

LI 2023/21 - Explanatory statement -



Explanatory Statement

Foreign Acquisitions and Takeovers (Register Notices) Data Standard 2023

General outline of Instrument

1. This data standard is made under subsection 130ZZ(1) of the *Foreign Acquisitions and Takeovers Act 1975* (the Act).
2. It describes how information regarding registrable interests recorded on the Register of Foreign Ownership of Australian Assets must be given, including what information must be provided to accompany a register notice. It also describes how the Registrar may store and correct information, and provides that the Registrar will generally communicate electronically with interested parties.
3. The data standard is a legislative instrument for the purposes of the *Legislation Act 2003*.
4. Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws) the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Date of effect

5. This data standard commences on the later of either the day after it is registered, or the day after Part 2 of Schedule 3 of the *Foreign Investment Reform (Protecting Australia's National Security) Act 2020* (FIR Act) commences.

Effect of the instrument

6. This data standard provides rules that specify:
 - (a) how a register notice is to be provided to the Registrar
 - (b) what information or documents may be required to accompany a register notice
 - (c) how information held by the Registrar may be presented, corrected and updated
 - (d) the way in which the Registrar will communicate with people, and
 - (e) the requirement to provide a signed declaration.

Registrar may determine manner of giving register notices

7. Section 130ZZ of the Act allows the Registrar to determine the way in which register notices must be given to the Registrar, and the way in which the Registrar will communicate with persons who are permitted by law to access information on the register. This includes executors, administrators, and liquidators.
8. Section 5 of the data standard provides that the default method of giving register notices is via the electronic platform made available by the Registrar. However, if a person is unable to provide a register notice via the electronic platform (for example, because they are unable to access it), the

Registrar may allow them to provide the notice in an alternative way (such as via another electronic form).

Registrar may request information or documents

9. Section 130ZZ of the Act enables the Registrar to determine information or documents that must accompany a register notice. Subsection 6(1) of the data standard requires a person to give information or documents to the Registrar to accompany a register notice when the Registrar requests them to do so.

10. Subsection 6(2) of the data standard identifies the information or documents that the Registrar may request to accompany a register notice. The Registrar may request information before or after a register notice has been given.

11. In general terms, subsection 6(2) enables the Registrar to request information or documents to establish or verify:

- (a) the identity of the entity or person providing the notice, and
- (b) information about the registrable interest that the notice pertains to.

12. For example, the Registrar may request information to establish or verify the identity of an individual, a company or trustee, an agent, or a foreign person who has submitted a register notice. This might include personal information about relevant individuals including names and former names, dates and places of birth, addresses and former addresses, contact details, and nationality and foreign person status. It may also include a company address, an Australian Business Number or Australian Company Number, or a foreign investment identifier.

13. The new register will record information about 'registrable interests', which is defined in the data standard to mean an interest to which Division 3 of Part 7A of the Act applies. This includes interests in land, water, entities, businesses and assets in Australia for which a register notice must be given to the Registrar. A 'registrable interest' is different from a 'registered circumstance' (which is a term that is defined in the Act). A registered circumstance arises after a register notice is given. It is not a precursor to, or a trigger of, all requirements to give a register notice. This is why the data standard introduces the new concept of a 'registrable interest'. If a register notice is not yet given, then a registered circumstance will not exist. However, a registrable interest may exist (even though the register notice has not yet been given). A change in a registered circumstance may also give rise to a requirement to give a register notice. For example, where a foreign person ceases to be a foreign person, they may be required to give a register notice to notify of the cessation to an existing registered circumstance.

14. Under subsection 6(2) of the data standard, the Registrar may request information about each registrable interest, including the date of acquisition, the reason for providing the register notice, the registrable event day, the consideration paid for the interest, and the percentage of the registrable interest held or owned.

