PwC International Business Reorganisations Network – Monthly Legal Update

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Welcome

Welcome to the first edition of the PwC International Business Reorganisations (**IBR**) Network Monthly Legal Update for 2016.

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 January 2016 issue:

- PwC Australia introduces Australia's new foreign investment regime;
- PwC Legal UK reports on the introduction of a new type of body corporate in the Cayman Islands; and
- Law Square (Belgium) reports on proposed reforms to Belgian company and association laws.

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PwC Australia – Introducing Australia's new foreign investment regime

At a glance

The new foreign investment laws came into force on 1 December 2015, establishing a new regime for assessment of foreign investment in Australia; the first major change to the law in 40 years.

The law has been substantially re-written, featuring stronger compliance and enforcement provisions, a new user-pay philosophy and new operational concepts and procedures.

The key 'national interest' screening test remains, along with most, if not all, of the criteria used to determine whether an investment requires screening.

In detail

The changes to Australia's foreign investment regime consists of a wholesale re-write of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (FATA Act) and a new set of regulations which are intended to modernise and strengthen the previous framework and which place a strong emphasis on compliance and enforcement. The changes have been effected through the following instruments:

a *Foreign Acquisitions and Takeovers Legislation Amendment Act 2015* (Cth) (**FATL Act**);

b *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (Cth) (**Imposition Act**);

c *Register of Foreign Ownership of Agricultural Land Act 2015* (Cth) (**Register Act**);

d *Foreign Acquisitions and Takeovers Regulation 2015* (Cth); and

e *Foreign Acquisitions and Takeovers Fees Imposition Regulation 2015* (Cth).

The FATL Act repeals all substantive provisions and represents a major overhaul of the FATA Act, which had not been significantly amended since its enactment. The FATL Act introduces stricter provisions and higher penalties for contraventions of the legislation, enables the transfer of responsibility for regulating foreign investment in residential real estate to the Australian Taxation Office (**ATO**) and lowers the screening threshold for investments in Australian agriculture, among other key changes.

We examine some of the key changes and important concepts under this new regime.

Increased threshold for acquiring a 'substantial interest'

Under both the old and new framework, foreign persons are generally required to notify the Foreign Investment Review Board (**FIRB**) if they intend to acquire a 'substantial interest' in a corporation or trust and the relevant monetary thresholds are reached. A substantial interest was previously an interest of 15 per cent and the FATL Act has increased this to 20 per cent.

This change in threshold is intended to align it with the takeover threshold in Chapter 6 of the *Corporations Act 2001* (Cth) (**Corporations Act**). A consequence of the change is that some acquisitions which previously required notification and screening will no longer be caught.

Significant Actions and Notifiable Actions

The FATL Act has introduced two important new concepts to the foreign investment regime, 'significant actions' and 'notifiable actions'.

The term 'significant actions' refers to actions that a person has taken or is proposing to take that do not require notification in advance (unless they are also 'notifiable actions', discussed further below) but can be prohibited or unwound if the Treasurer considers that they are contrary to Australia's national interest. A significant action is generally an action to acquire interests in securities, assets or Australian land or an action in relation to entities and businesses with a connection to Australia.

In order to be a significant action, the action must either result in a change in control involving a foreign person or be an action taken by a foreign person and, in some cases, meet certain percentage interest and monetary thresholds.

It is compulsory to notify FIRB of a significant action which constitutes a 'notifiable action'. There are four conditions to be satisfied for an action to be notifiable. The first is that the proposed action involves acquiring a direct interest in an agribusiness, acquiring substantial interests in Australian entities or acquiring an interest in Australian land. The other conditions relate to threshold requirements, categories of entities and the nature of the foreign person involved.

The benefit of proactively notifying FIRB of a 'significant' action which does not yet constitute a 'notifiable' action, is that an investor is able to obtain a 'no objection' certificate providing certainty as to compliance with Australia's foreign investment law. The risk is that the certificate is either issued subject to unacceptable conditions or withheld, although many investors will prefer to know this in advance of transacting, rather than have to deal with the consequences of an order to dispose of an asset or unwind a transaction, afterwards.

Investments in Agricultural Land

The new regime places a strong focus on investments in agricultural land. Since 1 March 2015, the screening threshold for acquisitions by non-government investors in agricultural land was lowered from $252 million to $15 million calculated on a cumulative basis. There has also been an attempt to streamline the provisions dealing with investments in land.

Under the previous law, a foreign person was required to notify the Treasurer of a proposal to acquire or increase an interest in 'Australian urban land', unless an exemption applied. The Treasurer could then make an order prohibiting the acquisition if this was considered to be against national interests, or could impose conditions.

