

Mining

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FOREIGN INVESTMENT IN AUSTRALIA'S MINING SECTOR – FREQUENTLY ASKED QUESTIONS

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This is the first in a series of seven articles being prepared by HFW which answer frequently asked questions concerning foreign investment in Australia's mining sector.

In the 2011-2012 financial year, Australia's Foreign Investment Review Board approved 241 applications for foreign investment in Australia's mining sector. The total value of these proposed investments was AUS\$51.65 billion, accounting for a little over 30% of the value of all approved foreign investment applications in Australia during that year.

In this series of seven articles we will examine:

- Australia's foreign investment notification regime, with particular emphasis on investments in the mining sector.
- The typical business structures for foreign companies investing in Australia's mining sector.
- The legislative regime applicable to the mining sector.
- The implication of the *Personal Property Securities Act 2009* (Cth) on the mining sector.
- Land access rights needed by mining companies.
- Environmental bonds.
- Government taxes and royalties relating to minerals.



In this first article, we will look at Australia's foreign investment notification regime in so far as it applies to investments in the mining sector.

Foreign investment is welcome in Australia. In 2011-12, a total of 11,420 applications for foreign investment were considered with 10,703 approved, 13 rejected, 534 withdrawn and 170 exempt¹.

Australia's *Foreign Acquisitions and Takeovers Act 1975* (Cth) requires a foreign investor to notify Australia's Foreign Investment Review Board (FIRB) of its proposed investment. Notification to FIRB of certain proposed investments is mandatory. Notification to FIRB of other proposed investments is often voluntarily made as the consequences of completing an investment that is subsequently determined to be contrary to Australia's national interest are significant (and can include an unwinding of the investment transaction).

FIRB will review the proposed investment and make a recommendation to the Commonwealth Treasurer. Based on that recommendation, the Treasurer will decide either that the Commonwealth Government has no objection to the proposed investment (with or without conditions), or that the Commonwealth Government prohibits the proposed

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investments on the grounds that it is "contrary to Australia's national interest".

The types of proposed investment transactions typically notified to FIRB are:

1. Foreign government investors

Any direct investment, starting up a new business or acquisition of an interest in land, including any interest in a prospecting, exploration, mining or production tenement by foreign government investors, regardless of the value of the investment.

Foreign government investors include a body politic of a foreign country, entities in which governments, their agencies or related entities have an aggregate interest (direct or indirect) of 15% or more from a single foreign country or an aggregate interest of 40% or more from more than one foreign country, or entities that are otherwise controlled or could be controlled by foreign governments, their agencies or related entities, and any associates.

An investment of an interest of 10% or more is considered to be a direct investment. An investment that involves interest below 10% may also be considered a direct investment if the acquiring foreign investment investor is building a strategic stake in the target, or can use that investment to influence or control the target.

2. Australian business or corporations

Acquisition by a private foreign entity (and its associates) of an interest of 15% or more (or an acquisition by 2 or more private foreign entities (and their associates) of an aggregate interest of 40% or more) in an Australian business or corporation that is valued above AUS\$248 million or in an offshore company whose Australian subsidiaries or gross assets are valued above AUS\$248 million.

3. Australian urban land

- Acquisition of an interest in Australian urban land, including:
- Acquisition of an interest in a share in an Australian urban land corporation; or
 - Acquisition of an interest in a prospecting, exploration, mining or production tenement where it provides the right to occupy Australian urban land and the term of the tenement is likely to exceed five years; or
 - Acquisition of an interest in an arrangement involving the sharing of profits from the use of Australian urban land.

Australian urban land refers to all land other than land that is used wholly and exclusively for carrying on a business of primary production.

¹ Foreign Investment Review Board Annual report 2011-12, page 10.



The Treasurer reviews each foreign investment proposal against a national interest test.

4. **Operational mine** Acquisition of an operational mine where the mining assets are valued at or above AUS\$54 million (or AUS\$5 million for property subject to heritage listing).

In each case, the threshold amounts are as at 2013 and will be indexed annually.

The Treasurer reviews each foreign investment proposal against a national interest test. 'National interest' is not defined in the legislation. Each proposal is decided on a case-by-case basis. Guidance is drawn from the Australian Government's Foreign Investment Policy, and relevant considerations include existing governmental policy and legislation, national security, competitive effects, impact on Australian government policies, impact on the general economy and the community, and the character of the investor. Previous decisions by the Treasurer indicated that acquisition of a controlling shareholding, assets in a sensitive area (eg, near areas used by Australia's defence forces), assets at lower than market value, or a target that will be delisted from the Australian Stock Exchange after the transaction, will be subject to close scrutiny from the Treasurer.

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