



## TAX GUIDANCE

Last updated: 21 September 2020

Successive governments have considered that the effects of foreign investment on the tax system should form part of the consideration of whether proposals are contrary to the national interest. This includes the potential impact of an action on Australian tax revenues and the integrity of the tax system in determining whether the action is contrary to the national interest.

If the Treasurer (or delegated decision maker) considers that tax conditions need to be imposed to protect the national interest, 'standard' conditions may be imposed as part of a no objection notification. If an action is considered to have a significant or particular tax risk, then additional tax conditions may also be imposed.

### ROLE OF THE ATO IN THE APPLICATION REVIEW PROCESS

The Australian Taxation Office (ATO) has a dedicated Tax Consult area that is consulted on all foreign investment proposals. Separately, the ATO also has a dedicated foreign investment screening team that administers the *Foreign Acquisitions and Takeovers Act 1975* with respect to screening of residential land and non-sensitive internal reorganisations and commercial land applications. The ATO's foreign investment screening team consults with the ATO Tax Consult area on these applications. The ATO's foreign investment screening team is separate from the ATO's Tax Consult area with whom it consults.

The scope of the ATO's Tax Consult advice about an action is the potential impact on the Australian Government's tax revenues and the integrity of the federal tax system. The ATO Tax Consult advice provides a risk rating of 'low', 'medium' or 'high' for each action along with qualitative advice on the risks to tax revenues and the integrity of the tax system as a result of the action (see details about the ATO's assessment process in the next section). The following risk rating definitions are adopted:

- Low: the ATO has not identified significant tax issues.
- Medium: there may be a risk to tax revenue or to the integrity of the tax system.
- High: there is a clear risk to tax revenue or to the integrity of the tax system.

One distinguishing factor between risk ratings of 'medium' or 'high' is the likelihood of the outcome occurring. High risk ratings indicate that the estimated tax consequence of the action is 'likely' to occur rather than it being just 'possible'.

The ATO may assess an action that involves complex structuring (such as layered trusts or the use of holding entities in tax havens) as low risk if that structuring does not create Australian tax issues of concern.

#### Summary of tax issues

The ATO's advice to the Treasurer (or delegated decision maker) and risk rating reflects a broad range of matters including:

- Compliance with the substantive tax law;
- The tax compliance history of the applicant and its related parties;
- The transparency of the applicant's engagement with the ATO;
- The choices and behaviours that the applicant evidences in their tax affairs;
- Potential application of the general anti-avoidance rule and the Diverted Profits Tax;
- Tax outcomes that are inconsistent with the policy intent of tax laws;
- Maintaining the integrity of the tax regime;
- Related or earlier actions undertaken that are relevant to the consideration of the proposal; and
- Whether the arrangement has features of concern, or is within high risk parameters identified by the ATO in guidance material including, but not limited to:
  - Taxpayer Alerts;
  - Practical Compliance Guides;
  - Framework documents for particular industries;
  - ATO Interpretative Decisions; and
  - Tax Rulings.

The ATO's legal database ([www.ato.gov.au/Law](http://www.ato.gov.au/Law)) sets out a complete list of public guidance.

#### **Related or earlier actions undertaken**

The ATO undertakes a broad and holistic examination of the circumstances surrounding each action and each applicant. In formulating its advice about the impact of an action on the Australian Government's tax revenues the ATO considers:

- The tax impact of earlier transactions undertaken by the applicant and related parties;
- Any patterns of behaviour by the applicant and its related parties;
- Any pre-existing arrangements that may affect the tax revenue from the proposed action; and
- Known future actions that are related to the action and that may affect the tax revenues from the action.

For example, if asked to consider the tax risk associated with the acquisition of a new asset by an applicant, the ATO may have regard to any related party financing arrangements already in place that may have the effect of reducing the tax payable in respect of income to be derived from the new asset. This may be especially relevant when the ATO is asked to advise on the tax impact of an application for an exemption certificate, which allows an applicant to take certain actions (e.g. acquisition of multiple unspecified land titles) over a period of time.

