

Foreign Investment in Australia – Legal Framework

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China is currently ranked as Australia's largest trade partner¹, with Australian investment accounting for 15 per cent of China's total outbound investment in 2013 (up from 9 per cent in 2012 and 12 per cent in 2011).² According to PricewaterhouseCooper's report on China outbound deals: 2013 review and 2014 outlook Chinese investment in mining and minerals assets have recently fallen, taking its place is a marked increase on Chinese investor interest in other sectors including agribusiness, energy and power assets. The outlook on Australia's trade and investment with China remains optimistic especially if the Free Trade Agreement between the two countries raises the foreign review investment threshold.

This summary is aimed to provide Chinese investors with a general understanding of Australia's foreign investment review regime and a practical guide to the review process.

Introduction

The Australian Commonwealth Government (**Government**) generally welcomes foreign investment, recognising its importance in developing Australia's economy and enhancing the wellbeing of Australians. In the Government's own words:

"Foreign investment brings many benefits. It supports existing jobs and creates new jobs, it encourages innovation, it introduces new technologies and skills, it brings access to overseas markets and it promotes competition amongst our industries."³

Accordingly, foreign investment proposals that are able to bring such benefits to Australia are particularly welcomed. On the other hand, foreign investment proposals that appear to be against Australia's national interest are likely to be rejected by the Government or be subject to conditions that have to be observed by the foreign investor.

In reviewing foreign investment proposals, the Government adopts a case-by-case approach in assessing whether such proposals are against Australia's national interest (discussed further below). The Government will also consider the concerns of the community about foreign ownership of certain Australian assets.

Australia's FATA and Policy

Foreign investment in Australia is regulated under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) and its associated regulations (**FATA**), and Australia's Foreign Investment Policy (**Policy**) (collectively, **Australia's foreign investment regime**). Although the Policy is not – strictly speaking – law, any failure in complying with its requirements may make it more difficult for the foreign investor to obtain any necessary regulatory approvals for their proposed foreign investments, including future foreign investment approvals.

Key players

The regulators

¹ See Australian Department of Foreign Affairs and Trade latest biannual fact sheet on China at <https://www.dfat.gov.au/geo/fs/chin.pdf>

² See PricewaterHouseCoopers report "China outbound deals:2013 review and 2014 outlook"

³ Australia's Foreign Investment Policy (2013).

The main regulator of Australia's foreign investment regime is the Commonwealth Treasury through its Foreign Investment and Trade Policy Division. Under the FATA, the Commonwealth Treasurer or his delegate (**Treasurer**) has the power to review foreign investment proposals and decide if they are against Australia's national interest.

The Treasurer can block proposals that are against Australia's national interest or impose conditions on the way such proposals are implemented to ensure that they are not against Australia's national interest.

In deciding whether to approve a foreign investment proposal, the Treasurer is advised by a non-statutory body called the Foreign Investment Review Board (**FIRB**), which consists of five part-time members and a full time executive member. In most cases, the Treasurer will adopt the FIRB's recommendations.

The foreign investor (foreign person)

Australia's foreign investment regime applies to foreign persons that are proposing to invest in Australia. A foreign person is:

- a natural person not ordinarily resident⁴ in Australia;
- a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest;
- a corporation in which two or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest;
- the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or
- the trustee of a trust estate in which two or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.

Furthermore, a foreign person can either be categorised as a *foreign government investor* or a *privately-owned foreign investor*. Different rules and policies may apply (as discussed below) depending on whether a foreign investor is one or the other.

Foreign government investors include:

- a body politic of a foreign country;
- entities in which governments, their agencies or related entities from a single foreign country have an aggregate interest (direct or indirect) of 15 percent or more;
- entities in which governments, their agencies or related entities from more than one foreign country have an aggregate interest (direct or indirect) of 40 percent or more; or
- entities that are otherwise controlled by foreign governments, their agencies or related entities, and any associates, or could be controlled by them including as part of a controlling group.

⁴ Under the Policy, a person is ordinarily resident if: (i) their continued presence in Australia is not subject to any limitation as to time imposed by law (that is, they are permitted to stay in Australia indefinitely, such as Australian permanent residents and New Zealand citizens); and (ii) the person has actually been in Australia for 200 or more days in the previous 12 months. This may include Australian citizens living abroad, except when they are acquiring Australian urban land.

In the case of Chinese foreign government investors, this would include Chinese state owned enterprises and any other Chinese enterprises that satisfy the above conditions. It should be noted that in the case of foreign government investors, such as a Chinese state owned enterprise, all proposed investments by such entities are generally notifiable irrespective of the value or nature of the investment.

The term privately-owned foreign investor is quite misleading as it applies to foreign persons that are not foreign government investors.

