

EXPLANATORY STATEMENT

Issued by authority of the Assistant Minister to the Treasurer

Register of Foreign Ownership of Water or Agricultural Land Act 2015

Register of Foreign Ownership of Water or Agricultural Land Rules 2017

Section 35 of the *Register of Foreign Ownership of Water or Agricultural Land Act 2015* (Act) provides that the Minister may, by legislative instrument, make rules prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

In relation to agricultural land, section 5 of the Act enables rules to be made that specify that land of a kind is not agricultural land for the purposes of the Act and section 30 enables rules to exempt persons from requirements to give notice.

In relation to water, section 5A of the Act enables rules to be made that specify a kind of right that is not a registrable water entitlement and section 30U enables rules to exempt persons from requirements to give notice. The definition of a contractual water right in section 4 also enables the definition to include a right of a kind specified in the rules.

The *Register of Foreign Ownership of Agricultural Land Act 2015* commenced on 1 December 2015 and established a Register of Foreign Ownership of Agricultural Land. This Act also included a sunset clause to provide that the Agricultural Land Register would lapse if legislation was not enacted by 1 December 2016 to establish a Register of Foreign Ownership of Water Entitlements. Amendments to the *Register of Foreign Ownership of Agricultural Land Act 2015* were assented to in December 2016, establishing a Register of Foreign Ownership of Water Entitlements from 1 July 2017.

The primary purpose of the *Register of Foreign Ownership of Water or Agricultural Land Rules 2017* (the Rules) is to specify that certain kinds of rights are not registrable water entitlements. The Rules also provide an exemption from Part 3B of the Act for persons holding registrable water entitlements or contractual water rights by way of enforcement of a security held solely for the purposes of a money lending agreement.

The Rules also repeal the *Register of Foreign Ownership of Agricultural Land Rule 2015* and include the provisions previously contained in that instrument.

The Rules also provide an exemption from the requirement to register on both the Register of Foreign Ownership of Water Entitlements and Register of Foreign Ownership of Agricultural Land for entities which have substantial foreign custodian holdings.

Further details of the Rules are set out in [Attachment A](#).

The Statement of Compatibility is set out in [Attachment B](#).

The Rules are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Department of the Treasury (Treasury) released an exposure draft of the Rules for public comment between 25 January 2017 and 3 March 2017. During this period

Treasury, the Department of Agriculture and Water Resources, and the Australian Taxation Office met with a number of stakeholders.

The measures in the Rules are covered by the Regulation Impact Statement (RIS) included in the explanatory memorandum to the Register of Foreign Ownership of Agricultural Land Amendment (Water) Bill 2016 and Chapter 15 to the Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015, the Foreign Acquisitions and Takeovers Fee Imposition Bill 2015, and the Register of Foreign Ownership of Agricultural Land Bill 2015.

The Rules commence on 1 July 2017.

Section 1 — Name

The title of the instrument is the *Register of Foreign Ownership of Water or Agricultural Land Rules 2017*.

Section 2 — Commencement

The instrument commences on 1 July 2017.

Section 3 — Authority

The instrument is made under the Act.

Section 4 — Definitions

This section defines the meaning of terms used in the instrument.

Section 5 — Land that is not agricultural land

Schedule 1 to the Rules repeals the *Register of Foreign Ownership of Agricultural Land Rule 2015*. Instead, the rules contained in that instrument are included, unchanged, in the Rules.

Section 5 of the Act enables rules to be made that specify that land of a kind is not agricultural land for the purposes of the Act. Those rules have effect despite the definition of agricultural land in section 4 of the Act. Section 4 of the Act defines ‘agricultural land’ to mean land in Australia that is used, or that could reasonably be used, for a primary production business.

The effect of section 5 of the Rule is that land is not agricultural land for the purposes of the Act if the land is not agricultural land for the purposes of the *Foreign Acquisitions and Takeovers Act 1975* because of the *Foreign Acquisitions and Takeovers Regulation 2015* (Regulation). Section 5 of the Rule mirrors section 5 in the repealed *Register of Foreign Ownership of Agricultural Land Rule 2015*.

Section 44 of the Regulation provides that land is not agricultural land at a particular time if it meets the conditions specified in that provision. Broadly, the kinds of land that are specified by section 44 of the Regulation to not be agricultural land are:

- land that is not being used wholly or predominantly at the particular time for a primary production business and the zoning for the land requires a government authority to approve the use of the land for any primary production business;
- land that is not being used wholly or predominantly at the particular time for a primary production business if an application has been made to a government authority for the land to be rezoned as land whose zoning does not allow it to be used for a primary production business or the application is for approval for a mining operation to be established on the land;
- land that is not being used wholly or predominantly at that time for a primary production business and is used wholly or predominantly for a mining operation, to locate infrastructure relation to a mining operation or to store waste from a mining operation;
- land that is not being used wholly or predominantly at the particular time for a primary production business if an approval (other than a mining or production tenement) of a government authority is in force that allows a mining operation to be established or operated on the land; infrastructure relating to a mining

operation to be located on the land; or waste from a mining operation to be stored on the land. If land is acquired solely for, or used wholly or predominantly to meet a condition of such an approval (such as land purchased to satisfy a condition requiring land to offset an activity or act) it is also not agricultural land;

