



New Taxation Conditions to be Imposed on Investors as Australia's Foreign Investment Law Overhaul Continues

In Brief

On 22 February 2016, the Treasurer of the Commonwealth of Australia announced new taxation conditions for foreign investors seeking to acquire Australian assets or shares in Australian companies. Depending on the type and domicile of the investor and the nature and monetary value of the proposed investment, the Foreign Acquisitions and Takeovers Act 1975 (Cth) ("FATA") already requires certain proposed investments to be notified to the Treasurer. The Treasurer, acting on the advice of the Foreign Investment Review Board ("FIRB"), then decides whether the proposed investment can proceed.

The new tax conditions also require all foreign investors that receive approval to proceed with a proposed investment to:

- Comply with Australian tax laws;
- Provide documents or information requested by the Australian Tax Office ("ATO");
- Notify the ATO of any transaction to which Australian transfer pricing rules or tax anti-avoidance rules may apply;
- Pay any outstanding tax debt;
- Use the foreign investor's best endeavours to ensure that all of its "associates" (a broadly inclusive term defined under the FATA to include relatives, persons acting in concert, partners in a partnership, any entity in which the foreign investor is a senior officer and any entity or trustee of a trust in which the foreign investor holds a substantial interest of 20 percent or more) comply with the above conditions; and
- Provide an annual report on compliance with the new conditions.

Introduction

There has been considerable recent media and political commentary in relation to perceived tax minimisation practices by foreign-based multinational companies operating in Australia. This discourse has been fueled by the Organisation for Economic Cooperation and Development (“OECD”) Base Erosion and Profit Shifting action plans and recommendations. Australia is a member of both the OECD and the G-20 (which approved the final recommendations of the OECD at the end of 2015).

In its August 2015 interim report examining corporate tax avoidance and minimisation in Australia, the Senate Economics References Committee identified non-arm’s length transfer pricing for goods and services between related companies and the shifting of Australian-sourced profits to low-tax offshore jurisdictions as two of the primary factors that have contributed to the erosion of Australia’s tax base over the last decade.

In response to these developments, the Australian Treasurer announced on 22 February 2016 that all new foreign investments notified under the FATA will be approved subject to the imposition of new tax reporting and compliance conditions only.

The new tax conditions come after the Government’s extensive foreign investment reform package was passed by the Senate on 24 November 2015 and came into effect on 1 December 2015. The reform package included:

- Greater scrutiny of residential real estate acquisitions;
- A new cumulative \$15 million screening threshold for acquisitions of agricultural land by the same foreign investor (except for private investors from the United States, New Zealand or Chile, where the threshold is a non-cumulative \$1,094 million*, and private investors from Singapore or Thailand, where the threshold is a non-cumulative \$50 million*);
- A new \$55 million screening threshold for agribusiness investments (except for private investors from the United States, New Zealand or Chile, where a \$1,094 million threshold applies*);
- Requiring all foreign investors to register interests in agricultural land regardless of the value;

- The introduction of FIRB application fees; and
- A stricter civil and criminal penalty regime and the introduction of infringement notices for breaches relating to the acquisition of interests in residential real estate.

** Note: The higher threshold applies if the actual acquiring entity is incorporated in the United States, New Zealand, Chile, Singapore or Thailand (as applicable). It does not apply if that entity is, for example, an Australian incorporated entity.*

Australia’s Foreign Investment Framework

The FATA applies to a range of foreign investment activities, including the acquisition of agricultural, residential and commercial land in Australia and the acquisition of shares in, or interests in the assets of, an Australian company or business.

Under the FATA, “notifiable actions” require mandatory notification to and approval by the Treasurer, acting on the recommendation of FIRB, before they can proceed.

For certain other actions, termed “significant actions” under the FATA, notification of the proposed action is voluntary. However, as the Treasurer has power under the FATA to make a range of orders, including asset disposal orders, in relation to significant actions that are not notified, it is common in practice for foreign investors to give notice of all significant actions.

If notified of a proposed significant action (including a notifiable action), the Treasurer can: (i) make an order prohibiting the proposed action under section 67 of the FATA; or (ii) issue a “no objection notification” with or without conditions under sections 74 and 75 of the FATA.

Conditions can also be imposed where a significant action has already been taken by a foreign investor and either the Treasurer was not given notice of the action or notice was provided but the action was taken before the end of the prescribed period under the FATA (generally 40 days from the time the notice is received or up to 90 days from the time that any interim order is made by the Treasurer).

The Treasurer can make an order prohibiting a proposed significant action, or alternatively issue a no objection

notification with or without conditions, only if it is deemed to be in the “national interest”.

The Government’s policy document, *Australia’s Foreign Investment Policy*, sets out a range of factors that the Treasurer will consider in assessing what is in the national interest, including national security, competition, government policies (such as taxation), economic and community impact and the character of the foreign investor.

The Nature of the New Tax Conditions

It was noted in the Treasurer’s announcement on 22 February 2016 that, in exercising the discretion to consider what is in the national interest, the Treasurer will now impose mandatory tax conditions on *all* foreign investors that provide notice of a proposal to take a significant action.

The conditions, which apply in relation to the proposed significant action as well as any transactions, operations or assets that are *connected with* any assets or operations that are acquired *directly or indirectly* as a result of the proposed action, will require foreign investors to:

- Comply, and use best endeavours to ensure compliance by associates of the foreign investor, with Australian tax laws;
- Provide, and use best endeavours to ensure associates of the foreign investor provide, documents or information requested by the ATO within the timeframes nominated by the ATO;
- Notify, and use best endeavours to ensure associates of the foreign investor notify, the ATO upon entry into any material transaction or other dealing to which the transfer pricing rules or anti-avoidance rules under Australian tax law may potentially apply;
- Pay, and use best endeavours to ensure associates of the foreign investor pay, any outstanding tax debt which is due and payable at the time of the proposed action; and
- Provide an annual report to FIRB on compliance with the tax conditions.

Additionally, where the Treasurer identifies a “significant tax risk” in relation to a particular foreign investor and/or a proposed significant action, further conditions will be imposed requiring the investor to:

- Engage in good faith with the ATO to resolve any tax issues relating to the proposed action and the investment to be held; and
- Provide information as specified by the ATO on a periodic basis, including, at a minimum, a forecast of tax payable.

In the announcement, the Treasurer indicated only that the tax conditions will be imposed on all new “applications” (that is, notifications) determined by the Treasurer on or after the date of the announcement. There was no express indication of whether the conditions will also be imposed in relation to significant actions that have been taken without notification or with notification but prior to the expiry of the minimum period prescribed by the FATA.

The practical operation of the new tax conditions, particularly as they apply to associates of a foreign investor and the effect the conditions will have on foreign investment in Australia, remains to be seen.

First Transaction to Have the New Tax Conditions Imposed

On 23 February 2016, the Treasurer approved the purchase of Van Diemen’s Land Company, Australia’s largest dairy company, by the Chinese investment company Moon Lake Investments for \$280 million. The approval was the first to be subject to the new tax conditions that are now mandated under Australia’s foreign investment regime.

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