

Other news

2 March 2015

Enhancing Australia's investor visa program

On 12 February 2015, the Minister for Trade and Investment and the Assistant Minister for Immigration and Border Protection jointly announced the release of a draft investment framework for an enhanced Significant Investor Visa (SIV) Scheme, and design options for a new Premium Investment Visa (PIV).

Under the existing SIV scheme applicants are required to make an investment of at least \$5 million in complying investments for a minimum of four years. Currently a complying investment includes Government bonds. However under the proposed changes Government bonds would no longer be a complying investment class.

According to the announcement, the proposed complying investment framework for the SIV scheme includes:

- Specifying that at least 20 per cent of the applicant's \$5 million investment must flow into early stage, growth capital investments, through approved venture capital funds
- Specifying that at least 30 per cent of the applicant's \$5

million investment must flow into emerging listed companies, through managed funds investing in small Australian stock exchange listed companies

- Reinforcing the existing rules under which direct investment into residential real estate is not a complying investment, and introducing new rules under which indirect investment in real estate will similarly not be taken to be a complying investment where the investment is made through a scheme, where the dominant purpose of the scheme is investment into residential real estate
- From 1 July 2015, indirect investment in real estate through schemes where the dominant purpose is residential real estate will not be a complying investment
- Enhanced measures to improve protection for investors.

The PIV scheme would require a minimum investment of \$15 million and offer an accelerated 12-month pathway to citizenship. According to the announcement, this scheme will be more flexible in terms of investment class and will be aimed at attracting exceptional business people to Australia,

including high-calibre entrepreneurs.

The changes are proposed to apply from 1 July 2015. Closing date for submissions is 3 March 2015.

For further information contact Carter Bovard on +61 (2) 8266 1080.

Proposed residential and rural real estate reforms

Currently all 'foreign persons' (temporary residents or non-residents) require prior approval from the Foreign Investment Review Board (FIRB) to acquire residential real estate in Australia. Different rules apply depending on whether the property is a new dwelling or whether it is an established dwelling.

In relation to rural land in Australia, it is currently an offence for a 'foreign person' to make an investment without FIRB approval where the investment exceeds the relevant investment threshold. At 1 January 2015 this was \$252 million for residents of 'non free trade agreement' countries. Generally, a higher threshold (\$1,094 million) applies for 'free trade agreement' countries, with Australia reserving the right to apply the lower threshold in the case of residents of Japan,

Korea and China (when that treaty commences to apply).

On 25 February 2015, the Government released a Consultation Paper on proposed reforms to strengthen Australia's foreign investment framework, particularly around residential real estate and agriculture.

The proposed reforms outlined in the Paper include:

- increasing compliance and enforcement activities around foreign investment in residential real estate through the creation of a specialised investigative and enforcement area within the Australian Taxation Office (ATO)
- introducing a civil penalty regime for breaches of the foreign investment framework as it applies to residential real estate, with penalties (imposed on foreign investors and any third party who knowingly assists a foreign investor to breach the framework) being calculated as a percentage of the property value so as to act as an effective deterrent. The existing regime of divestment orders and criminal sanctions would remain in place
- extending this civil penalty regime to business, commercial real estate and agricultural investment applications required to be made under the framework
- introducing application fees for applications required to be made under the framework. For residential real estate, a fee of up to \$5,000 would apply for properties valued at under \$1 million. A \$10,000 fee

would apply to properties valued at \$1 million, with the fee increasing by \$10,000 for each additional \$1 million in property value. Businesses, commercial real estate and agribusiness investments would be subject to fees ranging from \$10,000 to \$100,000 depending on the size and sector. Property developers seeking an advanced off-the-plan certificate under the framework, would be levied a fee based on the number of dwellings sold to foreign investors

- from 1 March 2015, requiring foreign investors into rural land to obtain prior FIRB approval, where the cumulative value of the rural land owned by the foreign investor, including the proposed purchase, is \$15 million or more, and
- introducing a new \$55 million screening threshold (based on value of the business) for investment into 'agribusinesses'. All proposed direct investment by foreign governments investors, including agriculture will continue to be reviewed regardless of value.

Closing date for submissions is 20 March 2015.

For further information contact Andrew Wheeler on +61 (2) 8266 6401 or Simon Lewis on +61 (2) 8266 2161.

Research and development (R&D)

The Department of Industry recently released the *2014 Australian Innovation System Report* prepared by the Chief Economist. The Report analyses data on business innovation and

innovation-related activities in Australia, outlines the achievements and actions of Australian innovators, and outlines the challenges and opportunities available for Australian innovators. A finding outlined in the Report is that Australia's innovation system is a mid-range performer among Organisation for Economic Co-operation and Development (OECD) countries. The Report also concludes that there is evidence which suggests that Australia's innovation performance is lagging, potentially leaving Australia less resilient to future global shocks. [See the full Report.](#)

Foreign agricultural land purchases

In a joint media release on 11 February 2015, the Prime Minister, Treasurer and the Minister for Agriculture announced that steps will be taken to better scrutinise and report on foreign purchases of agricultural land. From 1 March 2015, the screening threshold will be reduced from \$252 million to \$15 million, and from 1 July 2015 the Australian Taxation Office (ATO) will collect information on all new foreign investment in agricultural land regardless of value. The ATO will use land title registry information and work alongside the State and Territory governments to gather information.