- land that is not being used wholly or predominantly at the particular time for a primary production business and is used, either under a law of the Commonwealth, a State or a Territory or a legally binding agreement, wholly or predominantly for the purposes of the protection or conservation of the environment;
- land that is not being used wholly or predominantly at the particular time for a primary production business land that is wholly or predominantly used for the purposes of a wildlife sanctuary or for rehabilitating animals;
- land that is not being used wholly or predominantly at the particular time for a primary production business and is located within an area that has been approved by a government authority as an industrial estate;
- land that is not being used wholly or predominantly at that time for a primary production business and has been approved by a government authority for use as a tourist facility, an outdoor education establishment, or an outdoor recreation facility that is open to the public;
- land that is not being used wholly or predominantly at the particular time for a primary production business and is one hectare or less; or
- the only primary production businesses that the land is or could reasonably be used for is a primary production business relating to submerged plants and animals etc.

Consistent with amendments made to the Regulation by the *Foreign Acquisitions and Takeovers Amendment (Fee Streamlining and Other Measures) Regulations 2017*, the kinds of land that are specified by section 44 of the Regulation to not be agricultural land are also:

- land that is not being used wholly or predominantly at the particular time for a primary production business if an application has been made to a government authority for approval (including accreditation) for establishing or operating a wind or solar power station to be located on the land (whether on or beneath the surface);
- land that is not being used wholly or predominantly at the particular time for a primary production business and the land is used wholly or predominantly for a wind or solar power station located on the land (whether on or beneath the surface);
- land that is not being used wholly or predominantly at the particular time for a primary production business and an approval of a government authority (including accreditation) is in force allowing a wind or power station to be established or operated on the land (whether on or beneath the surface); or
- land that is not being used wholly or predominantly at the particular time for a primary production business which was acquired solely, or is used wholly or

predominantly, to meet a condition of an approval of a government authority, which relates to other land, to establish or operate a wind or solar power station.

Section 6 - Private harvestable rainwater rights

Paragraph 5A(2)(d) of the Act provides that rules may be made that specify that a right of a kind is not a registrable water entitlement for the purposes of the Act.

The effect of section 6 is that a registrable water entitlement does not include a right, or a part of a right, conferred by or under a law of a State or Territory, to capture, store or take rainfall for stock and domestic purposes.

Example 1

Laurent Dubois is a foreign person who has a 'harvestable water right' issued by the state of NSW which allows him to capture and store rain which falls on his property. Mr Dubois owns an intensive piggery business and is allowed to use the first 20 ML of this right for stock and domestic purposes. The remainder is used for commercial purposes in Mr Dubois piggery. The 20ML of his right which is for stock and domestic purposes will not meet the definition of a registrable water entitlement, and will not need to be registered with the ATO. To the extent that the remaining part of Mr Dubois right is not for stock and domestic purposes, it will meet the definition of registrable water entitlement and must be registered with the ATO.

Section 7 - Certain rights held by an irrigation infrastructure operator

Paragraph 5A(2)(d) of the Act provides that rules may be made that specify that a right of a kind is not a registrable water entitlement for the purposes of the Act.

The effect of section 7 is that a registrable water entitlement does not include a right to the extent that the right is used to meet an irrigation infrastructure operator's obligations to supply water to its customers.

Example 2

Dynamic Irrigation Cooperative (DIC) is an irrigation infrastructure operator operating in NSW which meets the definition of foreign person.

DIC has four water access entitlements which are used to meet its customers' irrigation rights and account for the water that is lost through transit.

The rights held by DIC are not registrable water entitlements.

Example 3

Sunny Valley is an irrigation infrastructure operator in South Australia which meets the definition of foreign person.

Sunny Valley holds three water access entitlements which give it access to water with a nominal volume of 2,500 ML.

Sunny Valley determines that 1,500 ML is subject to customers' irrigation rights and to cover irrigation system distribution losses. That part of Sunny Valley's water holdings will not meet the definition of registrable water entitlement.

The remaining 1,000 ML will meet the definition of registrable water entitlements.

Section 8 — Exemption for persons holding freehold interests or other rights because of enforcement of securities for moneylending agreements

Schedule 1 to the Rules repeals the *Register of Foreign Ownership of Agricultural Land Rule 2015*. Instead, the rules contained in that instrument are included, unchanged, in the Rules.

Section 30 of the Act enables rules to be made that provide that Part 3 of the Act, or specified provisions of Part 3 of the Act, do not apply in relation to either all persons or persons specified by the rules, either generally or in circumstances specified by the rules.