## PROCESS IF THE APPLICANT IS UNABLE TO PROVIDE SUFFICIENT INFORMATION TO ASSESS THE TAX RISK

The ATO generally requires that all relevant information specified in the FIRB Application Checklist and FIRB Application Appendix - Tax Checklist be provided with the application.

If the applicant is unable to provide the required information, there may still be a possibility of the tax risk being assessed as either 'low' or 'medium' – dependent on the nature of the potential risks present, and provided that additional tax conditions are imposed.

## WHEN MAY A TAX CONDITION BE IMPOSED?

### Risk to tax revenue or the integrity of the tax system exists (standard tax conditions)

If, following consultation, the Treasurer (or delegated decision maker) considers that tax conditions need to be applied to protect the national interest (including to address a risk to the integrity of the tax system and/or tax revenue), the 'standard' conditions may be imposed as part of a no objection notification, to ensure that the action will not be, or is not, contrary to the national interest.

An example of the 'standard' tax conditions is at [Attachment A](#).

The imposition of the 'standard' tax conditions is not limited to applications assessed as medium or high tax risk and will be done on a case-by-case basis.

Situations where the 'standard' tax conditions may be imposed to ensure an action is not contrary to the national interest would be to address risks associated with, *but not limited to*, the following:

- Capital gains tax;
- Transfer pricing;
- Low tax jurisdictions;
- Consolidations;
- Withholding taxes;
- Debt and equity risks;
- Thin capitalisation;
- Tax avoidance;
- Tax liabilities on future disposals; or
- Particular use of structures.

Matters that will be taken into consideration include:

- The complexity of the action;
- The size of the action;

- Previous interactions with Australia's tax system; and
- Level of certainty the applicant can provide in relation to the details of the action.

Foreign investors will be given an opportunity to review and respond to these and any other proposed conditions as part of the application review process.

Applicants may agree in advance to the 'standard' tax conditions. This does not mean that the conditions will necessarily be applied, but in the event that some or all of the 'standard' tax conditions are applied, no further discussion on those conditions will be initiated by the Treasurer (or delegated decision maker) with the applicant.

#### **Particular tax risk (additional tax conditions)**

If an action is considered to have a significant or particular tax risk then 'additional' tax conditions may also be imposed. The imposition of such conditions would be considered on a case-by-case basis, and any conditions would be tailored to the particular circumstances of the action under consideration.

An example of some possible 'additional' tax conditions is at [Attachment B](#).

Should the Treasurer (or delegated decision maker) wish to impose any 'additional' tax conditions, the applicant will be given the opportunity to ask questions about the operation and effect of the condition and to provide comments to the decision maker as part of the application review process.

Note that advance agreement to the 'standard' tax conditions does not prejudice an applicant's right to comment on any other conditions that may be imposed, including the 'additional' tax conditions.

In cases where particularly complex or novel conditions are proposed, or the applicant considers that there is an error or other technical issue with the proposed conditions, the applicant may ask to discuss this further with the Treasury, or jointly with the Treasury and the ATO. Both Treasury and the ATO are willing to engage in such discussions with applicants, where appropriate. Should an applicant wish to request such a discussion with either the Treasury, or jointly with the Treasury and the ATO, they can ask for this when responding to the application review process. All requests for further discussions will be considered on a case-by-case basis, and where there is considered to be a reasonable need for such a discussion, Treasury will contact the applicant to arrange this. Please note, however, that personalized discussions impose a significant time and resource cost on both applicants and government agencies, and are unlikely to be considered necessary for the imposition of 'standard', simple or common tax conditions.

If a discussion involving the ATO is required, it is important that all representatives for the applicant are appropriately authorised to talk to the ATO. If an adviser is not the registered tax agent of the applicant it is recommended that a 'nomination of a representative' form (NAT75152-02.2019) is completed for anyone involved in the discussion.

Further information on tax conditions is at [Attachment C](#).

## WHAT IS THE EFFECT OF THE CONDITIONS?

The effect of the 'standard' tax conditions, generally speaking, is to require compliance with the Australian Government's tax laws, co-operation with the ATO by producing information in a timely and complete manner, payment of outstanding tax debt, and reporting on compliance with the conditions and the holding of the asset.

