

## PricewaterhouseCoopers (Australia)

'Marketed widely': Understanding policy changes to foreign investment in Australian agricultural land

## PricewaterhouseCoopers AG (Liechtenstein)

Initial Coin Offerings

# ***PwC International Business Reorganisations Network – Monthly Legal Update***

## ***Edition 3, March 2018***

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### ***Welcome***

Welcome to the third edition of the PwC International Business Reorganisations (**IBR**) Network Monthly Legal Update for 2018.

The PwC IBR Network provides legal services to assist multinational organisations with their cross-border reorganisations. We focus on post-deal integration, pre-transaction separation and carve outs, single entity projects, and legal entity rationalisation and simplification as well as general business and corporate and commercial structuring.

Each month our global legal network brings you insights and updates on key legal issues and developments relevant to multinational organisations.

We hope that you will find this publication helpful, and we look forward to hearing from you.

### ***In this issue***

In our March 2018 issue:

- PricewaterhouseCoopers (Australia) considers policy changes in respect of foreign investment in Australian agricultural land; and
- PricewaterhouseCoopers AG (Liechtenstein) explores key legal and taxation issues relating to initial coin offerings.

### ***Contact us***

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# ***PricewaterhouseCoopers (Australia) – 'Marketed widely': Understanding policy changes to foreign investment in Australian agricultural land***

## ***At a glance***

On 1 February 2018, the Australian Treasurer announced important updates that will impact how foreign investors can acquire agricultural land (whether freehold or leasehold with a term over five years) in Australia, where approvals from the Foreign Investment Review Board (**FIRB**) are required. This article provides a summary of the Treasurer's announcement and the subsequent guidance note provided by FIRB, with a takeaway of the key elements of the change, impacts and interpretation of the need for land to be 'marketed widely'. The new rules will have the greatest impact on the ability to consummate a deal off market with a foreign investor, one which has traditionally been favoured by farmers and investors alike.

## ***In detail***

### ***Background***

On 1 February 2018, the Australian Treasurer **announced important changes** that will affect how foreign investors can acquire agricultural land in Australia where FIRB approval is required for the acquisition.

The key element of the change will require a foreign investor to demonstrate to FIRB, as part of the application process, that the property proposed to be acquired has been marketed widely, allowing Australians an equal opportunity to participate in the sale process.

Following the Treasurer's announcement, FIRB has **issued a guidance note** in relation to the changes. Key takeaways from the guidance note include:

The property must be '**marketed widely**' which means:

- a public marketing/advertising was undertaken for the sale of the property, using channels that Australian bidders could reasonably access (for example, advertised on a widely used real estate listing site, or in a large regional/national newspaper);
- b the property was marketed/advertised for at least 30 days; and
- c there was equal opportunity for bids or offers to be made for the property while still available for sale.

The guidance note also lists some exceptions to the new 'marketed widely' requirement, including where the applicant:

- a is acquiring a property via a private sale that was marketed/advertised in the above manner in the last six months but did not sell or where the sale fell through; or

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- b has a substantial Australian ownership share (i.e. 50 per cent or more), as this constitutes an opportunity for Australian bidders, despite a foreign ownership share; or
- c is required to make the acquisition to comply with state or commonwealth law (e.g. mining buffer zones).

The changes apply immediately, including to applications currently being considered by FIRB, as well as those to be submitted in the future.

### ***Implications of the policy change***

In light of this announcement, it is worth recapping the high level rules around foreign investment in agricultural land, including:

- a FIRB approval will generally be required for proposed investments in agricultural land by foreign persons (excluding foreign government investors) where the cumulative value of a foreign person's agricultural land holdings exceeds AUD15 million. Exceptions apply to investors from Australia's trade agreement partners (Chile, New Zealand, Thailand and the United States), which have higher thresholds. All acquisitions of agricultural land by foreign government investors require approval.

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- b Separate to the FIRB approval process, all acquisitions of interests in agricultural land by foreign persons, regardless of whether they require FIRB approval and regardless of value, must be notified to the Australian Taxation Office Register of Foreign Ownership.

The theme of the 1 February policy change, that Australians be given the opportunity to participate in the sale process of agricultural land where foreign persons are the ultimate acquirer, is not entirely new. FIRB has been raising this issue in its assessment of foreign investment applications in relation to agricultural land in a number of applications PwC has been involved with in recent times.

Clearly, pressure has been applied through public channels by local interests in relation to the threat, whether real or perceived, of valuable Australian agricultural assets favouring foreign buyers in off market transactions.

There are many legitimate reasons why a vendor would choose not to opt for a public sale process of an asset, including for political, reputational, commercial, privacy and timing reasons. Clearly, such a vendor could still choose not to market their property 'widely' however, their potential source of buyers would therefore exclude foreign persons if FIRB approval is required, thereby arguably limiting the ability for a true market value being achieved for the asset.

Similarly, there may be good reasons why a foreign buyer may not wish to participate in a public sale process. Take for example an existing foreign agricultural land owner who wishes to acquire a neighbouring property to expand operations. The ability to privately approach the neighbouring owner and consummate a deal off market will be compromised where FIRB approval is required.

