



Law Council
OF AUSTRALIA

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27 May 2016

Dear Sir/Madam,

Draft Tax Conditions Guidance Note

The Foreign Investment Committee of the Business Law Section of the Law Council of Australia welcomes the opportunity to comment on the draft tax conditions guidance note provided on 20 May 2016, proposed to be issued by the Foreign Investment Review Board.

We welcome the revisions made on 3 May 2016 to the standard tax conditions released by the Treasurer on 22 February 2016. These revisions addressed a number of concerns raised during the consultation. However, there are still some aspects of the conditions that would benefit from further specificity. In this regard we refer to the submission of the Foreign Investment Committee and the Tax Committee of the Business Law Section of the Law Council of Australia dated 4 March 2016.

In this letter we have not repeated the comments made in our 4 March submission, some of which continue to cause concerns. We continue to press for the Government's consideration of these comments.

In this letter, we have instead focussed on the specific issues in the draft guidance note as follows:

- 1 Page 2 What if a tax condition is breached? – If the applicant breached a tax condition which has a relevant penalty tax and interest under the Australian tax law and the applicant has satisfied the penalty under the tax law, the applicant should not be subject to additional or double sanction for the same conduct under the foreign investment rules. It would be desirable to clarify in the guidance note whether prompt satisfaction of tax penalties would at least be taken into account in deciding whether actions would be taken under the foreign investment rules.
- 2 Page 5 Attachment A footnote 1 – The footnote refers to the “obtaining” of a private ruling with the ATO as an example of what is expected of the applicant in engaging with the ATO to resolve tax issues. However, on page 2, fourth paragraph under the heading “What is the effect of the conditions?” the reference is to a “request” for a private binding ruling.

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- The reference to “obtaining” a private ruling at footnote on page 5 should be changed to “requesting” a private ruling to align with the reference on page 2.
- 3 Page 6 Attachment B – It would be desirable to have some examples or guidance on the scope of the phrase “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”.
 - 4 Page 6 first paragraph – The cross reference to page 1 of the guidance note as the location of the definition of the termination event is incorrect. The reference should be page 5.
 - 5 Page 7 Condition 5 – Is there a deadline to pay the outstanding tax debt, e.g. by the time the proposed action is taken or X days after the action is taken?
 - 6 Page 7 Condition 6 – It should be clarified that the template annual report is provided as guidance and needs to be modified on a case by case basis.
 - 7 Attachment C template compliance report:
 - a. The template refers to “interest” and not “action” as used in the conditions. This would not be appropriate if the action is the starting of an Australian business.
 - b. The template provides only a Yes/No binary answer. However, there may not be a Yes/No answer for some conditions as they may not be applicable for a particular reporting period, e.g. provision of information will only be relevant if there is a request from the ATO. The answer could be more accurately cast as Yes/No/Not applicable.

The Committee would be very pleased to meet with representatives of Treasury and the FIRB in relation to our comments in this letter or our submission on the tax conditions of 4 March 2016. In the first instance, please contact:

- the Committee Chair, Malcolm Brennan, on 02-6217 6054 or via email: Malcolm.Brennan@au.kwm.com,
- Committee Deputy Chair, Wendy Rae, on 03-9613 8595 or via email: Wendy.Rae@allens.com.au.

Yours faithfully,



Rebecca Maslen-Stannage, Acting Chair
Business Law Section