In cases with a particular tax risk some 'additional' conditions may impose other obligations. These may include requiring the investor (and/or its associates) to supply certain information, to enter into good faith negotiations with the ATO for an advance pricing arrangement, to request a private binding ruling, or to take other action to resolve tax issues. These may not necessarily be required to be completed in order for a no objection notification to be given, but may be required within a certain timeframe afterwards.

Regardless of whether any conditions are imposed, all obligations under Australian tax law must be met.

Foreign investors will be expected to work with the ATO in complying with any conditions.

A compliance report template on foreign investment tax conditions is at [Attachment D](#).

## WHAT IF A TAX CONDITION IS BREACHED?

If a condition is breached (including any condition that may require an investor to notify the FIRB of certain actions within a specified time period), an investor may be subject to prosecution or an application for a civil penalty order. It will depend on the breach and the circumstances surrounding it as to whether legal proceedings are commenced.

If legal proceedings are commenced and a court finds that a condition has in fact been breached then it is a matter for the courts to apply penalties. Where a court has found that an offence has been proven or has made a civil penalty order, and the Treasurer considers it is contrary to the national interest to allow the investment to continue, the Treasurer may consider an order requiring disposal of the interest. This would be reserved for the most serious of breaches.

## TAX RISK NOTIFICATION PARAGRAPHS

Tax risk notification paragraphs (TRNPs) serve to alert applicants to particular tax risks that the ATO has identified that may warrant their consideration. TRNPs often request that the applicant engage with the ATO to discuss the identified issues further.

TRNPs are not conditions imposed upon applicants and are therefore not legally binding. Where the ATO has reason to suspect that an applicant may not be willing to engage voluntarily with the ATO, and the ATO believes such engagement is necessary to mitigate tax risks, the ATO may recommend that this requirement be imposed via a legally binding tax condition.

If an applicant is uncertain as to whether commentary in their no objection notification constitutes a legally binding condition or a TRNP, they should contact the officer named on the no objection notification for clarification.

## FURTHER INFORMATION

Further information is available on the FIRB website or by contacting +61 2 6263 3795.

**Important notice:** This Guidance Note provides a summary of the relevant law. As this Note tries to avoid legal language wherever possible it may include some generalisations about the law. Some provisions of the law referred to have exceptions or important qualifications, not all of which may be described here. The Commonwealth does not guarantee the accuracy, currency or completeness of any information contained in this document and will not accept responsibility for any loss caused by reliance on it. Your particular circumstances must be taken into account when determining how the law applies to you. This Guidance Note is therefore not a substitute for obtaining your own legal advice.

## ATTACHMENT A - 'STANDARD' TAX CONDITIONS

Conditions that may apply until a termination event<sup>1</sup> occurs:

- 1) The applicant must comply with the taxation laws of the Commonwealth of Australia in relation to the action, and any transactions, operations or assets in connection with the assets or operations acquired as a result of the action. An applicant does not breach this condition if it has taken reasonable care to comply with the relevant taxation laws and has a reasonably arguable position.
- 2) The applicant must use its best endeavours to ensure, and within its powers must ensure, that entities in its control group<sup>2</sup> comply with the taxation laws of the Commonwealth of Australia in relation to the action and any transactions, operations or assets in connection with the assets or operations acquired as a result of the action. An applicant does not breach this condition if entities in its control group have taken reasonable care to comply with the relevant taxation laws and have a reasonably arguable position.
- 3) The applicant must provide any documents or information<sup>3</sup> that is required to be provided to the Australian Taxation Office (ATO) in accordance with the taxation laws of the Commonwealth of Australia in relation to the action and any transactions, operations or assets in connection with assets or operations acquired as a result of the action. These documents or information must be provided within the timeframe specified by the ATO.
- 4) The applicant must use its best endeavours to ensure, and within its powers must ensure, that entities in its control group provide any documents or information that is required to be provided to the ATO in accordance with the taxation laws of the Commonwealth of Australia in relation to the action and any transactions, operations or assets in connection with assets or operations acquired as a result of the action. These documents or information must be provided within the timeframe specified by the ATO.
- 5) The applicant must pay its outstanding taxation debt under the taxation laws of the Commonwealth of Australia, and must use its best endeavours to ensure, and within its powers must ensure, that entities in its control group pay any outstanding taxation debt under the taxation laws of the Commonwealth of Australia, which is due and payable at the time of the proposed action. This condition does not apply to payment arrangements

