



TAX GUIDANCE

TAX AS A FACTOR — WHY

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. This is done on a case-by-case basis.

This Guidance Note provides guidance on the circumstances in which the Government will consider imposing tax-related conditions and serves as advice to potential foreign investors on the tax conditions that in certain circumstances may be applied.

ROLE OF THE ATO IN THE APPLICATION REVIEW PROCESS

The Australian Tax Office (**ATO**) is consulted in determining the potential tax impact of non-residential foreign investment proposals.

The ATO also administers the Act 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's relevant tax areas on these applications.

ASSESSMENT OF TAX RISK BY THE ATO

The scope of the ATO's advice about an action is the impact on Australian tax revenues and the integrity of the tax system.

The ATO 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 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
 - Tax Rulings

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

MORE INFORMATION ON PARTICULAR TAX ISSUES

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 Australian 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
- 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 allow 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 THE 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 'low' – provided that additional tax conditions are imposed and/or the applicant provides some form of undertaking that:

- the action will not have features of concern or be within high risk parameters, as identified by the ATO in guidance material; and
- the applicant will provide certain information to the ATO after implementation to allow the ATO to check whether the arrangements have been implemented in a manner consistent with the undertaking.

Some of the factors that may affect the suitability of an undertaking include:

- The size of the applicant and the size of the proposed arrangement;
- The transparency of the applicant's engagement with the ATO, including previous engagement prior to the lodgement of a given application and during the application review process for a given application; and
- The choices and behaviours the applicant evidences in their tax affairs.

An example undertaking is provided at **Attachment A**.

TAX CONDITIONS

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 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 (**Attachment B**) 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.

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
- 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
- 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 Foreign Investment Review Board (FIRB) 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. These would be tailored to the particular circumstances of the action under consideration.

As per the imposition of the 'standard' tax conditions, whether or not additional conditions are required is assessed on a case-by-case basis and 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 (as described above) to the 'standard' tax conditions in **Attachment B** does not prejudice an applicant's right to comment on any other conditions that may be imposed, including the tax conditions listed in **Attachment C** or otherwise.

See **Attachment D** for additional information on tax conditions.

WHAT IS THE EFFECT OF THE CONDITIONS?

The effect of standard tax conditions, generally speaking, is to require compliance with Australia'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.

See **Attachment E** for the compliance report template on foreign investment tax conditions.

ENFORCEMENT AND COMPLIANCE

WHAT IF A TAX CONDITION IS BREACHED?

If a condition is breached, 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, the decision maker 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 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.

EXAMPLE UNDERTAKING

The applicant undertakes to the Commissioner of Taxation that if it proceeds with the proposed Action/s, it will observe the position outlined in this letter.

- 1. Proposed Action/s: [Insert description of proposed Action/s]*
- 2. With respect to the proposed Action/s, the Applicant must use best endeavours to ensure, and within its powers must ensure, that:*
 - a. Its arrangements in relation to the proposed Action will not have features of concern or be within certain high risk parameters identified by the ATO in its public guidance material (see Schedule [1]).*
 - b. [Any other relevant matters]*
- 3. The applicant agrees to provide certain information (see Schedule [2]) to the ATO [within 90 days of implementation of the proposed Action/s].*
- 4. The Applicant will provide evidence to the ATO [within 90 days of implementation of the proposed Action/s] that its arrangements were implemented in a manner consistent with the undertaking.*

'STANDARD' TAX CONDITIONS

A. CONDITIONS THAT MAY APPLY UNTIL A TERMINATION EVENT¹ 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 group² 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 information³ 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.

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

¹For 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.

² 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*.

³ This includes documents or information held, possessed or stored outside Australia.

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.¹
2. The applicant must provide information as specified by the ATO on a periodic basis including at a minimum a forecast of tax payable.²

¹ 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.

² 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 TAX CONDITIONS

Tax conditions will apply until a termination event occurs. Termination event is defined in the conditions, see page 8 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.

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 60 days. Details should be sent to the same address as for condition seven.

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 behavior. 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.

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

Or posted to:

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