

INVESTING IN AUSTRALIA FIRB'S TAX CONDITIONS

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Often, a foreign investor must seek the Australian Treasurer's approval to directly or indirectly invest in Australia. The application is made to the Foreign Investment Review Board (**FIRB**), which will consult with the Australian Taxation Office (**ATO**) on the tax impact of the investment. If you are prepared for the ATO's processes, this part of the FIRB application should go smoothly. This guide provides an outline of that process.

YOUR APPLICATION AND THE TAX CHECKLIST

The first step in helping your application proceed smoothly through the ATO's review is to comply with FIRB's [Tax Checklist](#).

Many FIRB applications do not provide this information, and invariably results in the ATO and FIRB issuing requests that slow down the application process. A good tax adviser, engaged early as part of the FIRB application process, will help provide appropriate submissions for the tax checklist.

THE ATO'S REVIEW

The ATO advises FIRB on the risk to Australian tax revenues and the integrity of the Australian tax system, using the standards:

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.



FOREIGN INVESTORS OFTEN ASK WHY THE ATO AND FIRB INQUIRE ABOUT THEIR HISTORICAL TAX AFFAIRS OR THE TAX AFFAIRS OF OTHER INVESTMENTS THEY MAY HOLD IN AUSTRALIA.

The ATO's advice to FIRB reflects a broad range of matters ranging from the proposed investment's compliance with tax laws to the applicant's compliance history and transparency during prior engagements with the ATO. Additionally, the ATO may have regard to existing arrangements (such as related party financing arrangements) which could have the effect of reducing the tax payable in respect of income to be derived from the proposed investment.

The ATO appreciates that details of the post-implementation transaction structure and expected funding will not always be finalised or known at the time an application is made to FIRB. In these circumstances, additional tax conditions may be imposed and/or the applicant may be required to provide an undertaking in respect of certain features of the proposed investment (see sample undertaking on page 6).

THE TAX CONDITIONS

In most circumstances, foreign investors should expect that the standard tax conditions will be imposed on them (even when assessed as low risk). Sometimes, specific or additional tax conditions may also be imposed and some preliminary ATO views on the proposed investment may be noted as part of the conditions.



STANDARD TAX CONDITIONS

There are eight standard tax conditions. Most of the standard conditions are ordinary tax compliance obligations which apply to all taxpayers. Their imposition on foreign investors is aimed at encouraging those not familiar with the Australian tax system to seek tax advice and to remain current in compliance. However, as it is part of the FIRB process, breaches of the conditions can result in sanctions beyond the mere imposition of tax-related penalties (see Complying with the tax conditions below).

#	CONDITIONS	COMMENTARY
1, 2	<p>Compliance with Australian tax laws</p> <p>The applicant and its “control group” (refer page 5) must exercise “reasonable care” when complying with Australian tax laws and have a “reasonably arguable position” (RAP).</p>	<p>This obligation broadly applies to all taxpayers. A position is a RAP if it is just as likely to be, or more likely to be, correct as incorrect. Whilst Australian investors are not expressly required to take reasonable care or have a RAP, they may be subject to significant penalties if they do not and, as a consequence, pay insufficient tax. Foreign investors are therefore under a positive obligation to ensure their tax positions are reasonably arguable.</p>
3, 4	<p>Providing information / documents</p> <p>The applicant and its “control group” must provide documents or information to the ATO in relation to the transaction in accordance with the Australian tax laws, and in the timeframe prescribed by the ATO.</p>	<p>This obligation applies to all taxpayers. The applicant will still be entitled to the usual common law or statutory rights or privileges against the disclosure of relevant information or documents, including legal professional privilege.</p>
5	<p>Paying tax debts</p> <p>The applicant and its “control group” must pay their tax debts under Australian tax laws which are due and payable at the time of the proposed transaction. This condition does not apply to the extent the ATO has agreed to a particular payment arrangement.</p>	<p>All taxpayers are obliged to pay their tax debts when due. However, the focus of this condition is on tax debts existing at the time of the transaction (and not on prospective tax debts). Because the definition of “control group” is extended to include the entity to be acquired in an acquisition, this obligation requires the foreign investor to ensure pre-acquisition tax liabilities of the target entity are met.</p>
6	<p>Reporting obligations</p> <p>The applicant must provide an annual report to FIRB on its compliance with the tax conditions by the due date of its tax return.</p>	<p>This is an additional reporting obligation for foreign investors, though applicants with multiple investments only need to fill in one report. The report is a relatively simple notification to FIRB, and a sample annual report can be found at the end of this guide.</p>
7, 8	<p>Notification of commencement and termination event</p> <p>The applicant must advise FIRB within 60 days of making the investment and within 60 days of a termination event (ie. ceasing to hold or control the interest subject to the application, or ceasing to carry on a business in Australia).</p>	<p>Although not strictly tax related, these are new conditions and will apply until an eventual disposal occurs. The expectation is that this will give FIRB (and the ATO, more importantly) an early notification of the disposal event.</p>