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<sup>1</sup> For the purposes of these conditions a termination event occurs: (a) when the applicant ceases to hold the interest the acquisition of which was the subject of the no objection notification; (b) when the applicant ceases to control, as defined in the *Foreign Acquisitions and Takeovers Act 1975*, the entity or business the control of which was the subject of the no objection notification; (c) when the applicant ceases to carry on an Australian business the starting of which was the subject of the no objection notification; or (d) when the applicant ceases to be a foreign person, as defined in the *Foreign Acquisitions and Takeovers Act 1975*.

<sup>2</sup> For the purposes of these conditions, an applicant's control group consists of entities: (a) that control the applicant (a controller); (b) that a controller controls; (c) that the applicant controls, which includes for the purposes of these conditions an entity that is the subject of the application. For the purposes of determining a control group, control has the meaning in section 50AA of the *Corporations Act 2001*.

<sup>3</sup> This includes documents or information held, possessed or stored outside Australia.

agreed with the ATO or where the ATO has exercised its discretion to defer part or all of the payment of a disputed amount, to the extent that those arrangements are complied with.

- 6) The applicant must provide an annual report to the Foreign Investment Review Board on compliance with these conditions. The first report must cover the period from the date the action takes place to the end of the applicant's income year for tax purposes. All subsequent reports must cover the applicant's income year for tax purposes. If the action takes place less than 90 days before the end of the first income year, then that period can be incorporated in the next report. Each report must be provided by the due date for lodgement of the applicant's tax return for that year.
- 7) The applicant must advise the Foreign Investment Review Board within 30 days of taking the action that it has done so.
- 8) The applicant must advise the Foreign Investment Review Board within 30 days of a termination event that the event has taken place.



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## ATTACHMENT B - POSSIBLE 'ADDITIONAL' CONDITIONS FOR CASES WHERE A PARTICULAR TAX RISK IS IDENTIFIED

- 1) The applicant must engage in good faith with the ATO to resolve any tax issues in relation to this transaction and its holding of the investment<sup>4</sup>.
- 2) The applicant must provide information as specified by the ATO on a periodic basis including at a minimum a forecast of tax payable<sup>5</sup>.
- 3) Provide the following information to Treasury (FIRBCompliance@treasury.gov.au) within 90 days of the transaction completing:

In your response, reference the FIRB ID and provide a copy of the No Objection Notification Letter.

- a) Where a new Australian entity associated with the transaction has been incorporated provide the Tax File Number (TFN) or Australian Business Number (ABN).
  - i) Provide the details (name, position and firm) of any adviser/s who advised on Australian tax matters in relation to this transaction, FIRB application and/or request for information/condition response.
  - ii) A copy of the most recent audited financial statements for the Target, or, if audited financial statements are not available, the latest financial records or unaudited financial statements.
- b) Provide an overview of the acquisition/restructure (the Transaction) step plan including a diagram of the pre and post Transaction organisational structures of the Target that includes the flow of funds used to finance the Transaction, as well as the legal form and tax residency of the ultimate investor(s) or shareholder(s) ('the Investors') and all of the entities interposed between them and the Target.
- c) State if the ultimate unitholders or shareholders (either directly or indirectly via a wholly owned subsidiary or associate) propose to borrow from a third party for the purpose of financing part or all of the proposed acquisition. If yes, provide the following information for each third party loan: the lender's name, the amount, the currency used and the rate of interest (including AUD equivalent interest rate).
- d) Using the below table, provide details of the existing and/or proposed debt and equity arrangements of Australian entities, including Australian Bid/Hold Co(s) used for the

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<sup>4</sup> Depending on the issues raised by the ATO this might include entering into the negotiation of an advance pricing arrangement or the requesting of a private ruling with the ATO within a certain timeframe, the reporting of information as requested on certain transactions, for example, relating to the transfer pricing rules in Division 815-B of the *Income Tax Assessment Act 1997*, or the anti-avoidance rules in Part IVA of the *Income Tax Assessment Act 1936*. The relevant requirements would be included and tailored as appropriate in each case.