The effect of section 8 of the Rules is that Part 3 of the Act does not apply to a person if the person started to hold the person's freehold interest in agricultural land or their right to occupy agricultural land under a relevant lease or licence by way of enforcement of a security held solely for the purposes of a moneylending agreement and the person is either the person who entered the moneylending agreement or a subsidiary or holding entity of that person.

Section 8 of the Rules mirrors section 6 of the repealed *Register of Foreign Ownership of Agricultural Land Rule 2015*.

Section 4 of the Rules provides that 'moneylending agreement' has the same meaning as in the Regulation. Section 5 of the Regulation defines 'moneylending agreement' to mean an agreement entered in good faith, on ordinary commercial terms and in the ordinary course of carrying on a business of lending money or otherwise providing financial accommodation, except an agreement dealing with any matter unrelated to the carrying on of that business. In addition, the entity that holds or acquires the interest must be:

- the entity (lender) that provided the money or financial accommodation under the moneylending agreement;
- a subsidiary or holding entity of the lender;
- a person who is in a position to determine the investments or policy of the lender;
- the security trustee (that is, an entity that holds various security interests created on trust for banks and other lenders) who holds or acquires the interest on behalf of the lender; or
- a receiver, or a receiver and manager, appointed in relation to one of the above persons.

Section 9 - Exemption for persons holding water entitlements or contractual water rights because of enforcement of securities for moneylending agreements

Section 30U of the Act enables rules to be made that provide that Part 3B of the Act, or specified provisions of Part 3B of the Act, do not apply in relation to either all persons or persons specified by the rules, either generally or in circumstances specified by the rules.

The effect of section 9 of the Rules is that Part 3B of the Act does not apply to a person if the person started to hold the person's registrable water entitlement or contractual water right by way of enforcement of a security held solely for the purposes of a moneylending agreement and the person is either the person who entered the moneylending agreement or a subsidiary or holding entity of that person.

Section 4 of the Rules provides that 'moneylending agreement' has the same meaning as in the Regulation. Section 5 of the Regulation defines 'moneylending agreement' to mean an agreement entered in good faith, on ordinary commercial terms and in the ordinary course of carrying on a business of lending money or otherwise providing financial accommodation, except an agreement dealing with any matter unrelated to

the carrying on of that business. In addition, the entity that holds or acquires the interest must be:

- the entity (lender) that provided the money or financial accommodation under the moneylending agreement;
- a subsidiary or holding entity of the lender;
- a person who is in a position to determine the investments or policy of the lender;
- the security trustee (that is, an entity that holds various security interests created on trust for banks and other lenders) who holds or acquires the interest on behalf of the lender; or
- a receiver, or a receiver and manager, appointed in relation to one of the above persons.

Section 10 - Exemption for persons in which foreign custodian corporations have interests

Sections 30 and 30U of the Act enable rules to be made that provide that Part 3 and Part 3B respectively of the Act, or specified provisions of Part 3 or Part 3B of the Act, do not apply in relation to either all persons or persons specified by the rules, either generally or in circumstances specified by the rules.

The effect of section 10 is that a person will not be required to notify the Commissioner of Taxation of an event in Part 3 or Part 3B of the Act if the person meets the conditions in subsection 41A(2) of the Regulation.

The conditions in section 41A(2) of the Regulation will be met where the foreign person is a corporation, trustee of a trust or the general partner of a limited partnership who meets the definition of foreign person only as a result of the legal interests held by foreign custodian corporations in that corporation, trust or limited partnership in the course of the foreign custodian corporation providing custodian services to other persons. Paragraph 30(a) of the Regulation explains what is meant by foreign custodian corporation and custodian services.

Example 4

Company ABC Ltd is a corporation that holds a registrable water entitlement. Custodian Company Pty Ltd is a foreign custodian corporation which holds a legal interest of 25 per cent in Company ABC Ltd, which as a result means that Company ABC Ltd meets the definition of foreign person.

The interest held by Custodian Company Pty Ltd is held in the course of providing custodian services. If Custodian Company Pty Ltd did not hold this interest in Company ABC Ltd, Company ABC Ltd would not meet the definition of foreign person.

As Company ABC Ltd meets the conditions in subsection 41A(2) of the Regulation, Parts 3 and 3B of the Act do not apply and it is not required to register on either the Register of Foreign Ownership of Agricultural Land or the Register of Foreign Ownership of Water Entitlements.

Schedule 1 - Repeals

Schedule 1 repeals the *Register of Foreign Ownership of Agricultural Land Rule 2015*. The sections in that rule have been mirrored in the Rules.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Register of Foreign Ownership of Water or Agricultural Land Rules 2017

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The primary purposes of the *Register of Foreign Ownership of Water or Agricultural Land Rules 2017* (the Rules) are to:

- specify a kind of right that is not a registrable water entitlement for the purposes of the *Register of Foreign Ownership of Water or Agricultural Land Act 2017* (Act); and
- to exempt persons from requirements to give notice under the Act.

The Rules also repeal the *Register of Foreign Ownership of Agricultural Land Rule 2015* and include the provisions in that instrument.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.