SPECIFIC OR ADDITIONAL TAX CONDITIONS AND NOTIFICATIONS

In cases where the proposed investment can present significant tax planning opportunities or significant risks to Australian tax revenue, the Treasurer can either prohibit the investment (which is generally highly unlikely) or allow the investment but impose additional tax conditions. Some examples of specific or additional tax conditions are set out below.

EXAMPLE TAX CONDITION	WHEN IS IT TYPICALLY IMPOSED
<p>The buyer must pay \$X of the purchase price in Australian dollars to the ATO with respect to the taxation liabilities of the seller.</p>	<p>Where the seller owes tax to the ATO but does not have the means of funding it other than from the sales proceeds. This is particularly likely where the seller has offshore parents which are outside the ATO's reach, and the seller could direct that the sales proceeds be paid to those offshore parents. This is not a typical tax condition.</p>
<p>Treaty shopping to take advantage of Australia's tax treaty network through the interposition of intermediate entities that do not have a clear commercial purpose may attract the operation of the general anti-avoidance rule. The ATO requests that you engage with them in relation to your holding structure as soon as possible and prior to disposing of this investment.</p>	<p>Where the buyer is controlled by a private equity or similar investor and at least one entity in the holding structure is in a low tax jurisdiction.</p>
<p>Provide a full and complete ownership structure of all entities in the holding structure.</p>	<p>Where the holding structure is still a work in progress (for example, where the FIRB application is made very early in the transaction process).</p>
<p>Provide various details about related party financing arrangements. By and large, the details mirror the details necessary to apply the risk rating in Practical Compliance Guideline PCG 2017/4. Sometimes, an actual risk rating under the guideline may be required.</p>	<p>Where related party financing arrangements are likely to be used to finance the acquisition and often when those arrangements are still being developed at the time of the FIRB application.</p> <p>Further information on PCG 2017/4 and a useful tool can be found on our website.</p>
<p>Provide information on the application of specific Australian tax provisions to the transaction, such as membership of a consolidated group.</p>	<p>This will depend on the particular transaction and the issues identified. For example, the ATO may have a concern that the tax cost base of intellectual property assets may be reset to their market value under the tax consolidation rules, allowing for a tax-free transfer of those assets offshore. The ATO may want to obtain information on the application of the consolidation rules and the intention of the buyer in relation to those assets.</p>
<p>Engage with the ATO to resolve any tax issues in relation to the transaction and your holding of the investment.</p>	<p>This is an unhelpful condition as it provides no guidance on the issues the ATO is concerned about. Applicants should seek this information from the ATO before agreeing to the condition. It will also help define the parameters of subsequent engagement with the ATO.</p>
<p>Engage with the ATO on applying for rulings or advanced pricing arrangements.</p>	<p>Where specific issues are known or suspected, typically focussed on profit repatriation or hybrid/exotic financing arrangements. This has also been imposed in industries where offshore sales hubs are common. Again, applicants should seek to confine this to specific issues, where possible.</p>
<p>Provide information specified by the ATO on a periodic basis, including a forecast of tax payable.</p>	<p>Where profit repatriation is suspected, usually with private equity investors and easily transferrable assets, such as intellectual property.</p>

Foreign investors who make frequent investments in Australia may find that specific tax conditions will be imposed on some transactions and not on others.