<sup>5</sup> This could include a requirement to advise the ATO, and provide an explanation, of significant variations from the forecast of tax payable.

purpose of acquiring Target Co/Group. In addition, provide details of existing and/or proposed debt and equity arrangements of any non-resident beneficiaries/unitholders of Division 6 trusts.

Key terms	
Legal characterisation (e.g. loan, note, ordinary shares, preference shares etc)	
Tax Treatment (per Division 974 ITAA 1997)	
Borrower	
Lender (Clearly state if the Lender/s are a related party or not)	
Amount	
Tenor	
Ranking (i.e. senior, subordinate, mezzanine)	
Currency	
Interest rate ( <i>if currency is not AUD, also equivalent AUD rate</i> )	
Credit rating of the Borrower	
Other features (security, restrictive covenants, guarantees, guarantee fee, contingencies, payment in kind, convertibility, options, etc.)	

- e) For any related party debt disclosed at question 3(d), whether or not cross-border, having regard to Schedule 1 of the Practical Compliance Guideline 2017/4 (PCG 2017/4), advise for each:
- i) The risk rating;
  - ii) How each price and behavioural indicator was scored; and
  - iii) Which of the comparison options at paragraph 61 of Schedule 1 of PCG 2017/4 was used and the key terms of the debt (as set out in the table at question 7).
- f) Where international transfer pricing documentation has been prepared and/or provides further details on demonstrating the arm's length principles for any of the above dealings, provide a copy and detail if this information has been previously provided to the Australian Taxation Office.
- g) Advise if any part of your Transaction has features or an arrangement covered by one or more of the following Taxpayer Alerts (examples of such Taxpayer Alerts could include):
- i) TA 2020/4 – Multiple entry consolidated groups avoiding capital gains tax through the transfer of assets to an eligible tier-1 company prior to divestment
  - ii) TA 2020/3 – Arrangements involving interposed offshore entities to avoid interest withholding tax

- iii) TA 2020/2 – Mischaracterised arrangements and schemes connected with foreign investment into Australian entities
  - iv) TA 2020/1 – Non-arm’s length arrangements and schemes connected with development, enhancement, maintenance, protection and exploitation of intangible assets
  - v) TA 2019/2 – Trusts avoiding CGT by exploiting restructure rollover
  - vi) TA 2019/1 – Multiple entry consolidated (MEC) groups avoiding CGT through intra-group debt
  - vii) TA 2018/4 – Accrual deductions and deferral or avoidance of withholding tax
  - viii) TA 2018/2 – Mischaracterisation of activities or payments in connection with intangible assets
  - ix) TA 2017/1 – Re-characterisation of income from trading businesses
  - x) TA 2016/10 – Cross - Border Round Robin Financing Arrangements
  - xi) TA 2016/7 – Arrangements involving offshore permanent establishments
  - xii) TA 2016/3 – Arrangements involving related party foreign currency denominated finance with related party cross currency interest rate swaps
- h) Provide for each distribution expected to be made by an Australian entity to an offshore recipient after the Transaction’s completion:
- i) The tax treatment of the payment for the Australian entity making the distribution;
  - ii) The tax treatment of the receipt for the non-resident entity receiving the distribution;
  - iii) The proportion of the payment subject to withholding tax; and
  - iv) If the withholding tax rate is less than 10% or the payment is not subject to withholding tax, the reason(s) why.
- i) Provide for each arrangement where an interest payment is expected to be made to the Investors or a non-resident associate of the Investors after the Transaction’s completion:
- i) The name and residency of the recipient;
  - ii) A description of the payment’s characterisation for tax purposes in the hands of the recipient;
  - iii) The proportion of the payment subject to withholding tax;

- iv) If the withholding tax rate is less than 10% or the payment is not subject to withholding tax, the reason(s) why;
- v) The tax treatment of the receipt of interest for the non-resident entity receiving the distribution, including the effective tax rate it will be subject to; and
- vi) If it is subject to an effective tax rate of 10% or less, explain the commercial purpose for the loan or arrangement.

