Hogan Lovells

Foreign investment in Australia's energy and resources sector

February 2022

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Want to know more?

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This note is written as a general guide only. It should not be relied upon as a substitute for specific legal advice.

1. Introduction

Introduction

This guide is intended to supplement our popular Foreign Investment in Australia guide and has been drafted with the intention of providing an overview of the specific considerations a foreign person who is seeking to make an investment into the Australian energy and resources sector ("**Energy and Resources Investor**") should be aware of. Please note that this guide is written as a general guide only. It should not be relied upon as a substitute for specific legal advice.

Australia's foreign investment policy encourages foreign investment that is consistent with Australia's national interest. As a resource rich country with a relatively high demand for capital and a small population, foreign investment helps fill the void between what Australia saves and invests every year. Australia's national investment and savings gap has been on average about 4 per cent of gross domestic product per year over the last few decades.

In 2020, foreign direct investment in mining and quarrying was A$360.4 billion and in electricity, gas and water was A$22.7 billion.

Due to its low level of sovereign risk, Australia's energy and resources sector is generally regarded to be an excellent place to invest for foreign investors.

Australia's future E&R policy direction

The National Resources Statement was released on 14 February 2019 and sets out the Government's position on the policy and long-term agenda for the Australian resources sector. Driving the statement is the Government's vision for Australia to have the world's most advanced, innovative and successful resources sector. In the Statement the Government recognises that Australia's resources sector has never been more important to the nation's economic wealth and prosperity than it is today. The Government seeks to grow the resources sector by attracting international investment and supporting employment through progressive policy development in partnership with industry, research and Australian state and territory governments.

To maintain its strong position in the global resources market, the Government will prioritise five key goals that will form the future of all Government action within the sector:

1. deliver the most globally attractive and competitive destination for resources projects;
2. develop new resources, industries and markets;
3. invest in new technologies and approaches, especially to deliver better environmental outcomes;
4. create well paid, secure jobs; and
5. support communities to ensure they receive benefits from the development of Australian resources.

The Government's primary priority is to promote the Australian resources sector as globally attractive to encourage investment from foreign companies. Since the release of the Statement, the government has made significant progress towards achieving its goals including the launch of new projects and strategies to support the industry and strengthen global partnerships. As Australia's resources sector continues to grow, the sector can expect changes in resource regulation, new investment opportunities and a greater insight into the future direction of the resources sector in Australia. With these upcoming developments, the resources sector is rich in potential for foreign investors and investment that seeks to capitalise on the opportunities.

2. What you need to know

The Australian Foreign Investment Review Board ("FIRB") reviews foreign investment proposals on a case-by-case basis and advises the Treasurer on the national interest implications of the proposed transaction. The decision to grant or refuse an application is made by the Treasurer. If FIRB clearance is required and a foreign investor makes an acquisition without it, the investor risks delaying the transaction, the transaction not completing, having the investment unwound or even civil or criminal penalties being imposed.

2.1 The legal regime

The main laws that regulate foreign investment in Australia are the:

(a) *Foreign Acquisitions and Takeovers Act 1975* (Cth) ("**FATA**");

(b) *Foreign Acquisitions and Takeovers Regulation 2015* ("**FATR**"); and

(c) *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (Cth) ("**Fees Imposition Act**") and its associated regulations.

Other relevant laws include:

(a) *Security of Critical Infrastructure Act 2018* (Cth) ("**SCIA**");

(b) *Foreign Influence Transparency Scheme Act 2018* (Cth); and

(c) *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth).

FIRB Guidance Note 5 ("**GN 5**") provides useful commentary on foreign investment in the energy and resources sector.

FIRB Guidance Note 8 ("**GN 8**") also provides helpful commentary on when the new national security provisions (which commenced on 1 January 2021 and was last updated 9 July 2021) apply to foreign investment proposals.

Notification to FIRB and clearance by the Treasurer is required if the value of a proposed investment exceeds the prescribed monetary threshold or if the proposed investment gives rise to national security concerns. The relevant monetary threshold is determined by the type of investor and the type of investment.

All FIRB applications are lodged online through the FIRB portal. The FIRB website provides a checklist outlining information that must be included in all applications. Significant delays in processing of the application can be expected if the application does not include all information outlined on the checklist. Once the application has been submitted and the correct application fee has been paid, the Treasurer has 30 days to consider the application and decide whether to grant FIRB clearance. The 30 day period may be extended by a further 90 days in certain circumstances.

