

28 March 2017

Manager
Foreign Investment Policy Unit
The Treasury
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By Email:
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Dear Sir or Madam

Foreign Investment Framework 2017 Legislative Package – Consultation Paper – Submission

We refer to the document entitled ‘Foreign Investment Framework 2017 Legislative Package Consultation Paper dated March 2017’ released by the Treasury on 8 March 2017 (**Consultation Paper**).

We make the following submissions in response to the Consultation Paper in relation to issue for consultation number 5 (Miscellaneous Technical Issues and Ideas for Further Reform) and in particular, in relation to paragraph 112 of the Consultation Paper which states:

“It is common with major legislative reform to follow with subsequent technical amendments that are mostly minor in nature or seek to align more closely with the intended policy outcomes and commercial practices. Stakeholders are encouraged to provide examples of where technical amendments could be made to the FATA Regulation, Fees Act and Fees Regulation”

1. Reduction in capital of an entity which results in increase of the foreign person’s voting power

It is submitted that the *Foreign Acquisitions and Takeovers Act 1975 (Cth) (Act)* and the *Foreign Acquisitions and Takeovers Regulation 2015 (Cth) (FATA Regulation)* (together, the **Legislation**) would benefit from more clarity on whether the increase in voting power of a foreign person as a result of that foreign person electing not to participate in a return of capital undertaken by an entity, is intended to be a notifiable action or not.

Pursuant to section 20(1)(c)(i) of the Act, the definition of “*acquire*” in respect of an “*interest of a specified percentage in an entity*” includes being in a position to control more of the voting power where a foreign person already holds an interest in that entity.

There are two situations where a foreign person's voting power in an entity can increase involuntarily:

- (a) one is where a foreign person takes part in a pro-rata entitlement action undertaken by that entity and some or all of the other shareholders do not take part, for example, the foreign person participates in a rights issue or a dividend reinvestment plan;
- (b) the second one is where a foreign person does not take part in an action initiated and undertaken by the entity, whereas other shareholders do, for example, a cancellation of shares or a share buy-back.

The first situation is already covered by exemptions in regulation 41 of the FATA Regulation. The Legislation is silent on what is intended in the case of an entity undertaking a buy-back, share cancellation or another capital reduction action permitted under Part 2J of the *Corporations Act 2001* (Cth) (each a **Capital Reduction Action**).

In our submission, these Capital Reduction Actions should also be excluded from being notifiable actions under the Act. Similar to a rights issue or a dividend reinvestment plan, the increase in voting power of a foreign person arises in response to an action initiated by the entity not by the foreign person and is a result of the decisions made by other unrelated shareholders.

In a similar context, the *Corporations Act 2001* (Cth) recognises a buy-back as an action expressly exempted (by item 19 of section 611 of the *Corporations Act 2001* (Cth)) from the operation of takeover rules in Chapter 6 of the *Corporations Act 2001* (Cth) (subject only to operation of rules concerning the unacceptable circumstances).

If any one or more Capital Reduction Actions should be expressly exempted, we submit that Treasury should introduce express exemptions in Part 3 of the FATA Regulation.

Example of proposed amendment in the FATA Regulation

We propose that the following amendment is included as new regulation 41(2)(c) of the FATA Regulation:

“(c) the acquisition is under a share buy-back, share cancellation or another type of capital reduction under Part 2J of the Corporations Act 2001 (Cth)”.

2. Devolution by operation of law

Regulation 29 of the FATA Regulation states:

“The excluded provisions do not apply in relation to an acquisition of an interest in securities, assets, a trust or Australian land that is acquired by will or devolution by

operation of law, other than as a result of an arrangement under Part 5.1 or 5.3A of the Corporations Act 2001”.

We submit that the Legislation would benefit from clarifying what is intended to be covered by this exemption. As an example, by reference to section 1 of our submission, is it intended that any involuntary increase in voting power of a foreign person as a result of a Capital Reduction Action be covered by this exemption?

3. Compulsory acquisition

Regulation 33 of the FATA Regulation exempts “compulsory acquisition” from the exemption of the excluded provisions under the Act.

We note that the document entitled Explanatory Statement Select Legislative Instrument No. 217, 2015 Issued by the Authority of the Treasurer, in respect of the Act and the FATA Regulation states on page 23 that the exemption covers acquisitions under ‘a compulsory acquisition or compulsory buy-out under Chapter 6A – Compulsory acquisitions and buy-outs, of the Corporations Act’.

We note that section 23 of the Exposure Draft of the FATA Regulation released on 6 July 2015 specifically referred to Chapter 6A of the *Corporations Act 2001* (Cth) and this reference was not included in the FATA Regulation.

We submit that the FATA Regulation would benefit from expressly making a reference to Chapter 6A in the exemption in Regulation 33, so that it is clear that compulsory acquisition does not extend to other circumstances such as Court ordered acquisition under a scheme of arrangement.

Example of proposed amendment in the FATA Regulation

We propose that the regulation 33 of the FATA Regulation is amended as follows:

“The excluded provisions do not apply in relation to an acquisition of an interest in securities if the securities are acquired under a compulsory acquisition or compulsory buy-out under Chapter 6A of the Corporations Act 2001 (Cth).”

4. Capitalisation of wholly-owned entities by a foreign person

Pursuant to section 20(1)(c)(ii) of the Act, the definition of “acquire” in respect of an “interest of a specified percentage in an entity” includes starting to “hold additional interests in the issued securities in the entity” where a foreign person already holds an interest in that entity.

Arguably, this applies to a situation where a foreign person owns 100% of securities in an entity and then further capitalises that entity through issue of shares, for example, to increase the working capital of the entity or to reduce the external borrowings of the entity.

In our submission, this is an unintended consequence of this provision and it is appropriate to make an express exclusion for an acquisition of additional interest where the foreign person is starting from 100% ownership of securities.

Example of proposed amendment in the FATA Regulation

We propose that a new regulation is included as regulation 34A in Subdivision C (Significant and notifiable actions relating to entities) of Division 3 of Part 3 of FATA Regulation:

"34A Capitalisation of wholly owned entities

The excluded provisions to not apply in relation to an acquisition of an interest of securities if:

(a) the acquisition is of an interest in a wholly owned subsidiary; and

(b) as a result of the acquisition:

- i. the subsidiary remains a wholly-owned subsidiary; and
- ii. there is not a change in control of the foreign person."

Yours sincerely



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