Notification of foreign investment proposals

The basic principle is that not all foreign investment proposals require the Government's prior approval. But for those that do, the foreign investor is obliged to notify the Government and seek its approval before the investment can be implemented (**Compulsory Notification**).

Other foreign investment proposals may not necessarily require the Government's prior approval; however, given the Treasurer's broad power to unwind foreign investments, it is often advisable for foreign investors to notify the Government voluntarily and seek its approval in order to avoid future scrutiny (**Voluntary Notification**), especially where the investment proposal may raise potential national interest concerns (discussed further below).

Proposals that are subject to Compulsory Notification

Governmental approval must be obtained with respect to certain proposed acquisitions in order to avoid criminal sanctions under the FATA. The following acquisitions must be notified irrespective of the value of the investment or nationality of the foreign investor:

- all direct investments by foreign governments and their related entities, and proposals by them to establish a new business in Australia or acquire interests in land;
- all vacant non-residential land;
- all residential real estate (some exemptions apply);
- all shares or units in Australian urban land corporations or trust estates (some exemptions may apply); and
- all investments of 5 percent or more in the media sector.

All other acquisitions (including shares or assets of an Australian business) should be notified if the target is valued at or above the applicable monetary threshold set by the FATA or Policy. As at 1 January 2014, the thresholds are as follows:

All investors other than New Zealand investors and United States investors (2014)	
\$5 million	Developed non-residential commercial real estate, where the property is subject to heritage listing
\$54 million*	Developed non-residential commercial real estate, where the property is not subject to heritage listing
\$248 million*	<ul style="list-style-type: none"> • An interest in an Australian business; or • An interest in an offshore company that holds Australian assets or conducts business in Australia, and the Australian assets or businesses of the target company are valued above the threshold.
New Zealand investors and United States investors (2014)	

\$248 million*	Involving prescribed sensitive sectors: ⁵ <ul style="list-style-type: none"> • an interest in an Australian business; or • an interest in an offshore company that holds Australian assets or conducts a business in Australia, and the Australian assets or businesses of the target are valued at or above the threshold
\$1078 million*	Developed non-residential commercial real estate
\$1078 million*	Not involving AUSFTA prescribed sensitive sectors: <ul style="list-style-type: none"> • an interest in an Australian business; or • an interest in an offshore company that holds Australian assets or conducts a business in Australia, and the Australian assets or businesses of the target company are valued above the threshold

*The threshold is indexed annually on 1 January

In determining whether prior approval is required for a particular investment proposal, the foreign investor should consider that:

- both the acquisition and the exercise of an option are considered to be an acquisition of an interest under the FATA and as such may require FIRB approval;
- foreign investments where potential voting power or potential shareholdings will be acquired (including the acquisition of convertible notes) require prior approval if the relevant interest and value thresholds of FATA as mentioned above are met; and
- holdings of any associates of the foreign investor will be included when determining whether a substantial interest is to be acquired.

National interest considerations

As mentioned above, the Treasurer can ban or unwind acquisitions by foreign persons that are deemed to be against Australia's national interest. 'National interest' is undefined and applications are assessed on a case by case basis. Notwithstanding, in determining a foreign investment proposal is contrary to Australia's national interest, the FIRB will have regard to the following five considerations when making its recommendations to the Treasurer:

- **National security** – the focus is on the extent which the investment will affect Australia's ability to protect its strategic and security interests. In assessing issues pertaining to national security, the Government will rely on advice from the relevant national security agencies.
- **Competition** – the Government generally favours diversity of ownership within Australian industries and sectors to promote healthy competition and will consider whether a proposed investment may result in an investor gaining control over market pricing and production of a good or service in Australia. It may also consider the impact that a proposed investment may have on the make-up of the relevant global industry, particularly where concentration could lead to distortions to competitive market outcomes. Competition issues are also examined separately by the Australian Competition and Consumer Commission.

⁵ For the purposes of a s 17H(b) of the FATA, the following are prescribed sensitive sectors: media; telecommunications; transport (including airports, port facilities, rail infrastructure, international and domestic aviation and shipping services provided within, or to or from, Australia); the supply of training or human resources, or the manufacture or supply of military goods or equipment or technology, to the Australian Defence Force or other defence forces; the manufacture or supply of goods, equipment or technology able to be used for a military purpose; the development, manufacture or supply of, or the provision of services relating to, encryption and security technologies and communications systems; the extraction of (or the holding of rights to extract) uranium or plutonium or the operation of nuclear facilities.

- **Other Australian Government policies (including tax)** – the Government will consider the impact of the investment on Australian tax revenues. Foreign investments must also be consistent with the Government's objectives in relation to matters such as environmental impact.
- **Impact on the economy and the community** – the Government will consider the impact of the investment on the general economy, which includes the impact on any plans to restructure an Australian enterprise following its acquisition. Also relevant are the nature of the funding of the acquisition and the level of Australian participation in the enterprise after the completion of the foreign investment as well as the interests of existing employees, creditors and other stakeholders of the target.
- **Character of the investor** – the Government will consider the extent to which the investor operates on a transparent and commercial basis and is subject to adequate and transparent regulation and supervision. Proposals by foreign owned or controlled investors that operate on a transparent and commercial basis are less likely to raise national interest concerns than proposals from those that do not.

