

Australia's investment regime for foreign governments and agencies

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Louise Le Yi Gong

lgong@chamberslawyers.com

China has emerged as the third-largest source of foreign investment into Australia with projects worth over A\$34 billion (US\$31.5 billion) submitted to the Australian Foreign Investment and Review Board (FIRB) for approval over the past 18 months. The most high profile proposals being made by Chinese state-owned enterprises (SOEs) are in the resources sector as China moves to secure long term supply of natural resources. In response to the increased volume of applications, the Australian government has recently moved to clarify Australia's foreign investment regime as it applies to foreign government investments.

Australia's foreign investment regime

Australia's foreign investment regime is regulated by a combination of federal legislation and policy. All direct investments by foreign governments and their agencies irrespective of their size require notification to the FIRB for prior government approval under the Federal Government Policy. Notification under the *Foreign Acquisitions and Takeovers Act 1975* will also be required if the investment meets the specified monetary thresholds under the Act and the *Foreign Acquisitions and Takeovers Regulations 1989*.

The Act is the key legislation for assessing both private and government related foreign investment proposals. Under the Act, an acquisition of an interest of 15% or more in an Australian entity or assets valued at above A\$219 million will require statutory notification to the FIRB. A statutory review period of 30 days applies to all investment proposals which be extended for a further 90 days by an Interim Order issued by the Treasurer.

Unlike under the Act, there is no formal review mechanism for proposals notified under the Policy. The Policy works in conjunction with the Act to provide a framework for assessing certain investment proposals in the purchase of Australian businesses and real estate. The Policy itself has no statutory force and is revised from time to time. Media releases and public announcements made by the government on foreign investments also

form part of the Policy and become guidelines for assessing future proposal.

The FIRB is responsible for screening each proposal and reporting its findings to the Treasurer. The Act gives the Treasurer the ultimate power to reject or impose conditions on proposals that do not pass the "national interest" test. National interest is not defined in the Act or the Policy but rather each proposal is assessed on a case-by-case basis and in accordance with the guidelines set out in the Policy.

Investments by foreign SOEs

The Policy sets out six principles to assess whether a foreign government investment is against the national interest. They require the government to look into the independence, commerciality, corporate governance and business behaviour of an SOE investor. The extent to which the investor operates at arm's length from a government is a relevant factor that will be considered. Proposals by SOEs that operate on a "transparent and commercial basis" will be less likely to raise national interest concerns. However, investments that will impact on Australia's national security, hinder competition or impact on Australian revenue policies will be closely scrutinised. The government will also examine the extent of Australian participation in the ownership, control and management of the company after being acquired by the foreign investor.

In his speech to the Australia-China Business Council in July 2008, the Treasurer differentiated between investments in existing producing firms with developed resources and greenfield (undeveloped) projects in the resources sector. Proposals to control the former would be closely scrutinised by the Government.

In September 2009, the guidelines were the subject of further comment by Patrick Colmer, Director of the FIRB. He expressed the view that the FIRB would be "much more comfortable" to see investments by SOEs in the resource sector kept at "below 50% for greenfield projects and around 15% for major producers." However, he qualified his statement by adding that the FIRB would remain flexible and consider deals made outside Policy parameters and on a case-by-case basis.

In the most recent announcement on October 23, the FIRB approved Yanzhou Coal Mining's 100% takeover of Felix Resources. The deal is conditional on legally enforceable undertakings by the Chinese SOE that require it to operate its Australian mines through an Australian company (Yancoal Australia Pty Ltd) and to list that entity on the Australian Stock Exchange by the end of 2012. With the listing, Yanzhou must reduce its ownership of Yancoal Australia to less than a 70% holding and its economic ownership of the underlying mining assets must not exceed 50%.

The Yanzhou Felix takeover approval is in conflict with past decisions which limited these foreign past takeovers to 49.9% (except in several cases of economic distress). It is also difficult to align this decision with the comments made in September. Since the Felix decision, the assistant Treasurer issued a statement that the Yanzhou deal structure should not be viewed as a specific framework for other foreign investment approvals. Accordingly, predicting an outcome for investments is made even more difficult as it seems there is no consistent policy under which to attempt to base proposed investment decisions for foreign government owned entities.

Louise Le Yi Gong is a Senior Associate at Chambers and Company International Lawyers in Melbourne. As a qualified Australian lawyer, she advises Chinese State-Owned Enterprises (SOE) on major energy and resource projects within the Australian mining industry and globally. She has extensive experience with working with the Australian Foreign Investment and Review Board, representing SOEs such as Sinosteel Corporation and Wuhan Iron and Steel (Group) Co. Ltd on its international acquisitions and joint ventures.

**CHAMBERS
& COMPANY**
INTERNATIONAL LAWYERS

Level 43
55 Collins Street
Melbourne, Victoria 3000, Australia
Tel: (61) 3 9654 1988
Fax: (61) 3 9650 3958
Website: www.chamberslawyers.com