Most applications will be 'approved' by the Treasurer unless it is deemed to be contrary to Australia's national interest. With reference to FIRB approval, this approval should be seen by proponents as FIRB 'clearance'. It does not mean that the Australian Government has approved the project in question. FIRB clearance refers to a statement by FIRB of no objection to the matters/transaction outlined in the application.

For a more fulsome overview of the prescribed monetary thresholds, the types of investors and the types of investments which will fall within the ambit of FIRB and application process, please see our Foreign Investment in Australia guide.

For an overview of the key changes to Australia's foreign investment framework which commenced on 1 January 2021, please see our publication titled "Major reforms to Australia's foreign investment framework to commence on 1 January 2021" and our updated Foreign Investment in Australia guide.

2.2 Energy and resources investors

Foreign investors may require clearance from FIRB to acquire an interest in a mining or petroleum tenement or underlying land/title used to carry out mining or petroleum operations.

The need for FIRB clearance for an Energy and Resources Investor can depend on a range of factors including:

(a) the type of investment;

(b) type of interest e.g. mining tenement, exploration tenement, etc

(c) who the interest in the mining or petroleum assets is being acquired from;

(d) whether the foreign person is a foreign government investor;

(e) the value of the interest being acquired; and

(f) whether the investment involves a national security business or national security land.

Energy and Resources Investors looking to acquire securities in Australian mining or petroleum companies and Australian real property assets, including mining or petroleum tenements are usually subject to obtaining FIRB clearance.

Each investment proposal is reviewed on a case-by-case basis by the Treasurer. The general test conducted is whether the investment proposal is "contrary to Australia's national interest".

3. Australian land and acquiring an interest

Acquisitions in the energy and resources sector frequently involve acquisitions of interests in land of varying kinds, which may have separate clearance requirements.

3.1 Interest in Australian land

An interest in Australian land includes:

(a) a freehold interest;

(b) an interest as lessee or licensee in a lease or licence giving rights to occupy Australian land if the term of the lease or licence (including any extensions or renewals) is reasonably likely to exceed 5 years;

(c) an interest in a share in an Australian land corporation, being:

(i) a holding entity that prepares financial statements, where based on the financial statements, the interest in Australian land exceeds 50 percent of the value of the total assets; or

(ii) any entity whose interests in Australian land exceeds 50 percent of the total value of the assets of the entity;

(d) an interest in a unit in an Australian land trust, being a unit trust where the interests in Australian land held by the trustee exceeds 50 percent of the total assets of the trustee; and

(e) if the trustee of an Australian land trust is a corporation, an interest in a share of that corporation.

A person acquires an interest in Australian land even if the person previously acquired an interest in Australian land or is increasing the amount of an existing interest in Australian land.

A person also acquires such an interest if the person enters into an agreement or has a right to acquire such an interest under an option.

From 1 January 2021, acquisitions of royalty interests in respect of mining tenements are exempt from foreign investment screening where the interest does not provide rights to occupy the land or have control or influence over the land.

3.2 Types of Australian land

There are four categories of Australian land. These are agricultural land, commercial land, residential land and mining or production tenements.

Mining or production tenement

An Energy and Resources Investor will typically require FIRB clearance for acquisitions of interests in mining or petroleum tenements unless it is acquired directly from the Commonwealth, State or Territory government.

A mining or petroleum tenement will usually include:

(a) mining leases and licences;

(b) petroleum production leases (both onshore and offshore);

(c) rights that preserve a right to recover minerals, oil or gas;

(d) leases (including subleases) where the lessee has rights to recover minerals, oil or gas; and

(e) an interest in a mining tenement (includes certain interests including profit/income sharing agreements).

A mining or production tenement is defined under section 4 of FATA as being a type of "Australian land".

For acquisitions by Energy and Resources Investors from the relevant Free Trade Agreement nations (Chile, New Zealand and United States), an Energy and Resources Investor will only require FIRB clearance if the value of the acquisition is higher than **A$1,192 million** provided the acquisition does not raise national security concerns.

Foreign government investors and other Energy and Resources Investors are required to notify FIRB of any acquisitions of a legal or equitable interest in a mining or petroleum tenement.