Proposed investments by foreign government investors

As already stated, all proposed investment by foreign government investors are generally notifiable to the FIRB irrespective of the value or nature of the investment. In the FIRB's consideration of proposed investments by foreign government investors, other principles and considerations will apply in addition to those five general considerations noted above when the proposal under examination is made by a foreign government investor. In examining investment proposals by foreign government investors, the Government will consider whether the proposed investment is commercial in nature or whether the foreign government investor may be pursuing broader political or strategic objectives that may be contrary to Australia's national interest.

Proposed investments from foreign government investors that operate on full arm's length and commercial basis are less likely to raise national interest concerns. Notwithstanding, whilst the Government will scrutinise investment proposals by foreign government investors that are not operating on a full arm's length and commercial basis, the Government does not have a policy of prohibiting such investments but looks at the overall proposal to determine whether such investments may be contrary to Australia's national interest.

Mitigating factors that assist the Government in determining that such proposals are not contrary to Australia's national interest may include:

- the existence of external partners or shareholders in the investment;
- the level of non-associated ownership interests;
- the governance arrangements for the investment;
- ongoing arrangements to protect Australian interests from non-commercial dealings; and
- whether the target will be, or remain, listed on the Australian Securities Exchange or another recognised exchange.

The Government will also consider the size, importance and potential impact of such investments when considering whether or not the proposal is contrary to Australia's national interest.

Conditional approvals

In the majority of FIRB decisions to date, there are no conditions attached. There may be exceptional circumstances whereby due to national interest considerations, the FIRB has required the foreign investor's agreement to comply with certain undertakings or make certain concessions as a condition for the FIRB's non-objection of the underlying proposed investment. From recent cases involving

mining investments by Chinese entities⁶, these undertakings and concessions have included:

- operation of the acquired assets in accordance with standard industry practices;
- assets to be owned and/or operated by Australian based companies;
- exclusion of certain target assets located in sensitive or prohibited areas;
- keeping a predominantly Australian management team and key executives to have Australia as their principal place of residence;
- sales of products to be undertaken in accordance with regular commercial arm's length terms;
- maintenance of employment levels;
- compliance with Australian industrial relations laws and employee entitlements;
- support of indigenous Australian communities;

reduction of foreign ownership interest to a specified level over time.**Notification and review process – a practical guide**

Typically, a notification to FIRB regarding a proposed foreign investment would comprise of a formal written submission, which will cover in detail:

- description of the proposed investment and target company and/or assets;
- profile of the foreign investor including its capability to meet the investment;
- profile of the Australian target company and/or assets;
- statements purporting that the proposed investment does not contravene any of the national interest considerations;
- any other relevant factors for the FIRB's consideration.

The written submission should be accompanied by the relevant prescribed forms as well as other supporting documents such as the foreign investor's latest financial reports and corporate and business profiles.

For a FIRB submission made under FATA, the FIRB is required to provide its decision within thirty days from the date a submission is lodged. If the Treasurer is unable to deliver its decision within this initial review period, the FIRB can extend the initial review period for up to a further ninety days. For a FIRB submission made under the Policy, it should be noted that there is no prescribed review period but the FIRB typically endeavours to adhere to the same timeframe. During the review period, the FIRB may issue further enquiries or seek further information or comments from the foreign investor.

If the FIRB has no objections to the proposed investment, it will issue a formal notice notifying the foreign investor, which may include any conditions that are imposed. It should also be noted that if the underlying proposed investment does not proceed within 12 months from the date of the FIRB's non-objection notice, then a new submission will generally need to be submitted together with necessary updates on the underlying transaction if the proposed investment is to proceed later.

It is recommended for foreign investors to seek advice from experienced Australian advisors as soon as possible to determine the notification requirements under FATA and/or Policy for its proposed Australian investment. When taking into account the timing for a proposed investment, foreign investors should allow sufficient time to prepare its submission and factor in the FIRB review timing. All proposed investments should be made conditional upon the receipt of FIRB's confirmation of non-objection to the investment before it can proceed with the investment.

⁶ Refer to FIRB's decisions in 2009 relating to China Minmetals Non-ferrous Metals Company Ltd's financing arrangement with OZ Minerals Ltd, Yanzhou Mining Co's proposed investment involving Felix Resources Ltd, the subsequent merger between Yancoal Australia Pty Ltd and Gloucester Coal Ltd and then the merger between Yanzhou and Yancoal.