### ***The takeaway***

Vendors, foreign buyers and their respective advisers will need to factor in these new FIRB rules when planning for the sale and purchase of agricultural land in Australia. Our experience shows that there is significant, growing appetite for Australian agricultural land assets and we await to see how this latest policy change may impact the market for agricultural land.

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# PricewaterhouseCoopers AG (Liechtenstein) – Initial Coin Offerings

## At a glance

- An **initial coin offering (ICO)** or a token sale is when a company sells a predefined number of digital tokens to the public in a limited period of time.
- The ICO market has **grown very rapidly** in recent months and has been a new avenue for blockchain based start-ups and projects to get the funding needed to launch their projects.
- In September 2017, the **Financial Market Authority Liechtenstein (FMA)** published a **fact sheet** on ICOs which stated that depending on their specifications, tokens may constitute financial instruments subject to financial market law.
- Careful structuring of the ICO is necessary to manage potential issuance stamp tax consequences (in case of issuance of equity tokens) as well as VAT and corporate income tax consequences (in case of issuance of utility token).

## In detail

### 1. What are ICOs?

ICO (also referred to as token generation event, token launch or token offering) is a term describing a limited period in which a company sells a predefined number of digital tokens (crypto coins) to the public, typically in exchange for major cryptocurrencies (as of today, mostly Bitcoins and Ether).

On the side of the token issuer, the collected funds are typically used to finance a project (e.g. the building of a software/ blockchain-based platform). In exchange for the financing, the investor receives a token which may be connected with the right to receive a dividend, a voting right, a license, a property right or a right to participate in the future performance of the issuer. Usually, tokens are tradable on cryptocurrency exchanges.

### 2. Token characteristics

**Tokens** (coins) can have different functions, which triggers the way how to treat them from a legal and regulatory perspective. Four main forms exist to date (incl. many hybrid combinations).

#### a Security token

Tokens with security character (e.g. debt, equity or derivatives) with income generating component and potential rights vis-à-vis the issuer (e.g. governance, participation, ownership).

#### b Digital currency

Tokens with an attributed value. They can be used to buy and sell goods and services and can be used to store value (although they can be very volatile).

#### c Asset-backed token

Tokens that provide underlying exposure to real world assets (e.g. gold, diamond, securities, cash, real estate, etc.).

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#### d Utility token

Tokens with utility character provide access to a blockchain-based platform, product, or service. They are not primarily designed in means of an investment.

### 3. What are the characteristics of an ICO?

In general, an ICO has the following structure:

- a Publication of a white paper describing a project or product as well as the funding via ICO. The white paper also describes the intended use of the tokens to be issued. Software and the technical specifications are published on open source platforms like GitHub.
- b A smart contract is set up, usually based on the Ethereum blockchain. The smart contract is needed to generate and distribute the tokens later on.
- c During a fixed time period, cryptocurrency payments (usually ether or bitcoin) are accepted by way of the smart contract.
- d Using the public key for those payments (similar to a digital account number), the smart contract generates the new tokens and makes them available to investors.
- e The tokens may be stored by third parties (wallet providers) and/or made tradable with the help of cryptocurrency trading platforms.

- f Once the funded project is complete, the investor can sell the tokens or exchange them for services.

### 4. What are the key challenges of an ICO?

Worldwide, regulators start to look into ICOs, but only few have actually taken actions (e.g. China, USA and Singapore). It is expected that the US SEC/EU ESMA and other major regulators will soon regulate the ICO space, particularly from a capital markets, tax and KYC/AML perspective.

A further challenge is that many ICOs still lack proper **cybersecurity** which can represent a major threat for investors. As most ICOs raise money in the form of cryptocurrencies, high-volume transactions provide an attractive target for criminals. Besides ICOs, several cryptocurrency wallets (where tokens/coins get stored) have been hacked recently.

### 5. How does Liechtenstein treat ICOs from a legal/ regulatory perspective?

In September 2017, the FMA published a [fact sheet](#) on ICOs which stated that depending on their specifications, tokens may constitute financial instruments subject to financial market law.

Depending on their specification, tokens may constitute **financial instruments** subject to financial market law. This may include tokens that have characteristics of equity securities or other investments. In principle, activities relating to financial instruments are subject to licensing by the FMA on the basis of special legislation and may require publication of a prospectus.

In all cases, the **specific design and de facto function of the tokens** are decisive. Any AML/KYC obligations also depend on the specific design. Connecting factors for FMA jurisdiction exist, for instance, if a company's registered office or branch is in Liechtenstein and/or if relevant activities are pursued on the Liechtenstein market.

### 6. How is an ICO taxed in Liechtenstein?

Liechtenstein offers a **favourable tax system with modest tax rates** for issuers of tokens (typically using foundation structure or a special purpose vehicle), for ICO entrepreneurs and for investors.

Careful structuring of the ICO is necessary to manage potential issuance stamp tax consequences (in case of issuance of equity tokens) as well as VAT and corporate income tax consequences (in case of issuance of utility token). Since there is no gift tax in Liechtenstein, employing a charitable foundation structure is an option which is worth considering in detail.

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Taxation of ICO entrepreneurs and investors domiciled in Liechtenstein depends on the categorization of a specific token. Capital gains on digital currency tokens should generally be exempt from income tax (due to taxation of notional income from wealth instead of effective investment income).

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