign person is generally:

- an individual that is not ordinarily resident in Australia; or
- a foreign government or foreign government investor; or
- a corporation, trustee of a trust or general partner of a limited partnership where an individual not ordinarily resident in Australia, foreign corporation or foreign government holds a substantial interest of at least 20 per cent; or
- a corporation, trustee of a trust or general partner of a limited partnership in which two or more foreign persons hold an aggregate substantial interest of at least 40 per cent.

### Example 1

Ms Smith is an Australian citizen. She resides in the United Kingdom which has been her permanent home for the last 15 years. As Ms Smith is not ordinarily resident in Australia, she meets the definition of foreign person.

### Example 2

The Cattle Company Pty Ltd is incorporated in Australia. It owns farmland in Australia and runs cattle. A foreign company owns 24 per cent of the shares in the Cattle Company Pty Ltd. The Cattle Company Pty Ltd meets the definition of foreign person.

### Example 3

The Orchard Company acts as trustee for the Orchard Unit Trust. 30 per cent of the units in the Orchard Unit Trust are owned by a foreign person. The Orchard Company acting as trustee for the Orchard Trust is a foreign person.

### Example 4

The Orange Company is general partner of the Orange Limited Partnership. The Limited Partnership is 40 per cent owned by foreign companies from the United States, the United Kingdom and Japan. The Orange Company as general partner of the Orange Limited Partnership is a foreign person.

### Example 5

The Department of Agricultural Acquisitions is part of a body politic of a foreign country. The Department is a foreign person.

Further guidance on who is a foreign person can be found at the Foreign Investment Review Board website at: <http://firb.gov.au/resources/guidance/gn31/>

## What types of water entitlements need to be registered?

Foreign persons will need to register their interests in a 'registrable water entitlement' or a 'contractual water right'.

A 'registrable water entitlement' will be defined as:

- an irrigation right – as defined in the *Water Act 2007*;
- a right (including an Australian water access entitlement<sup>1</sup>) conferred by or under a law of a State or Territory to do either or both of the following:
  - to hold water from a water resource in Australia;
  - to take water from a water resource in Australia.

The following types of water rights will be **excluded** from the definition of a 'registrable water entitlement':

- stock and domestic rights,
- annual water allocations, and
- riparian rights.

A 'contractual water right' of a person will be defined as a contractual right (including a deed) that the person holds (alone or jointly) to another person's 'registrable water entitlement'.

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<sup>1</sup> An Australian water access entitlement means a perpetual or ongoing entitlement, by or under a law of a State or Territory, to exclusive access to a share of the water resources of an area in the State or Territory.

### **Example 6**

Amy is a foreign person and operates a zucchini farm. Amy holds a water access entitlement issued by the state government that enables her to take water from the river running through her farm to use on her zucchini crops. Amy is required to register her water access entitlement.

Bob and Jenny are foreign persons that own the neighbouring property. The river also runs through their property and they pump water from the river for domestic purposes. As Bob and Jenny have riparian rights to use the water from the river they do not need to register their interests.

### **Example 7**

Australian Ore Corporation is a foreign person operating outside of a water resource plan area. Australian Ore Corporation holds a license issued by the state government to enable it to extract water as a by-product of its operations. The license is considered to be a water access entitlement for the purposes of the register and is therefore required to be registered by the Australian Ore Corporation.

As part of its operations, Australian Ore Corporation treats some of the water it extracts and supplies it to industrial and agricultural users in the area. One such user is Agricultural Company, a foreign-owned agribusiness, that has a 10 year contract with Australian Ore Corporation for part of its water supply. As Agricultural Company is a foreign person and has a contractual water right for more than five years, it is also required to register its interest.

### **Example 8**

Amethyst Company has a water access right which enables the company to take a specified amount of water from a water resource that runs through their property. Amethyst Company is not a foreign person and is therefore not required to register its interests in the water access right.

Amethyst Company decides to enter into a lease with Garnet Company which is also a foreign person, so that Garnet Company leases the water access right for 10 years. As Garnet Company is a foreign person and has a contractual water right of more than five years, Garnet Company is also required to register their interest in the water right.