Also, it is common to see “notifications” rather than conditions. Notifications do not require the applicant to undertake any actions – they are merely intended to notify the applicant of the ATO’s preliminary view on risks and possible courses of action. A common notification, for example, states that related party financing arrangements in the transaction present a risk of non-compliance, that they may not have the tax outcomes the applicant expects and that the ATO may allocate resources to review those arrangements. A properly advised investor should already be aware of these risks!

“CONTROL GROUP”, BEST ENDEAVOURS AND WITHIN ITS POWERS

Where tax conditions are imposed in respect of the control group, the applicant must use its best endeavours to ensure (or, where within its powers, it must ensure) that its control group complies with the conditions. If these steps are taken, but a control group entity does not comply, this should not in itself breach the tax conditions.

An applicant’s control group consists of the entities that:

- 1 control the applicant (a controller);
- 2 the controller controls (sister companies); and
- 3 the applicant controls, which includes for the purposes of these conditions the entity being acquired under the transaction.

Broadly, an entity “controls” another entity if it has the capacity to determine the outcome of decisions relating to the other entity’s financial and operating policies. In determining this, the entity’s practical influence (rather than enforceable rights) and prior practice or pattern of behaviour is considered.

NEGOTIATING TAX CONDITIONS

Foreign investors will typically be given an opportunity to discuss their tax affairs with the ATO during the application process for large transactions (although this may be limited given the restricted time frames for processing applications). Foreign investors will also have an opportunity to review and respond to any proposed tax conditions before being imposed.

It is very unlikely that the ATO and FIRB will amend or negotiate the standard tax conditions, and applicants should be prepared in most cases to accept their imposition (although we have been able to persuade FIRB to recommend modifications to the standard tax conditions in unusual cases). The standard tax conditions are not imposed for every transaction.

It is possible to negotiate specific tax conditions (given their customised nature). Investors should try and anticipate specific tax conditions to best position themselves for negotiation – keeping in mind the deal timeline is often the applicant’s worst enemy for successful negotiations. It is also helpful to seek precision in the scope of the specific tax conditions.

We work with investors during this process to decide whether to seek early engagement with the ATO and whether to accept (or negotiate) any proposed tax conditions.

COMPLYING WITH THE TAX CONDITIONS

As contravention of the FIRB-imposed tax conditions can have more severe consequences than the mere monetary consequences of a breach of tax obligations, it is important that investors and their tax advisers are live to the tax conditions imposed by FIRB.

Some specific conditions requiring engagement with the ATO will name an individual or department within the ATO with whom the engagement must occur. Those conditions may also impose a time restriction. In other cases, they may not be as specific. Depending on the nature of the investor or the target, engagement using an existing ATO key client manager may be enough.

FINALLY, INVESTORS SHOULD DESIGN AND IMPLEMENT SUITABLE GOVERNANCE PROCEDURES TO ENSURE THEY MEET THEIR COMPLIANCE OBLIGATIONS UNDER THE TAX CONDITIONS, WHICH WE CAN HELP WITH.

SAMPLE UNDERTAKING

This is a sample undertaking that the ATO may request an applicant to provide when they are unable to provide certain information at the time of their application.

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/s will not have features of concern or be within certain high risk parameters identified by the ATO in its public guidance material.
 - b) (Any other relevant matters)
- 3) The applicant agrees to provide certain information 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.

Signed:

Obviously, this sample undertaking will require tailoring to each particular transaction and care should be taken in formulating the precise undertakings.



SAMPLE FIRB ANNUAL REPORT

This is a sample pro forma FIRB annual report to satisfy standard tax condition 6 in respect of two transactions:

Investor:	<i>Foreign Investor Plc</i>	
Action(s) in this report:	(1)	Security interest in ABC Limited Approved date month year Acquired date month year
	(2)	Security interest in DEF Limited Approved date month year Acquired date month year
Reporting year:	2019	
Condition (Example condition 1)	Complied Yes / No	Details of Non-Compliance Details (must be provided if there was non-compliance or there is a dispute with the ATO).
<p>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. (Add all other conditions imposed)</p>		
Additional information for the Foreign Investment Review Board:		
(Include any additional information that you would like to provide to FIRB in relation to the tax conditions)		
Signed:		



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