
Tax compliance central to Australia's foreign investment clearance process

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In brief

The Australian Government has announced that conditions will formally be applied to the clearance of foreign investment proposals, aimed at ensuring foreign investors are compliant with Australian tax laws. The conditions include requirements relating to the settlement of outstanding debts, ongoing compliance with tax laws and annual reporting to the Australian Taxation Office (ATO).

The conditions formalise and extend the consideration of tax issues in the assessment of Australia's national interest, the key criterion in the foreign investment clearance process, and show a convergence of debate relating to foreign investment regulation and the base erosion and profit shifting (BEPS) agenda.

There are a number of implications arising from the imposition of the conditions, with possible impacts on the timing and certainty of clearance of transactions and the creation of ongoing compliance and reporting obligations for foreign investors.

The changes, in conjunction with the broader foreign investment reforms in 2015, underline the need for early engagement with legal, tax and financial advisers, to carefully plan and prepare foreign investment proposals.

In detail

The national interest test

The Australian government has always welcomed foreign investment that is in Australia's national interest and this is the criterion by which foreign investment proposals are assessed, under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (FATA).

The components of Australia's 'national interest' has been intentionally left without definition in FATA, providing the Treasurer, acting on the advice of the Foreign Investment Review Board (FIRB), with the flexibility to assess each proposal on its merits, without being bound by prescriptive rules.

The inherent uncertainty for foreign investors in this approach has been addressed to some degree by the publication of Australia's Foreign Investment Policy by FIRB (the Policy), which provides guidance on the kinds of factors that will often be considered in the assessment of Australia's 'national interest'.

The protection of Australia's tax base has long been one of the factors that FIRB and the Treasurer has taken into account when assessing Australia's 'national interest'. The focus on tax has steadily increased in recent years, in line with enhanced information-sharing between Australian Government agencies.

New conditions on foreign investment clearance

The Treasurer is empowered to provide a certificate of non-objection in respect of a foreign investment proposal, including subject to conditions, under section 74 of FATA. The imposition of conditions has traditionally occurred in response to issues of concern that are specific to the particular proposal. We are aware, for instance, that approval has been conditional upon obtaining a private ruling from the ATO.

In his statement of 22 February the Treasurer confirmed that a standard set of conditions would be applied to clearance of investment proposals; in summary these conditions require applicants to, and use its best endeavours to procure its associates do, the following in relation to a proposal:

- comply with Australian tax law in relation to the proposal and associated transactions;
- provide information to the ATO in relation to the application or potential application of Australia's tax laws to the proposal or associated transactions;
- notify the ATO of any material transactions or dealings it has or will enter into in connection with the proposal or associated transactions, to which the transfer pricing or anti-avoidance provisions of the Australian tax law may apply that have not been previously notified;
- pay any outstanding tax debt which is due and payable at the time of the proposal; and
- provide annual report to FIRB of its compliance with the abovementioned conditions.

The Treasurer has foreshadowed the imposition of two additional conditions where a significant tax risk is identified, in this case an applicant may be required to:

- engage in good faith with the ATO to resolve any tax issues in relation to the proposal; and
- provide information specified by the ATO on a periodic basis, including a forecast of tax payable.

It is worth noting that the changes further empower and highlight the increasingly important role the ATO has in the context of investors seeking clearance of foreign investment proposals. Importantly FIRB approvals will now, in part, depend upon the administrative interpretation of tax law by the ATO.

A foreign investor who contravenes conditions imposed by the Treasurer subject to the sanctions under Part 5 of the FATA, including possible criminal liability and civil penalties.

Broader foreign investment reform process

The Treasurer's announcement of the imposition of these additional conditions come shortly after an extensive process of reform of Australia's foreign investment framework undertaken throughout 2015. The process constituted the most significant change to Australian foreign investment structure in 40 years, including:

- transferring certain responsibilities from FIRB to the ATO, particularly in relation to compliance and enforcement, taking advantage of the greater resource and technical capabilities of the ATO;
- formalising information sharing between Commonwealth government agencies;
- amending screening thresholds for certain types of acquisition;
- establishing registers of foreign land ownership;
- introduction of significant fees for applications before a proposal is considered by FIRB; and
- undertaking a wholesale re-write of the FATA.

You can find additional information on these in the previous alerts which we published in 2015.

It is early days in the life of the new regime, although the increased focus and resource of the foreign investment clearance process is obvious. Many foreign investors who had become accustomed to the old regime had regarded it as a procedural, rather than substantive, review. The new regime requires foreign investors to carefully prepare their foreign investment proposal, including doing the analysis needed to be able to clearly articulate the commercial rationale for a transaction, the tax impact it will have and the benefit of the transaction to Australia. This will be increasingly important to avoid delay in processing of applications and the unnecessary characterisation of proposals towards the higher end of the risk spectrum, which may lead to the imposition of additional conditions.

The takeaway

The imposition of the conditions confirms the central role that tax compliance has in the assessment of Australia's national interest. The conditions will result in heightened scrutiny of the tax impact of foreign investment proposals, particularly in relation to corporate group restructuring by multi-national groups.

The requirement to provide potentially extensive information to the ATO, along with the ongoing annual reporting requirements, imposes additional compliance obligations on foreign investors.

The conditions follow the broader foreign investment reform process in 2015 and underline the importance for investors to adopt a renewed diligence in carefully planning foreign investment proposals.

Let's talk

Early engagement with legal, tax and financial advisers will be critical in order to avoid additional delay, and advisers with an international and multi-disciplinary focus are well placed to help foreign investors navigate a smoother path in the foreign investment clearance process.

Our experts routinely advise foreign investors on all aspects of their investment in Australia, including:

- foreign investment notification requirements and clearance process;
- corporate structuring and transaction design;
- due diligence, acquisitions, divestments and restructures;
- tax and duty issues in transaction design;
- real property conveyance and leasing;
- compliance with requirements in regulated industries; and
- employment, industrial relations and immigration.

We also bring to our clients the breadth of expertise throughout PwC, within Australia and throughout the world, notably including our tax specialist, corporate finance specialists and deals advisory teams. To find out more about how these issues might affect you, please contact your usual PwC advisor or:

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