Note: Subdivision 832-J of the ITAA 1997 disallows an Australian deduction for a payment of interest (or a payment of a similar character) under a scheme to a foreign entity where it is reasonable to conclude that the entity, or one of the entities, that entered into or carried out all part of the scheme did so for a purpose including a purpose of enabling a deduction to be obtained in respect of the payment, or enabling foreign income tax to be imposed on the payment at a rate of 10% or less.

- j) Confirm which (if any) entities in the post-acquisition structure will be members of a 'Tax Consolidated Group' in accordance with the consolidation rules contained in the Income Tax Assessment Act 1997 (ITAA 1997) and provide the name of the head entity for each tax consolidated group.
- k) For each entity that will be required to lodge an Australian income tax return:
  - i) Will it be subject to the Thin Capitalisation rules in Division 820 of the ITAA 1997?
  - ii) The method it will apply to determine their respective maximum allowable debt amount post the completion of the Transaction.
  - iii) If it will rely on any exemption from the Thin Capitalisation rules, which exemption(s) are to be relied on the reasons why they apply.
- l) Provide the complete group structure for the Applicants global group including all directly and indirectly owned subsidiaries. Indicate the legal form of each entity and the relevant jurisdiction it is located in.
- m) Explain the commercial rationale for the interposition of the relevant entities.
- n) Explain the functions, risks and assets carried out by the relevant entities.
- o) In respect of the interposed incorporated entity/ies, please provide details of the main business activities conducted, number of employees and date of incorporation.
- p) A full and complete ownership structure that includes the details of all entities between [The PE Fund] and the Australian assets of AusHeadCo and/or its subsidiaries]; include tax residency and complete descriptions of the functions, roles, responsibilities and commercial purpose of all interposed entities located between [The PE Fund] and the Australian assets of AusHeadCo and/or its subsidiaries].

- q) Outline any proposed changes to the functions, assets and risks of [Australian Target] and its subsidiaries following the Proposed Transaction, with specific reference to functions associated with the development, enhancement, maintenance, protection and exploitation of intangible assets.
- r) Confirm whether any intangible assets acquired under the Proposed Transaction will be transferred to offshore entities following the acquisition.

## ATTACHMENT C - ADDITIONAL INFORMATION ON TAX CONDITIONS

Tax conditions will apply until a termination event occurs. A termination event will be defined in the conditions. The current definition is:

For the purposes of these conditions a termination event occurs:

- a) when the applicant ceases to hold the interest the acquisition of which was the subject of the no objection notification;
- b) when the applicant ceases to control, as defined in the *Foreign Acquisitions and Takeovers Act 1975*, the entity or business the control of which was the subject of the no objection notification;
- c) when the applicant ceases to carry on an Australian business the starting of which was the subject of the no objection notification; or
- d) when the applicant ceases to be a foreign person, as defined in the *Foreign Acquisitions and Takeovers Act 1975*.

The termination event that is applicable depends on the action that is the subject of the no objection decision.

If the action was the gaining of an interest (which did not require a change in control for it to be a significant action), then paragraph (a) of the definition of termination event is applicable. For example, acquiring an interest in Australian land. While ever the applicant has any interest in the land, the conditions apply. If an applicant acquired a direct interest in an agribusiness, then while ever the applicant owns a direct interest in the agribusiness, then the conditions apply.

If the action required the gaining of control, then paragraph (b) of the definition of termination event is applicable. For example, acquiring interests in assets of an Australian business per paragraph 41(2)(b) of the *Foreign Acquisitions and Takeovers Act 1975*. In that case, while ever the applicant has control the conditions apply.

