NEW TAX CONDITIONS FOR FOREIGN INVESTMENT IN AUSTRALIA

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Tax Alert

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On 22 February 2016, the Hon Scott Morrison MP, Treasurer of the Commonwealth of Australia, published a media release regarding new requirements for foreign investment applications to ensure foreign companies investing in Australia pay tax on what they earn in Australia.

These conditions are a part of the Federal Government's package of legislation targeting international structuring and profit shifting by multinationals and foreign investors, which have arisen as a result of Australia's participation with other G20 countries through the OECD's Base Erosion and Profit Shifting Project. To date, this has included new transfer pricing laws, a targeted anti-avoidance provision and penalties for multinationals operating in Australia, as well as a new proposed withholding regime applicable from 1 July 2016 for nonresidents disposing of direct or indirect interests in Australian real property

Under the *Foreign Acquisitions and Takeovers Act 1975 (Cth)* (FATA), certain proposed acquisitions of Australian land and other assets, or shares in Australian companies, by foreign persons or entities are required to be notified to the Treasurer. In practice, this notification is made by way of an application to the Foreign Investment Review Board (FIRB), which examines the proposal and provides advice to the Treasurer. The final decision in respect of a foreign investment proposal rests with the Treasurer.

The Treasurer has the power to block foreign investment proposals or apply conditions to the way proposals are implemented to ensure they are not contrary to the national interest. The payment of tax in Australia by foreign investors is a key aspect of the national interest test, and on that basis the Treasurer has implemented a new policy of imposing tax conditions on all foreign investment proposals.

The tax conditions that the Treasurer may impose are very general and give the Australian Taxation Office (ATO) and FIRB wide powers to obtain information. These conditions include compliance with Australian tax laws by the foreign investor, as well as expanded powers in relation to:

- imposing a condition on a foreign investor that they use their best endeavours to ensure that their "associates" comply with Australian tax laws, as well as provide documents and information to the ATO as requested. The documents and information include those stored outside of Australia
- the definition of associate for these purposes takes its meaning from the income tax legislation and is very broad
- a foreign investor must provide the ATO with information on any transaction or arrangement to which the transfer pricing laws or the anti-avoidance laws may potentially apply, they must also use their best endeavours to ensure that their associates provide this information

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- a foreign investor will be required to provide an annual report to FIRB setting out that they (and their associates) have complied with all of the tax conditions applicable to them.

FIRB may also impose further conditions on a foreign investor where they are considered to be of a significant tax risk. These may include:

- entering into advance pricing agreements with the ATO for transfer pricing purposes
- obtaining a private ruling from the ATO on a certain tax aspect of a transaction
- a requirement to provide the ATO with forecasts of tax payable in Australia and any material variation from this.

The conditions are drafted extremely broadly, and could be said to impose requirements on foreign investors in excess of those contained in the relevant taxation laws. It should also be noted that the requirements, particularly the reporting requirements, are ongoing in nature. Specifically, they do not apply for a fixed period of time following an investment into Australia.

The consequences of not complying with the tax conditions may be very significant to a foreign investor. As set out in the Treasurer's press release, a breach of these tax conditions by a foreign investor (or an associate) may result in prosecution, fines and potentially a divestment of the relevant Australian assets under FATA.

A full list of the standard tax conditions is available from the Treasury website here

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