## **What needs to be registered?**

There are a number of events which trigger the requirement to register. These are when a foreign person:

- starts to hold or ceases to hold a 'registrable water entitlement' or 'contractual water right' where the remaining term is reasonably likely to exceed 5 years;
- becomes or ceases to be a 'foreign person,' while holding a 'registrable water entitlement' or 'contractual water right';
- holds a right that starts or ceases to meet the definition of a 'registrable water entitlement' or 'contractual water right'; or
- holds an interest in a 'registrable water entitlement' or 'contractual water right' where there is a change to the volume of the water referred to in the 'registrable water entitlement' or 'contractual water right'.

## How will the Register apply to Irrigation Infrastructure Operators?

An Irrigation Infrastructure Operator (IIO) will only be required to register where:

- the IIO meets the definition of 'foreign person'; and
- the IIO holds registrable water entitlements (or portions of registrable water entitlements) that are not subject to irrigation rights.

A person holding an irrigation right with an IIO would be required to register this interest if the person holding the irrigation right meets the definition of a foreign person.

### **Example 9**

Sunny Valley is an IIO which distributes water in the Sunny Valley region. Sunny Valley's member irrigators are also company shareholders. Four foreign companies each hold 10 per cent in Sunny Valley which makes Sunny Valley a foreign person.

Sunny Valley holds 100 registrable water entitlements. 98 registrable water entitlements are held for its members, who hold irrigation rights with Sunny Valley, and the remaining two registrable water entitlements are held by Sunny Valley for transmission losses and investment purposes.

Sunny Valley is required to register its interests in the two water entitlements that are not subject to irrigation rights.

Green Valley Company is an irrigator who holds irrigation rights against five of the water access entitlements in the Sunny Valley IIO. Green Valley Company is a foreign person as a foreign government holds 20% of the shares in the company. Green Valley Company is required to register its irrigation rights it has against the five water entitlements with Sunny Valley IIO.

### **Example 10**

Irrigation Company is an IIO that manages irrigation infrastructure, and holds two registrable water entitlements. Irrigation Company is 100 per cent owned by Australian citizens. As Irrigation Company is not a foreign person, it is not required to register its interests in its two registrable water entitlements.

Irrigation Company also acts as trustee for Water Trust A and Water Trust B.

Water Trust A consists of 100 units of which 40 per cent are held by individuals not ordinarily resident in Australia. When the Irrigation Company is acting as trustee for Water Trust A, the Irrigation Company is considered to be a foreign person.

Water Trust A holds two registrable water entitlements, one that is subject to irrigation rights and the other which it holds in its own right.

Irrigation Company acting as trustee for Water Trust A is required to register its interest in Trust A's registrable water entitlement that is not subject to irrigation rights.

Water Trust B has 100 units of which 15 per cent is owned by a foreign company and the remaining units are held by Australian citizens. When the Irrigation Company is acting as trustee for Water Trust B, it is not considered to be a foreign person.

Water Trust B holds two registrable water entitlements, one that is subject to irrigation rights and the other which it holds in its own right. As Irrigation Company is not a foreign person when acting as trustee for Trust B, neither of the rights are required to be registered by Irrigation Company.

Orchard Holdings Company holds an irrigation right with Water Trust B. As Orchard Holdings Company is 100 per cent foreign owned, it is a foreign person and required to register its irrigation right it holds against Water Trust B's registrable water entitlement.

### **Rule-making powers**

There are a number of rule-making powers in the draft bill. The rule-making allows powers to:

- specify a right that is included in the definition of a 'contractual water right.'
- specify a right that is not included in the definition of a 'registrable water entitlement.'
  - It is envisaged this will specify concepts such as 'harvestable rights' which are not easily defined in the primary legislation.
- exempt from the requirements to give notice.
  - This will include an exemption for IIO's that are foreign persons from the requirement to notify when the 'registrable water entitlements' are subject to irrigation rights.
- add an event that is a change to a characteristic of a 'registrable water entitlement' or 'contractual water right'. This will create a new trigger event for notification requirements.
  - An example of a change to the characteristic of water entitlement could be changes to the security level of the entitlement.