If the action was starting an Australian business then paragraph (c) of the definition of termination event is applicable.

### CONDITIONS ONE AND TWO – COMPLY WITH AUSTRALIAN TAX LAWS.

These conditions make explicit that it is considered contrary to the national interest if foreign investors operating in Australia do not meet their obligations imposed under the tax laws, in relation to an action.

Compliance with Australia's tax laws would be determined by applying the usual legal principles and processes, including reliance on objection or appeal rights by affected entities.

If an applicant has taken reasonable care to comply with the relevant tax law and has a reasonably arguable position then it does not breach these conditions.

See below for the meaning of 'best endeavours' and 'control group' in condition two.

### CONDITIONS THREE AND FOUR – PROVIDE DOCUMENTS OR INFORMATION REQUESTED BY THE ATO

To ensure that an action does not give rise to or have ongoing tax issues that would make it contrary to the national interest, these conditions require that information that is requested by

the ATO, and which must be provided under tax law, must be provided to the ATO within the timeframe specified by the ATO.

Compliance with these conditions does not require the applicant to waive any common law or statutory rights or privileges, or the accountant's concession as provided in the ATO's access guidelines.

#### **CONDITION FIVE – PAYMENT OF OUTSTANDING TAX DEBT**

It is contrary to the national interest to allow foreign investment by investors who may not engage with the Australian tax system with the highest standards and best practices. The existence of and preparedness to address outstanding debts, that is, debts that are past due and payable, is one indicator of these matters. Outstanding tax debts are a pecuniary liability due and payable to the Commonwealth arising directly under a tax law.

The ATO may, at its discretion, permit an entity to pay outstanding tax debts by instalments or in another manner as permitted by the ATO. Those arrangements are not impacted by this condition.

For example, where an entity has exercised its right to dispute its liability for an outstanding tax debt by lodging an objection or filing an appeal, and the ATO has exercised its discretion to agree, subject to conditions such as payment of a portion of the outstanding amount or provision of relevant security, not to take recovery action while the objection or appeal is pending.

Payment of an outstanding tax debt that is not subject to an ATO payment arrangement may be required prior to the action being taken.

#### **CONDITION SIX – ANNUAL REPORT TO THE FOREIGN INVESTMENT REVIEW BOARD**

A reporting template is provided at [Attachment D](#) for applicants that are required to report to the Foreign Investment Review Board on compliance with tax conditions, as per condition six in [Attachment A](#). The report may be modified to suit particular circumstances.

If an applicant has a number of investments that have conditions imposed, it may complete a single report clearly identifying which investments are being reported upon and which of them did or did not comply with the relevant conditions.

Income year refers to an Australian income year for tax purposes (including an approved substituted accounting period). If the applicant is not required to lodge tax returns in Australia the Foreign Investment Review Board should be advised and a substitute reporting period will be determined (further information can be found in *FIRB Guidance Note 51: Compliance – reporting requirements for compliance and other purposes*).

The report must be signed by an authorised person. Authorised person includes an officer of an entity as per section 4 of the *Foreign Acquisitions and Takeovers Act 1975*.

Reports should be emailed to:

The Executive Member  
Foreign Investment Review Board  
FIRBCompliance@Treasury.gov.au

Or posted to:

The Executive Member  
Foreign Investment Review Board  
The Treasury  
Langton Crescent  
Parkes ACT 2600

#### **CONDITION SEVEN – ADVISE THAT THE ACTION HAS BEEN TAKEN**

If the applicant takes the action that is the subject of the no objection decision it must advise the Foreign Investment Review Board within 30 days.

Details should be emailed to:

The Executive Member  
Foreign Investment Review Board  
FIRBCompliance@Treasury.gov.au

Or posted to:

The Executive Member  
Foreign Investment Review Board  
The Treasury  
Langton Crescent  
Parkes ACT 2600

#### **CONDITION EIGHT – ADVISE THAT A TERMINATION EVENT HAS TAKEN PLACE**

If the conditions no longer apply to the applicant because a termination event has occurred, it must advise the Foreign Investment Review Board within 30 days. Details should be sent to the same address as for condition seven.