15. Subsection 6(2) also identifies information that may be requested in relation to particular types of registrable interests. The kinds of details that may be requested for an interest in Australian land are:

- (a) the land title details – such as volume and folio, section and block, allotment, parish and township, unique property identifier, plan type and plan
- (b) the title holding type – such as whether it is leasehold or freehold, or a perpetual lease
- (c) the nature or type of the land – such as whether it is commercial, residential or agricultural land
- (d) the current and intended use of the land – such as whether it is vacant or developed land, a new, established or second-hand dwelling, to be used to grow crops or rear

livestock, or used for horticulture, forestry, dairy, non-farming, commercial or industrial purposes

- (e) the location of the land – such as property address
- (f) the size of the land – such as the title land area, floor space or total property area, and
- (g) information about any relevant lease – such as the terms of any such lease, and the lease start and end date.

16. The kinds of details that may be requested for a registrable water interest are:

- (a) water entitlement details – such as entitlement number, type and volume, main overall system and resource, and the identity of the issuing entity
- (b) water licence details – such as the licence number and type, date of issue, date of expiry, and the identity of the issuing entity
- (c) the current and intended use of the water – such as whether it is or is intended to be used for construction, crops, energy, forestry, industry, intensive horticulture, manufacturing, mining, research, stock, tourism, trading, and
- (d) information about any relevant lease – such as the terms of any such lease, and the lease start and end date.

17. The kinds of details that may be requested for an exploration tenement or a mining and production tenement are:

- (a) tenement licence details – such as the licence number and type, date of issue, date of expiry, and the identity of the issuing entity
- (b) the relevant Australian and New Zealand Standard Industrial Classification code (ANZSIC code)
- (c) the relevant land size
- (d) the location of the tenement, and
- (e) information about any relevant lease – such as the terms of any such lease, and the lease start and end date.

18. The kinds of details that may be requested for an interest in an Australian business or entity, or in the assets of an Australian business or entity are:

- (a) the business or entity name
- (b) the business or entity identifier – such as the Australian Business Number or Australian Company Number
- (c) the relevant ANZSIC code
- (d) the main location of the business or entity
- (e) the business structure and the industry sector of the business or entity, and
- (f) the circumstances in which a ‘significant agreement’ was entered into or terminated, or a ‘constituent document’ (as those terms are defined in the Act) was altered – such as an agreement which requires a senior officer to act under directions, instructions or wishes of a foreign person who holds a substantial interest.

Combining register notices under multiple provisions in a single register notice

19. Section 7 of the data standard allows the Registrar to combine multiple register notices given under different provisions of Division 3 of Part 7A of the Act, or multiple registrable interests given under the same provision, into a single register notice.

Example

20. A foreign person acquires the Australian Cattle Station, which consists of 145 separate land titles. As the Register is on a title-by-title basis, each land title is a separate registrable event, which would ordinarily require a separate register notice. In this case, the Registrar may combine by listing each of these 145 register notices on a single register notice.

Correcting or updating information held by the Registrar

21. Section 8 of the data standard allows the Registrar to correct or update any information recorded and held in the Register if the Registrar has reason to believe the information is incorrect or missing, including because a person requests the Registrar to update their details. It also requires a person who has given a register notice or any other relevant person (such as an agent, liquidator or executor) to inform the Registrar of any errors in, or required corrections or updates to, the information held in the Register.

22. The Registrar is allowed to add information to the Register relating to a register notice or registered circumstance under section 130U of the Act. The Registrar must update or correct information collected under the data standard as required by section 130T of the Act. This aligns with the overarching policy intent that the Register remains an accurate record of foreign ownership of Australian assets.

23. Information on the Register is 'protected information' within the meaning of section 120 of the Act. It will be able to be used, recorded or disclosed where this is permitted under Division 3 of Part 7 of the Act.

Communication with the Registrar

24. Section 9 of the data standard establishes that the Registrar will communicate electronically with people who provide information to them, as well as other persons permitted by law to access Register information, unless those persons cannot communicate electronically. Where the Registrar is unable to communicate electronically with a relevant person, the Registrar may use another means of communication.

Signed declaration

25. Section 10 of the data standard requires a person who gives a register notice to provide a signed declaration that they are either the applicant identified in the registration or are authorised to act on their behalf, and that the information provided to the Registrar is true and correct. If the declaration is not made, the registration will not progress.

26. A declaration will be considered signed if it identifies the person making the declaration – for example, if the person prints their name on the electronic form containing the declaration.

