Investing in Australian agribusiness

by Warren Davis, Gadens Lawyers, Sydney

It is no surprise foreign investment in Australian agribusiness has significantly increased over recent years. Australia has large areas of rich and diverse agricultural production land. With a relatively low population, Australia also produces large, high quality food surpluses, much of which are destined for Asia.

A recent study by Citi Investment Research analyst, Tim Mitchell, estimates that more than $12b worth of direct overseas investment had been made in Australian agricultural businesses and land in the last four years. Asia and the Middle East investors have been particularly active, including sovereign wealth funds and state owned enterprises.

Recent acquisitions include, the A$1.74b acquisition of Gadens' client, Sucrogen Limited by Singapore's Wilmar Limited, and the acquisition of a 75% stake in Manassen Foods by China's Bright Food.

This article discusses some of the common issues to consider when investing in the Australian agribusiness sector.

Australia's foreign investment rules

Like most countries, Australia regulates the acquisition of its assets by overseas investors. That regulation is undertaken by Australia's Foreign Investment Review Board (FIRB). The consent of FIRB is usually not required in most agribusiness deals. This is often because the target agribusiness does not have interests in nationally sensitive assets, such as residential property, banking, shipping, civil aviation, telecommunications, airports or the media. The most common reasons where FIRB consent is required is because the target agribusiness is valued over the statutory threshold, currently A$231m (or A$1.005b for US investors) and a 15% or more interest in the target is being acquired; or where a foreign government or its related entity (for example, a state-owned enterprise or sovereign wealth fund) seeks to acquire a 'direct investment' in the target agribusiness. A 'direct investment' is generally understood to be any investment of 10 per cent or more in a business or corporation. However, FIRB will also want to review investments of less than 10 per cent where foreign governments and their related entities can utilise their investment to influence or control the enterprise.

Even where FIRB consent is required, there are very few examples where that consent has been refused. The Australian Financial Review, when reporting on the completion of the Manassen deal, quoted Bright Food Vice President Ge Junjie as saying "One of the reasons why we have chosen an Australian company to corporate with [is due to FIRB]."

"I have a lot of communications with governments and the business sector. The Australian government has been pragmatic and open minded."

Structuring the deal

Most target agribusinesses are a mix of Australian rural land, assets and sometimes shares or other securities. The nature of the particular target often determines whether the deal will be structured as an on-market or off-market share deal, or a business and asset deal, or a simple asset acquisition.

Each type of deal will require different Australian legal considerations. For instance, if the target agribusiness is listed on the Australian Stock Exchange (ASX), the overseas investor will need to satisfy the *Listing Rules* of the ASX and the takeover laws of Australia's *Corporations Act 2001*, including market disclosure and shareholder approval requirements. If the target agribusiness is a business and asset deal, an interest in rural land will usually be acquired, and that will require specific legal steps to be satisfied to comply with Australia's real estate laws, including, in most instances, registering the transaction with the relevant Australian State or Territory government property agency. In some cases, native title interests of Australia's indigenous people may be relevant to the rural land being acquired.

The overseas investor will also need to consider how it will interpose the target agribusiness in its existing corporate structure. Typically a new Australian subsidiary will be created which will be a separate and distinct legal entity from its foreign parent.

If an Australian subsidiary is used, the overseas investor will need to comply with certain company laws, including ensuring it has a minimum number of directors, one or two of whom must be Australian residents, depending on whether it is a proprietary company (like a private company) or a public company. The subsidiary must also have a registered office in Australia and must be domiciled in a nominated Australian State or Territory.

As an alternative to the Australian subsidiary, the overseas investor can establish a branch office and carry on business in Australia if it registers that branch office with the Australian Securities and Investments Commission (ASIC), the regulator of companies and other legal entities that trade in Australia. If it establishes a branch office, there are no requirements for the officers of the foreign company to be Australian residents, but it will have similar reporting requirements to an Australian subsidiary, such as notifying ASIC of changes to its officers.

Other options include establishing a joint venture, partnership or trust to acquire the agribusiness target.

Tax considerations

Businesses that carry on trade in Australia need to register with the Australian Tax Office, even if they are a foreign company with an Australian branch office.

The tax year in Australia runs from 1 July to 30 June. The current rate of corporation tax is 30%. Corporation tax is paid quarterly in instalments throughout the tax year based on the estimated tax liability, and is adjusted in the annual tax return of that business.

As a general rule, non-residents are liable for Australian tax on all Australian source income. In the case of dividends, interest and royalties, payers are required to withhold tax from interest, dividends and royalties paid to non-residents. The tax rates of withholding tax vary depending on, amongst other things, whether a 'Double Tax Treaty' applies.

Like many other countries, Australia also has other taxes that apply to businesses, including capital gains tax, stamp duty, payroll tax and local taxes. Australia also has thin capitalisation and transfer pricing rules to counter international profit-shifting techniques. There are consolidated regime rules for qualifying entities which allow qualifying group entities to file one tax return and for intra group transactions to be ignored for tax purposes.

Tax plays a major consideration for any acquisition, and often influences the structure of a deal. Tax advice should be obtained and factored in to the structure of any agribusiness deal before in-principle terms are agreed.

CONTACT US

If you would like any further information on investing in Australian agribusinesses, please contact:

Charles Cowper Partner	t + 61 (0) 2 9931 4724	e ccowper@nsw.gadens.com.au
Warren Davis Senior Associate	t + 61 (0) 2 9931 4751	e wdavis@nsw.gadens.com.au

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