The FATL Act introduces a new definition of 'Australian land' that replaces the 'Australian urban land' concept and the requirements that previously applied to Australian urban land now apply to all land in Australia unless below the threshold, exempt, or specific rules apply. The definition of Australian land includes agricultural land as well as commercial land, residential land or a mining or production tenement. Importantly, agricultural land is defined as land in Australia that is used, or that could reasonably be used, for a primary production business. It will be sufficient if the land is only partially used, or could be partially used, for primary production for it to be classified as Australian land.

The effect of this will be that the requirements previously applying to Australian urban land will apply to all land in Australia (including agricultural land) unless below the threshold, exempt, or specific rules apply. This change should simplify the operation of some of the provisions of the previous law as it will remove the existing distinction between urban and rural land.

New Screening Threshold for Investment in Agribusiness

The FATL Act also increases scrutiny around foreign investment in agriculture by lowering the screening threshold to $55 million for non-government investments in agribusiness.

The term 'agribusiness' is defined broadly to include a wide range of primary production businesses, agricultural, forestry and fishing activities and certain first stage downstream manufacturing businesses such as processing of meat, poultry, dairy, seafood, fruit and vegetables, oils and fat manufacturing, grain mill product manufacturing and sugar manufacturing.

The inclusion of downstream processing in the definition of 'agribusiness' is an important change, particularly in light of the sensitivity of ownership of agricultural infrastructure in Australia, seen clearly in the Treasurer's decision to block the proposed acquisition of GrainCorp by ADM in 2013.

Agricultural Land Register

The Register Act provides the legislative framework for the Agricultural Land Register which was established by the ATO prior to the introduction of the FATL Act and was referred to in FIRB's Foreign Investment Policy issued in June 2015.

The Register Act formally establishes the register of foreign ownership of agricultural land operated by the ATO. As noted above, agricultural land is defined as land in Australia that is used, or that could reasonably be used, for a primary production business. The ATO will be required to publish the statistical part of the Register on a website and provide regular reports to the responsible Minister. However, the contents of the Register itself will not be searchable by the public.

Under the Register Act, foreign persons with interests in agricultural land or changes to holdings of interests in agricultural land (including where foreign person status changes) will be required to report those interests or changes to the ATO, regardless of the value of the land. Notifications generally need to be made to the ATO within 30 days.

Business Investment

The monetary thresholds for share and business acquisitions remain the same under the new regime. To recap, foreign persons seeking to acquire a substantial interest (being an interest of at least 20 per cent) in an Australian entity valued above $252 million must gain approval prior to the acquisition. The higher threshold of $1,094 million remains for investors from countries with which Australia has a Free Trade Agreement (FTA Investors) including Chile, Japan, South Korea, New Zealand, the United States and China (once the domestic legislation implementing the China-Australia Free Trade Agreement comes into force).

However, if the investment is in a 'sensitive business', the $252 million threshold also applies to FTA Investors. Sensitive businesses include media, telecommunications, transport, defence and military related industries and the extraction of uranium or plutonium or the operation of nuclear facilities.

In addition, subject to some limited exceptions, foreign persons must still gain approval before acquiring any interest in any 'land entities' (which include 'Australian land corporations' or 'Australian land trusts') which refer to entities that have the majority of its assets in land. Such entities were previously known as an Australian urban land corporations or trusts under the old law.

Commercial Real Estate

Most of the screening thresholds for commercial land acquisitions remain the same, however, there are some changes to the rules and exemptions that are available. Under the new regime specific rules apply depending on whether the land is vacant or developed, whether it falls into the category of sensitive commercial land that is not vacant and the value of the proposed acquisition.

Generally, regardless of the value of the land, foreign investors must obtain approval for a proposed acquisition of commercial land that is vacant. For developed commercial land, FTA Investors are required to obtain approval only if the value of the interest is greater than $1,094 million. All other foreign persons must obtain approval for a proposed acquisition of developed commercial land where the value of the interest is likely to exceed $252 million.

The $252 million threshold referred to above represents an increase from the $55 million threshold that previously applied under the old law.

There is also a new lower threshold of $55 million that applies to sensitive land acquisitions. Sensitive land includes, among other things, mines and critical infrastructure, for example an airport.

Other commercial real estate changes include the removal of the previous $5 million threshold for heritage listed commercial property. Heritage listed commercial property will now be subject to the $252 million threshold, unless it is on sensitive land in which case the new $55 million threshold applies. The new laws also adjust the available exemptions. For example, the exemption available for acquisitions of commercial property that were incidental to the investor's main business has been removed. There are also new exemptions available for smaller acquisitions in Australian land corporations or trusts.

