



## TAX CONDITIONS

Under the *Foreign Acquisitions and Takeovers Act 1975* (Act), foreign persons who are planning to acquire certain interests are required to notify the Treasurer (such actions are known as notifiable actions).

If a notifiable action is a significant action (the action) then the Treasurer will consider whether it is contrary to the national interest. If it is considered to be contrary to the national interest the Treasurer may prohibit the action. The Act also allows the Treasurer to decide that the Commonwealth has no objection subject to conditions to ensure that the action will not be contrary to the national interest. (For more information on significant and notifiable actions see Guidance Note 35.)

This Guidance Note outlines circumstances in which the Treasurer will consider tax-related conditions and serves as advice to potential foreign investors of the tax conditions that in certain circumstances may be applied to a no objection notification. Foreign investors will be given an opportunity to review and respond to these and any other proposed conditions. Applicants may agree in advance to the conditions in Part A of Attachment A. This does not mean that the conditions will be applied, but in the event that some or all of them are applied no further discussion on those conditions will be initiated by the Foreign Investment Review Board (FIRB).

## WHEN MAY A TAX CONDITION BE IMPOSED?

In considering whether actions by foreign investors are contrary to the national interest, the Treasurer will consider factors including national security; competition; other Australian Government policies such as taxation; the impact on the economy and the community; and the character of the investor. For further information, see Australia's Foreign Investment Policy.

Consistent with those factors, the Treasurer does and will continue to consider the potential impact of an action on Australian tax revenues in determining whether the action is contrary to the national interest.

The Australian Taxation Office (ATO) is consulted in determining the potential tax impact of every non-residential foreign investment proposal.

### IF TAX RISK EXISTS

If, following consultation, the Treasurer considers the action may involve a risk to tax revenues, then the conditions shown at Part A of Attachment A may be imposed as conditions of a no objection notification, to ensure that the action will not be, or is not, contrary to the national interest.

Situations where 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
- Dividend withholding tax
- Transfer pricing
- Low tax jurisdictions
- Consolidations
- Non-resident withholding tax
- Debt and equity risks
- Thin capitalisation
- Tax avoidance
- Tax liabilities on future disposals

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

#### **PARTICULAR TAX RISK**

If an action is considered to have a significant or particular tax risk then one or both of the additional tax conditions shown at Part B of Attachment A may also be imposed. These would be tailored to the particular circumstances of the action under consideration.

The imposition of tax conditions will be considered on a case by case basis. Whether there is a particular risk to Australian tax revenues requiring the additional tax conditions will depend on the circumstances of the action.

As with the imposition of any tax condition, if an additional tax condition is to be imposed, 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. Note that advance agreement (as described on page 1) to the tax conditions in Part A of Attachment A does not prejudice an applicant's right to comment on any other conditions that may be imposed, including any tax conditions that may be imposed under Part B or otherwise.

#### **MINIMAL TAX RISK**

If the national interest would not be served by applying the tax conditions and any associated tax risk can be managed without the use of tax conditions, then they will not be applied.

### **WHAT IS THE EFFECT OF THE CONDITIONS?**

The Treasurer considering or imposing tax conditions is not a change to Australia's foreign investment policy or Australian tax law. Consideration of tax issues is a longstanding feature of the consideration of the national interest. The ATO will continue to assess the potential tax impact of an action in the same way that it previously has. The information that the ATO requires to conduct its assessment of the potential tax impact of an action does not change as a result of the tax conditions.

Conditions imposed by the Treasurer when raising no objection to an action are not expected to affect the timeframe for considering an action.

The conditions do not have any impact on Australia's tax laws, which continue to operate as per the legislation.

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

In cases with a particular tax risk some conditions may require the investor (and/or its associates) to enter into good faith negotiations with the ATO for an advance pricing arrangement, request a private binding ruling, or 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.

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

### WHAT IF A TAX CONDITION IS BREACHED?

If a condition is breached, then 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. For serious breaches where it is contrary to the national interest to allow the investment to continue, then the Treasurer may consider an order requiring disposal of the interest. This would be reserved for the most serious of breaches.

### FURTHER INFORMATION

Further information is available at [www.firb.gov.au](http://www.firb.gov.au) 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.

## Taxation conditions of certain no objection decisions

### A. 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 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 60 days of taking the action that it has done so.

- 
8. The applicant must advise the Foreign Investment Review Board within 60 days of a termination event that the event has taken place.

<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.

<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.

## **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>1</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>2</sup>

<sup>1</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>2</sup> This could include a requirement to advise the ATO, and provide an explanation, of significant variations from the forecast of tax payable.

## Additional information on the tax conditions.

Tax conditions will apply until a termination event occurs. Termination event is defined in the conditions, see page 5 of this guidance note, as follows:

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.

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* (FATA). 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.







---

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.

## 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

#### [Example condition 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.

Complied for all actions listed above with this condition    Yes / No

Details (must be provided if there was noncompliance or there is a dispute with the ATO, i.e. the ATO has advised that it disagrees with the position taken by the applicant):

[\(Add other conditions that were imposed as part of the no objection decision\)](#)

### Additional information for the Foreign Investment Review Board

[\(Include any additional information that you would like to provide to the Board in relation to the taxation conditions\)](#)

### Signed

Reports should be emailed to:

The Executive Member  
Foreign Investment Review Board  
[FIRBCompliance@Treasury.gov.au](mailto:FIRBCompliance@Treasury.gov.au)

Or posted to:

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