Exploration and prospecting tenements

GN 5 states that an exploration tenement is a right under federal, state or territory law to recover minerals, oil or gas in Australia from land or the seabed for the purpose of prospecting or exploring such minerals, oil or gas. Generally, they will be for a set period and will allow for activities including sampling, testing, drilling, surveys and prospecting.

Generally, an Energy and Resources Investor (who is not a foreign government investor) does not need to seek FIRB clearance to acquire an exploration tenement, regardless of the value of the tenement unless the underlying land is national security land by reason of the exemption in section 27B of the FATR.

A similar exemption applies to the cash bidding system which was introduced to allocate offshore petroleum exploration permits for mature areas or areas known to contain petroleum accumulations. Under section 31 of the FATR, an Energy and Resources Investor (other than a foreign government investor) will not require prior approval to participate in the cash bidding program as the acquisition of an interest in an offshore petroleum permit is directly from the Australian Government and therefore exempt.Further details on the cash bidding system are set out at section 3.5.

That being said, there are situations where the acquisition of an exploration tenement or tenements may be notifiable to FIRB, such as:

(a) if it is likely to exceed five years (including any extension or renewal) and confers the holder with a right to occupy the underlying land;

(b) depending on the type of land (for example, national security land, agricultural land, or commercial land);

(c) if it is not being acquired directly from an Australian government;

(d) depending on the value of the interest in the land;

(e) if a foreign government seeking to acquire a legal or equitable interest in an exploration tenement under section 47 of the FATA and section 56 of the FATR. This includes where an existing tenement is being converted to a different tenement (e.g. an exploration tenement being converted to a mining tenement) and where the interests in the tenement(s) are acquired directly; and

(f) the tenement(s) are included in a package of tenements and other tenements require FIRB clearance to be obtained.

Agricultural land

Agricultural land is land in Australia that is used, or could reasonably be used, wholly or partly for a primary production business (which includes carrying on a business cultivating plants, planting or tending trees in a forest plantation and maintaining animals for the purpose of sale).

There are certain key exemptions to land being agricultural land which relate to energy and resources transactions. The land is exempt from being categorised as agricultural land if the land is not used wholly or predominately for a primary production business and:

(a) the land is used wholly or predominately for a mine, oil or gas well, quarry or other similar operation under a mining or production tenement (mining operation), to locate infrastructure relating to a mining operation or to store waste from a mining operation;

(b) clearance from a government authority (that is not a mining or production tenement) is in force allowing a mining operation to be established or operated on the land, infrastructure relating to a mining operation to be located on the land, or waste relating to mining operations to be stored on the land; and

(c) zoning allows the land to be used for a primary production business and an application has been made to a government authority:

(i) for clearance for a mining operation to be established on the land;

(ii) for clearance to locate infrastructure relating to a mining operation on the land; or

(iii) for clearance for waste from a mining operation to be stored on the land.

FIRB clearance is not generally granted for an acquisition of an interest in agricultural land that will be used for a primary production business or residential development unless the agricultural land was first offered for sale through an open and transparent sale process. A public sales process that is marketed widely to potential Australian bidders for a minimum of 30 days and that allowed Australian bidders an opportunity to participate, will generally be considered an open and transparent sale process.

3.3 Acquisition in the underlying land for mining or petroleum operations

FIRB will need to be notified before an Energy and Natural Resources investor acquires an interest in land in Australia which is intended to be used to undertake mining or petroleum operation if the relevant value thresholds are triggered. Energy and Resources Investors may be required to notify and receive a no objection notification before acquiring an interest in land in Australia in which to undertake mining or petroleum operations. This will generally depend on the type of land that has to be acquired including agricultural land, commercial land and residential land.

Sections 74 and 75 of the FATA specify that the Australian Treasurer can issue a no objection notification for certain investments if the Treasurer considers that the investment is not contrary to the national interest.

Acquisitions of interests in land are considered on a title-by-title basis. Energy and Resources Investors should consider all types of Australian land they may be seeking to acquire, as there may be multiple notifiable actions in one acquisition. Notification and receipt of a no objection notification is only required if the relevant monetary thresholds are triggered for more than one of the types of Australian land.

3.4 Acquisition of an interest in an operational mine

GN 5 provides that an operational mine is considered to be sensitive developed commercial land. Foreign government investors are required to notify FIRB before acquiring any interest in developed commercial land, regardless of the value. Other Energy and Resources Investors need to notify before acquiring an interest in developed commercial land only if the value of the interest is more than the relevant notification threshold (**A$61 million**).