Note that Tax Conditions 7 and 8 will generally not be included where the no objection notification is subject to conditions in addition to tax conditions, as the objective of these two conditions would be satisfied in more general compliance reporting.

#### **MEANING OF CONTROL GROUP AND BEST ENDEAVOURS**

Conditions 2, 4 and 5 in [Attachment A](#) require that the applicant must use its best endeavours to ensure, and within its powers must ensure, that entities in its control group do certain things.

##### **Control group**

A control group consists of entities that: control the applicant (a controller); any entities that a controller controls; and that the applicant controls.

Control for this purpose is defined in section 50AA of the *Corporations Act 2001*. Section 50AA refers to the capacity to determine the outcome of decisions about another entity's financial and operating policies. It considers practical influence (rather than the rights that can be enforced) and practices or patterns of behaviour. It excludes circumstances where an entity has the capacity to influence decisions about another entity's financial and operating policies but is



under a legal obligation to exercise that capacity for the benefit of someone other than its own members.

Furthermore, conditions two and four only apply to entities in an entity's control group in relation to the action and any transactions, operations or assets in connection with the assets or operations acquired as a result of the action.

#### **Best endeavours and within its powers**

If an applicant controls another entity as per the definition of section 50AA of the *Corporations Act 2001*, then it would generally be expected that it is within the applicant's powers to ensure that the other entity acts in accordance with whichever of conditions 2, 4 and 5 have been applied.

For an entity in the applicant's control group that the applicant does not control, the applicant is expected to use its best endeavours to ensure that the other entity acts in accordance with the relevant condition.

Depending on the circumstances this might involve making representations to that entity and the controlling entity in relation to the relevant conditions in person and/or in writing. Best endeavours means to do all one reasonably can and this will depend on the relationships between the entities, the conditions that have been applied and the particular circumstances.

#### **POSSIBLE ADDITIONAL CONDITIONS**

These conditions may be applied if a particular tax risk is identified and would be tailored to the circumstances in each case. The imposition of additional tax conditions is not expected to impact the timing of a no objection decision. It is expected that the vast majority of additional conditions would involve action by the applicant after a no objection decision is made.

## ATTACHMENT D - COMPLIANCE REPORT ON FOREIGN INVESTMENT TAX CONDITIONS

### Investor:

Foreign Investor Plc

### Action(s) in this report:

Security interest in ABC Limited

Approved date month year    Acquired date month year

Security interest in DEF Limited

Approved date month year    Acquired date month year

### Reporting year

I, [insert name and title] am an officer<sup>6</sup> of [insert name of Applicant] and have the authority to make this report on behalf of [insert list of names off each relevant entity for which the person makes the attestation] (“the investor(s)”).

I have (made reasonable enquiries/caused reasonable enquiries to be made) with respect to compliance by the investors with (each condition/ conditions [insert numbers of relevant conditions e.g. 1 to 6]) specified in the no objection notification dated [date] for the [action/acquisition by the investor[s] of [name target] for the period [specify time period covered by the report]. On the basis of those enquiries I am satisfied that [,except to the extent specified below,] each investor has fully complied with those conditions.

### Exceptions

[Detail the exceptions to the statement of full compliance or, if the investors complied fully with each relevant condition, record “not applicable”.]

I hereby consent to each investor providing to the Department of the Treasury, on request, details of the enquiries I have (caused to be) made in order to make this Report, and the data produced as a result of those enquiries.

I acknowledge that giving false or misleading information to the Commonwealth is a serious offence.

### SIGNED AND DATED

NAME

Position

Reports should be emailed to:

The Executive Member  
Foreign Investment Review Board

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<sup>6</sup> An officer is defined in s. 4 of the *Foreign Acquisitions and Takeovers Act 1975*.

FIRBCompliance@Treasury.gov.au

Or posted to:

The Executive Member  
Foreign Investment Review Board  
The Treasury  
Langton Crescent  
Parkes ACT 2600