Compliance with data standard

27. Under section 11 of the data standard, the Registrar may accept that a register notice meets the requirement of the standard if the register notice is substantially in accordance with the data standard or has only such variations that the Registrar considers appropriate having regard to the person's circumstances. The data standard does not preclude the operation of section 25C of the *Acts Interpretation Act 1901*, which allows for substantial compliance with a form rather than strict compliance.

Compliance cost assessment

28. Compliance cost impact: Minor – There will be no additional regulatory impacts as the instrument is minor and machinery in nature OBPR23 – 04335.

Background

29. The Act established a regime for the notification, review and approval of foreign investment in Australia. In broad terms, the Act requires foreign persons who are planning to invest in certain interests to notify the Treasurer. Further, the FIR Act amended the Act to improve visibility of, and controls around, foreign investment into Australia.

30. The FIR Act amendments included the creation of a Register of Foreign Ownership of Australian Assets (the Register) in Part 7A of the Act and imposed additional obligations on foreign persons to notify the Registrar of a broader range of legal interests involving business assets and all land types.

31. The Register will replace the following registers currently administered and maintained by the ATO:

- (a) the Register of Foreign Ownership of Agricultural Land
- (b) the Register of Foreign Ownership of Water, and
- (c) the Register of Foreign Ownership of Residential Land.

Consultation

32. Subsection 17(1) of the *Legislation Act 2003* requires a rule-maker undertake an appropriate level of consultation before making a legislative instrument.

33. Broad public consultation was undertaken on this instrument from 20 February 2023 to 24 March 2023. The draft instrument and draft explanatory statement were published to the ATO Legal database. Publication was advertised via the 'What's new' page on that website, and via the 'Open Consultation' page on ato.gov.au. Major tax and superannuation publishers and associations monitor these pages and include the details in the daily and weekly alerts and newsletters to their subscribers and members. The ATO also notified its foreign investment stakeholder engagement group members of the instrument by electronic correspondence when it was publicly released.

34. The ATO only received one submission via the public consultation process. Where appropriate, changes were made to the instrument to address the feedback provided in the submission.

Legislative references

Acts Interpretation Act 1901

Commonwealth Registers Act 2020

Foreign Acquisitions and Takeovers Act 1975

Foreign Investment Reform (Protecting Australia's National Security) Act 2020

Human Rights (Parliamentary Scrutiny) Act 2011

Legislation Act 2003

Statement of compatibility with Human Rights

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

Foreign Acquisitions and Takeovers (Register Notices) Data Standard 2023

The *Foreign Acquisitions and Takeovers (Register Notices) Data Standard 2023* (the data standard) 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 data standard

The primary purpose of the data standard is to prescribe rules that specify:

- how a register notice must be provided to the Registrar of the Register of Foreign Ownership of Australian Assets (Register) established by the *Foreign Acquisitions and Takeovers Act 1975* (FATA)
- what information or documents may be required to accompany a register notice
- how information held by the Registrar may be presented, corrected and updated
- how the Registrar may communicate with people, and
- the requirement for an applicant (or their representative) to provide a signed declaration.

Human rights implications

The data standard engages the following human rights and freedoms:

- the right to protection from unlawful or arbitrary interferences with an individual's privacy, and
- the right to freedom from discrimination on prohibited grounds.

Right to protection from unlawful or arbitrary interference with an individual's privacy, family, home or correspondence

Article 17 of the *International Convention on Civil and Political Rights* (ICCPR) prohibits unlawful or arbitrary interferences with an individual's privacy, family, home or correspondence. It also provides that everyone has the right to the protection of the law against such interference or attacks.

The Human Rights Committee has interpreted the term 'unlawful' to mean that no interference can take place except in cases envisaged by a law which comply with the sections, aims and objectives of the ICCPR. The Human Rights Committee has also indicated that an interference will not be considered to be 'arbitrary' if it is provided for by law and is in accordance with the sections, aims and objectives of the ICCPR and is reasonable in the particular circumstances.

The following sections in the data standard engage the rights protected by Article 17 of the ICCPR:

- new section 6 of the data standard allows the Registrar to require any individual to give information or documents to accompany a register notice, and
- new section 8 of the data standard permits information to be corrected in specified circumstances.