3.5 Interactions with NOPTA

The National Offshore Petroleum Titles Administrator ("**NOPTA**") is the decision maker for transfer and dealing applications for petroleum titles. NOPTA can either approve or refuse to approve a transfer and/or dealing and will notify the applicant of the decision by written notice.

Transfers

A transfer or dealing relating to a title is of no force until approved and registered, in relation to a particular title.

Transfer of a title results in change(s) to the registered holders of a title. Registered holders of titles have certain rights, duties and obligations under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth). Duties and obligations apply to all holders of a title.

It must be noted that Energy and Resources Investors are responsible for obtaining FIRB clearance, if applicable. Evidence of FIRB approval should be provided to NOPTA with submission of an applicable transfer or dealing application. If it is not available at the time of submission, it may be provided separately before NOPTA makes a decision on the application.

Cash bids

Each year, the Australian government releases offshore petroleum exploration acreage and invites companies to bid for the opportunity to invest in oil and gas exploration in Australian waters.

NOPTA assesses each bid and takes into consideration a range of factors such as which bid is likely to progress the most comprehensive understanding of the petroleum prospectivity of the area.

As previously discussed, Energy and Resources Investors generally do not require prior approval to participate in the cash bidding program (unless the permit area is in relation to national security land). However, GN 5 provides that foreign government investors will require prior FIRB clearance to participate in the cash bidding program and to acquire an interest in an exploration permit issued under the program.

4. Acquisition of securities in Australian companies

4.1 Acquisition of substantial interest

Energy and Resources Investors must obtain FIRB clearance for any acquisition of a substantial interest in an Australian company or an Australian unit trust valued above the relevant monetary threshold or which holds a mining or production tenement. A person holds a substantial interest in an Australian company or unit trust if the person holds an interest of at least 20 percent in the company or unit trust.

The acquisition of shares in an Australian mining or oil and gas company will be a significant action where:

(a) it meets the prescribed threshold (A$281 million in most cases where the company is considered a sensitive business or A$1,216 million for investors from Free Trade Agreement nations provided the company is not a sensitive business);

(b) the company carries on an Australian business; and

(c) the action results in a change in control.

In relation to the concept of "control", a person is taken to determine the policy of an entity or business of exploiting a mining or production tenement (and thereby controls the entity or business) if that person can determine questions relating to disposal of an interest in the tenement.

4.2 Australian land corporations

Energy and Resources Investors acquiring an interest in an Australian mining, production or exploration entity may be notifiable to FIRB where the value of the company's interests in Australian land (including mining or production tenements) exceeds 50 percent of its total assets by value.

4.3 Agreement with holder of a tenement

Entering into or terminating a significant agreement with the holder of a mining or production tenement, where the total value of the business exceeds the threshold and the action results in a change of control, is also a significant action. Significant agreements include those relating to the right to use or lease assets or participate in profits or management and control of the business.

4.4 Foreign government investors

Foreign government investors are required to obtain FIRB clearance for any acquisition of a direct interest in an Australian company or Australian unit trust or business, regardless of value.

A "direct interest" includes:

(a) an acquisition of an interest of 10 percent or more in the entity or business;

(b) an acquisition of an interest of 5 percent or more in the entity or business if the person who acquires the interest has entered into a legal arrangement relating to the businesses of the person and the entity or business; and

(c) an interest of any percentage in the entity or business if the person who acquired the interest is in a position to influence or participate in the central management and control of the entity or business or to influence, participate in or determine the policy of the entity or business. This includes offshore transactions, subject to very limited exceptions.

5. Renewable energy land acquisition

There have been recent changes to the regime surrounding the foreign acquisition of land for the purposes of developing renewable energy infrastructure. The monetary threshold for requiring FIRB clearance for the foreign acquisition of land is affected by the way that land is categorised.

For more information on foreign investment in Australian land, please see our brochure 'Investing in Land in Australia'.

5.1 Solar or wind projects

In 2017, a new provision 40(2A) was added to the FATR. This provision states that where an investor is already the operator of a wind or solar power station in Australia, an acquisition of land for the purposes of energy development will be considered 'commercial', rather than 'agricultural land' – with a corresponding lower threshold. If a component of a wind or solar power station is on the surface of the land e.g. land that contains a wind turbine, the land will be treated as developed commercial land, provided that the land is not currently predominantly used for primary production. Additionally, land with a wind or solar power station on its surface will not be considered vacant under FATR. This means that land already containing a wind turbine, for example, will be treated as developed, and will not be subject to common development conditions such as the requirement to commence construction within five years.