Residential Land Acquisitions

The acquisition of residential real estate by foreign persons will continue to be heavily regulated and subject to screening, regardless of value. This is a particularly sensitive political issue and there has been a renewed focus on surveillance and enforcement in this area. The acquisition of established residential real estate by foreign persons remains restricted, although developments which increase the housing stock continue to be welcomed.

The ATO now has responsibility for monitoring compliance with the residential land requirements and taking enforcement action. There has been a significant increase in resource in this area and the ATO is able to use its sophisticated data matching systems and information sharing arrangements to increase the effectiveness of surveillance.

The FATL Act introduces new rules relating to the issue of exemption certificates. An exemption certificate can provide that a particular acquisition or series of acquisitions will not give rise to a significant or notifiable action and therefore FIRB notification or approval will not be required, subject to any conditions imposed. Exemption certificates are particularly useful for property developers or other professional investors undertaking a program of land acquisitions.

A $3m limit has been imposed on the total value of apartments that can be bought by a single foreign investor in a single development. Individual screening of purchases above this value would be needed.

Foreign Government Investors

All investments in Australia made by foreign government investors still need to be screened under the new law, regardless of value or type. The definition of a foreign government investor is not limited to departments of state and agencies, but includes sovereign wealth funds and extends to a private entity in which a foreign government entity has a substantial interest (i.e 20% interest, per above).

Application fees

The Imposition Act has introduced application fees on all foreign investment applications. Previously FIRB did not impose any such fees. The change is intended to shift the cost of reviewing FIRB applications and administering the foreign investment framework from taxpayers onto foreign investors and provide for additional resources for Treasury and the ATO. The Government has stated that it hopes for that these additional resources will improve service delivery for investors.

Fees are payable by any applicant before the application will be processed. The amount of the fee varies depending upon the type and value of the investment, for instance:

a residential land valued at up to $1m – $5,000 (and $10,000 per million above that);

b commercial land which is vacant – $10,000 ($25,000 if the land is not vacant);

c businesses where the consideration is less than $1bn – $25,000 ($100,000 otherwise); and

d internal reorganisations – $10,000.

If an application falls into more than one category, the highest fee applies. Fees will be indexed on 1 July each year based on CPI.

Timing for processing applications

The FATL Act retains the general 30 day statutory decision-making period; there is, however, now an ability for an applicant to request an extension of the statutory decision-making period in complicated cases so as to avoid the need for an interim order or to withdraw and re-submit the application, as was common in the past.

Increased Penalties

The foreign investment rules continue to provide penalties for those who commit an offence, such as failing to notify the Treasurer before taking a notifiable action or contravening a condition in an exemption certificate.

The FATL Act provides for new and increased penalties for contraventions of the foreign investment rules. Previously, only divestment orders and criminal penalties applied for breaches and not civil penalty regimes.

Now, criminal penalties for individuals and companies have increased to $135,000 (or 3 years imprisonment) and $675,000 respectively. New civil penalties apply for certain offences including fines of up to $45,000 for individuals and $225,000 for companies. In addition, foreign investors who breach rules relating to real estate may face civil penalties that are calculated with reference to a percentage of the purchase price, market value or capital gain made on divestment of the property. F or example a temporary resident who acquires established property without approval (where approval would normally have been granted) could face a penalty of 10 per cent of the purchase price or market value of the property (whichever is greater) in addition to the relevant application fee.

The FATL Act also includes a new civil penalty regime for third parties who knowingly assist in a breach for which the penalty will be equal to the penalty for the primary offence. This might catch, for example, real estate agents or advisers acting on a transaction if they knowingly facilitated the breach. The fact that a civil penalty regime now exists for third party conduct means a lower burden of proof applies. This may lead to more prosecutions against third parties who facilitate breaches of the Act.

For less serious breaches of the residential real estate rules, an infringement officer will have the power to issue an infringement notice if the officer believes on reasonable grounds that the person has contravened a civil penalty provision relating to land.

The 'national interest' test

Investment proposals continue to be assessed on a case-by-case basis by reference to whether they are contrary to 'Australia's national interest'. This is an intentionally broad and undefined test in order to provide the Treasurer with flexibility in considering different types of proposal.

There is updated guidance as to the factors the Government will have regard to when administering the 'national interest' test in the revised Australia's Foreign Investment Policy (**Policy**), which was released on 1 December 2015 to reflect the new laws and regulations. The factors will vary between investment proposals, but include national security, competition, other Australian Government Policies, the impact of the investment on the economy and community (including the tax base) and the character of the investor.

