HERBERT SMITH FREEHILLS

UPDATE ON ANNOUNCED BUT NOT ENACTED M&A TAX MEASURES

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Legal Briefings – By **Toby Eggleston** and **Ryan Leslie**

We provide an update on the Federal Government's position on announced but not enacted tax measures relevant to M&A which had been referred to a 'speed consultation' in late 2013.

SUMMARY

- As noted in our December M&A update, on 6 November 2013 the Federal Government released its position in relation to proposals for a number of tax measures which were announced but not enacted by previous governments.
- Some of the proposals were subject to a 'speed consultation', and the government's revised position on those measures was announced on 14 December 2013.
- The government has not provided any further details as to the form of, or eligibility for, the 'protection' it will legislate for taxpayers who have relied on announced measures which will not proceed.

UPDATE ON ANNOUNCED BUT NOT ENACTED MEASURES

Set out below is a the list of measures relevant to M&A included in our December update which were subject to further consultation, along with their current announced status.

Details of proposed measure	Status
Demergers – would have ensured a capital gain cannot arise for the head entity on the demerger and provided the demerging entity with a choice with to retain or reset the tax costs of the assets of the demerged group.	Not proceeding. Accordingly: • for a company undertaking a demerger a capital gain can arise if the liabilities of the demerged entity exceed the tax cost base of its assets. This can present significant problems for companies with significant internally generated goodwill; and • the demerged entity will need to re-set the costs of the assets of the demerged group. This could result in adverse skewing of the tax costs away from depreciable plant to non-deductible goodwill.
CGT – earn out arrangements – reforms taxation of earn outs so tax on receipt of earn out payment relates to disposal of underlying asset rather than being treated as a separate CGT asset as set out in TR 2007/D10.[1]	Proceeding but will only take effect from Royal Assent (previously it was announced that it would take effect from May 2010). The position for taxpayers who entered into an earn out arrangement prior to 6 November 2013 and relied on the original announcement is not entirely clear. The government announced that it will legislate 'protection' for taxpayers who have relied on announced measures which will not proceed. However, it is not clear what form the protection will take, for example, whether it will be protection from additional tax or will be limited to protection from penalties and interest. The proposed measures have been referred to in the tax section of a number of public deals undertaken since May 2010 such as Sportingbet's acquisition of Centrebet and the Charter Hall Office REIT transaction. Taxpayers who enter into an earn out arrangement between 6 November 2011 and the day on which to the new legislation receives Royal Asset will need to treat the earn out right as a separate CGT asset. This approach can cause difficult valuation issues to arise for the buyer and seller.
Off-market share buy-backs – would have reformed off-market buy backs, by removing the existing 14% cap on the size of the discount available on an off-market buy-back, removing the 'artificial' capital loss that may arise for shareholders under the existing rules and legislating the ATO's existing practices.	Not proceeding. Accordingly, companies undertaking a buy-back will continue to be subject to the 14% discount cap and seek an ATO class ruling to obtain certainty as to the tax outcomes.

ENDNOTES

1. TR 2007/D10

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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