For further information and contacts see our [TaxTalk Alert](#).

IGOT update

The Inspector-General of Taxation (IGOT) has completed his review into the *Australian Taxation Office's management of tax disputes with large*

business and high wealth individuals and delivered his report to the Assistant Treasurer on 30 January 2015. The Assistant Treasurer decides when the report will be publicly released, but it must be released within 25 parliamentary sitting days.

Taxation of excess non-concessional super contributions

Treasury has released exposure draft regulations and a draft explanatory statement to implement changes to the taxation of excess non-concessional superannuation contributions and to correct minor technical errors in the regulations.

The reforms will allow individuals to withdraw superannuation contributions in excess of the non-concessional contributions cap made from 1 July 2013 and associated earnings, with these earnings to be taxed at the individual's marginal tax rate.

The reforms were introduced on 4 December 2014 as part of *the Tax and Superannuation Laws Amendment (2014 Measures No. 7) Bill 2014* and are currently before Parliament.

The regulations would enable superannuation providers to release amounts to individuals who elect to withdraw non-concessional contributions under the reforms, and would also correct some other minor technical errors in the regulations.

Submissions close Wednesday 18 March 2015.

Commissioner appeals the Federal Court decision in favour of the Seven

Network regarding payments to the IOC

The Commissioner has appealed to the Full Federal Court against the decision in *Seven Network Limited v Commissioner of Taxation* [2014] FCA 1411. In that case the Federal Court held (at first instance) that amounts paid by Seven Network Limited (Seven) to the International Olympic Committee (IOC) were not royalties and, as a result, Seven was not required to deduct withholding tax from the payments.

Legal privilege waived by disclosure

In *Krok v Commissioner of Taxation* [2015] FCA 51, the Federal Court has held that the taxpayer had waived his right to claim legal privilege in respect of documents sought by the Commissioner during 'pre-trial discovery'. The litigation brought by the taxpayer was an appeal (Part IVC proceedings) under the *Taxation Administration Act 1953* against the Commissioner's decision to disallow objections against amended income tax assessments for the 2004 to 2009 income years.

The documents in question each related, in one way or another, to legal advice given by three solicitors in relation to structures put in place by the taxpayer in 2002 when the taxpayer migrated to Australia. In the Part IVC proceedings, two of these solicitors had sworn affidavits outlining "the gist of the advice given" by each of the solicitors who advised the taxpayer. It was the intention of the taxpayer that these affidavits would be relied upon in the proceedings.

The taxpayer submitted that the statements made in the affidavits did not waive legal privilege in the advice referred to, because "neither the reasoning behind the advice, nor the purpose of the advice, has been disclosed". The taxpayer also submitted that the only matter laid open to scrutiny was the process followed by the taxpayer, and it was necessary for the taxpayer to provide evidence of this process so as to satisfy the Court that the Commissioner was wrong in his assertion, in issuing the amended assessments, that the arrangements entered into by the taxpayer were shams or facades.

Justice Wigney held that legal privilege had been waived and the taxpayer was therefore required to provide discovery of the legal advices. In so holding, he said that a "fair reading of the relevant parts of the affidavits reveals that there has been a disclosure, most likely only a partial disclosure, of the purpose and reasoning behind some aspects of the advice concerning the structures". These purposes included dealing with South Africa's exchange controls, and, more critically in the context of the Part IVC proceedings, the 'tax efficiency' of the structures and the taxpayer's 'tax position' both in South Africa and Australia. According to Justice Wigney, the partial disclosure of the advice to the taxpayer, "or the disclosure of the gist, substance or effect of it" was inconsistent with the confidentiality that would otherwise attach to the communication recording the advice, and as a result, privilege had been waived. Importantly, he said that it was unfair of the

taxpayer in the circumstances to deploy a partial disclosure to secure a forensic advantage, and at the same time deny the Commissioner an opportunity to scrutinize and test the full text of the advice for accuracy and completeness.

Each claim for implied waiver of legal privilege depends very

much on the facts. In this case, references in the affidavits to the legal advice was fatal to the taxpayer's claim for privilege over that advice. The case highlights the need for caution in making references to privileged legal advice in other documents. If you are in doubt as to what you can disclose in

relation to legal advice received, and how, and still maintain privilege, you should seek proper advice. If privilege is waived, it cannot be "unwaived" again!

For further information on the item or legal privilege generally, contact Judy Sullivan on (02) 8266 0197.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

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