The updated Policy places renewed emphasis on factors that the Treasurer takes into account in agricultural land and agribusiness investments and the importance of increasing Australia's housing stock in assessing residential land acquisitions. In assessing a foreign investment proposal we also expect significant focus on how the proposal will impact on Australian tax payable by the investor.

The takeaway

Australia's foreign investment laws have undergone a comprehensive re-write, accompanied by organisational changes and additional resourcing for the administration of the law. The core 'national interest' screening approach and key screening thresholds remain, however new rules have been included in relation to investment in agriculture and residential land and significant changes have been made to the screening process, with enhancements to penalties and enforcement. Investors need to familiarise themselves with the new regime and redouble their efforts to ensure compliance with Australia's foreign investment law.

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PwC Legal UK – New Corporate Vehicle in the Cayman Islands

At a glance

A new type of body corporate is to be introduced in the Cayman Islands in 2016.

Following the publication of the Limited Liability Companies Bill 2015 (**Bill**) on 18 December 2015, the form of a Limited Liability Company (**LLC**) will be available as soon as the Bill comes into force.

The legislation is expected to take effect within the next six months.

In detail

Why has the Bill been introduced?

The Bill follows requests from the investment funds industry to offer an alternative vehicle to the vehicles currently available for structuring transactions, which include the exempted company, the exempted limited partnership and the trust. It is expected that the introduction of the LLC will strengthen the Cayman Islands' position as the domicile of choice for offshore investment funds by increasing the structuring options available in the jurisdiction.

The LLC is designed to allow for sufficient flexibility to have a broad range of applications, such as general partner entities, management holding vehicles and joint venture companies.

In addition, the Bill defers to the LLC agreement in many instances (i.e. "unless otherwise provided in the LLC agreement…") so that the parties involved have discretion to expand on the provisions of the Bill if desired. As a result, the LLC structure and its administration can be kept much simpler compared with that of a company governed by the Companies Law.

What is an LLC?

In the preparation of the Bill, the limited liability legislation of Delaware was examined and used as a model, and it is expected that the LLC will become a popular vehicle with US investors, who will be familiar with many of its key features.

The new corporate body essentially combines features of the existing Cayman Islands exempted company and the Cayman Islands exempted limited partnership with the Delaware limited liability company.

The result is a corporate vehicle which has its own legal personality, but does not have a share capital (but rather it is limited by reference to members' capital accounts and contributions).

What are the key characteristics of an LLC?

The LLC is a body corporate with limited liability and separate legal personality.

The LLC can be managed by its members or, in whole or in part, by managers - an LLC does not have a board of directors. If permitted by the LLC agreement, a member may be a manager

Members of the LLC can have capital accounts and are free to agree:

a the method in which profits and losses of the LLC will be allocated;

b the frequency and manner in which distributions will be made; and

c whether the LLC will be managed by its members or by an appointed third party.

The LLC is required to maintain three statutory registers: the register of members, the register of managers and the register of mortgages and charges. Only the register of managers must be filed with the Registrar of Companies in the Cayman Islands.

The LLC may participate with a merger or consolidation process under Cayman law.

The LLC may transfer its corporate domicile by continuation out of the Cayman Islands and foreign entities based in jurisdictions which allow the process may transfer their corporate domicile into the Cayman Islands by way of continuation.

Verdict

In light of its flexible features, such as its flexible corporate governance concepts and simplified fund administration system, an LLC could provide offshore investors with an attractive vehicle to satisfy their structuring needs.

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Law Square (Belgium) – Major reform of Belgium company and association law officially announced

At a glance

The Minister of Justice, Koen Geens, officially announced that he is working on a **major reform of Belgian company and association law**. The aim is to modernize the rules and make them easier to understand and more coherent.

In detail

Important proposed changes to Belgium company and association law include:

a the **integration of company law and association law in one single code** – pursuant to which associations would be allowed to carry out economic activities, but would be prohibited from distributing (directly or indirectly) any profits to their members;

b the **reduction of the number of (Belgian) company types to four**, being the partnership (with or without legal personality), the private limited liability company (**BVBA/SPRL**), the public limited liability company (**NV/SA**) and the cooperative limited liability company (**CVBA/SCRL**);

c the **abolishment of capital and capital maintenance rules in the BVBA/SPRL**, which would be replaced by solvency and liquidity requirements and stricter rules on director's liability.

It is currently not yet fully clear which measures will be implemented, what the new rules will look like, and when the new code will enter into force, but we expect that the new "Belgian companies and associations code" will create **great opportunities** for Belgian and multinational companies and associations doing business in Belgium.

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