Collection of information by the Registrar to accompany a register notice

New section 6 of the data standard allows the Registrar to collect particular types of protected information. However, to the extent that it authorises the collection of protected information about individuals or identifiable individuals, any interference with an individual's privacy is not arbitrary because the interference is necessary to achieve a legitimate public purpose.

In particular, new section 6 confers the Registrar with power to require a person to provide documents or give information to accompany a register notice, and this power could be exercised to require information about identified or identifiable individuals. This section is needed to enable information to be gathered for the purpose of monitoring and enforcing compliance with the obligations imposed by the FATA.

To the extent that the requirement to provide information constitutes a limitation on an individual's right to be protected from interference with their privacy, the limitation is justified because the provision of information is in pursuit of the legitimate objectives of the Register, and is connected and proportionate to that objective. As a practical matter, the information is required to establish the identity of relevant people and provide assurances to ensure that the Register is administered according to the intent of the legislation and community expectations. The types of information that the Registrar may collect are defined by the data standard.

Correction of information held by the Registrar

New section 8 of the data standard permits information to be corrected in specified circumstances if the Registrar has reason to believe the information is incorrect, including if a person whose personal details appear on the Register requests their details be updated, or a person notifies the Registrar of errors or corrections to information provided under section 6 of the data standard.

The circumstances in which information may be corrected are clearly defined by the data standard.

Safeguards

The Registrar will take steps to protect personal information they hold about individuals against loss, unauthorised access, use, modification or disclosure and other misuse. The Registrar will apply industry-best security methods, including information technology and physical security audits, penetration testing and industry best practice risk management and system security technologies to protect the information.

To the extent that information collected by the Registrar is personal information there are safeguards to protect an individual's right to privacy. In particular, the Registrar complies with obligations under the Australian Privacy Principles (APPs) contained in the *Privacy Act 1988* and records authorities issued by the National Archives of Australia. Further, a privacy impact assessment has been conducted in accordance with the *Privacy (Australian Government Agencies – Governance) Australian Privacy Principles Code 2017* to ensure legislative requirements and community expectations regarding privacy are met.

The secrecy provisions in Division 3 of Part 7 to the FATA also apply to protected information. Generally, protected information is defined to mean information that was disclosed or obtained under or for the purposes of the FATA.

It is an offence under section 128 of the FATA for a person to disclose protected information, unless the disclosure is permitted either under section 130V of the FATA or under one of the exceptions in Division 3 of Part 7 to the FATA.

The data standard itself will be a disallowable instrument and, therefore, subject to Parliamentary oversight. Further, the consultation requirements contained in the *Legislation Act 2003* mean that it will be subject to public scrutiny.

Right to be free from discrimination on prohibited grounds

The data standard engages with Article 26 of the ICCPR, which recognises that all persons are equal before the law and are entitled without discrimination to the equal protection of the law. Article 26 further provides that 'the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. However, the Human Rights Committee has recognised that 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'.

The data standard also generally engages the rights protected by the *International Convention on the Elimination of All Forms of Racial Discrimination*. Paragraph 1 of Article 1 of that Convention defines the term 'racial discrimination' to mean 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, or any other field of public life'. Under Article 2(1)(a) 'each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local shall act in conformity with this obligation'. Under Article 5, States Parties 'undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to ...national ...origin, to equality before the law' in the enjoyment of civil, political, economic, social and cultural rights, including the 'right to own property alone as well as in association with others'.

The data standard interacts with Article 26 of the ICCPR and Articles 2 and 5 of *International Convention on the Elimination of All Forms of Racial Discrimination* because the core obligations imposed by the data standard apply to a 'foreign person'. While an Australian citizen who is not ordinarily resident in Australia may be a 'foreign person' for the purposes of the data standard, it is anticipated that the majority of individuals who are directly affected by the data standard will not be Australian citizens.

While the data standard will primarily affect individuals who are citizens of countries other than Australia, there is no less restrictive way of achieving the objectives of the data standard given that the legislative framework the standard forms part of is fundamentally directed at governing foreign investment in Australia. Accordingly, those limitations are reasonable, necessary and proportionate to achieve the objectives of that legislative framework.

Conclusion

The data standard is compatible with human rights because, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.