"Wind or solar power station" is defined in the FATR to mean a wind or solar farm that is recognised as an accredited power station as defined in the Renewable Energy (Electricity) Act 2000. This definition applies to a project that has completed construction and received accreditation from the Clean Energy Regulator. This definition also includes each component that comprises a solar electricity generation system and each component that comprises a wind power station e.g. each wind turbine. The infrastructure must be used for the purpose of generating electricity for a commercial purpose. Therefore, the infrastructure must be operated as a power station rather than for private use.

5.2 Treatment of land which contains a developed wind or solar farm

(a) For all Energy and Resources Investors

For all Energy and Resource Investors where the land is being predominately used for a primary production business, the land is not considered to be agricultural land. If the land contains a wind or solar power station, it is considered to be developed commercial land (in addition to agricultural land, unless the land contains a wind or solar power station and the land is not currently being wholly or predominately used for a primary production business).

(b) For owners and operators of wind and solar farms

Under section 40 of the FATR, different treatments may apply to owners and operators of wind or solar farms. Acquisitions containing a wind or solar power station will not be considered as agricultural land regardless of whether the land is being currently used predominately for a primary production business, where the land is acquired by an operator for the sole purpose of operating a wind or solar power station.

Land that contains a wind or solar power station will be considered as developed commercial land and agricultural land

however, the thresholds for developed commercial land will apply.

(c) **Treatment of undeveloped wind and solar farms**

For all Energy and Resource Investors, land will not be considered as agricultural land where it is not currently being wholly or predominately used for a primary production business and the land meets one of the following conditions:

(i) An application to FIRB has been made for clearance to establish a wind or solar farm on the land.

(ii) FIRB has provided clearance allowing a wind or solar power station to be established or operated on the land.

(iii) The land was acquired solely, or is used wholly or predominately to meet a condition of an approval for a wind or solar power station to be operated on another piece of land.

The land will be treated as vacant commercial land and not agricultural land. If the land is predominately being used for a primary production business, the land will remain agricultural land as the exemption in section 44 of the FATR will not apply.

6. Australian land thresholds

Foreign persons must obtain FIRB clearance for all acquisitions of Australian land or securities in land rich entities where the target value exceeds the thresholds, unless exemptions apply.

For foreign investors

Action	Threshold Value of Investment
Acquisition of Mining Tenements.	For Foreign Investors from Chile, New Zealand and USA, A$1,250 million
	Others, A$0
Acquisition of Exploration Tenements	FIRB clearance not required unless in relation to national security land
Acquisition of Securities in Mining Companies that are not Sensitive Businesses (e.g. extraction of uranium or plutonium).	A$289 million
Acquisition of Agricultural Land.	For Foreign Investors from Thailand, where land is used wholly and exclusively for a primary production business, A$50 million.
	Other Foreign Investors, A$15 million (cumulative)
	For Foreign Investors from Chile, New Zealand and USA, A$1,250 million
Acquisition of Vacant Commercial Land.	A$0
Acquisition of Developed Commercial Land by Non-Agreement Country Investor.	A$289 million
	For Sensitive Land (including mines and critical infrastructure), A$63 million
Acquisition of an Interest in Developed Commercial Land (including an operational mine) by an Agreement Country Investor.	For Foreign Investors from Hong Kong and where Developed Commercial Land is also Sensitive Land, A$63 million
	Other Foreign Investors, A$1,250 million
Acquisition of National Security Land.	A$0

For foreign government investors

Action	Threshold Value of Investment
Acquisition of Mining Tenements	A$0
Acquisition of Exploration Tenements	A$0
Acquisition of Securities in Energy and Resources companies	Acquisition of at least 10% of Securities in the company, regardless of monetary value
Acquisition Agricultural Land	A$0
Acquisition of Vacant Commercial Land	A$0
Acquisition of Developed Commercial Land	A$0
Acquisition of an Interest in an Operational Mine	A$0
Acquisition of National Security Land.	A$0

7. Internal reorganisations

Mining/petroleum companies may undertake internal reorganisations. It is important to check whether the internal reorganisation falls within the definition of 'internal reorganisation' in the *Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020* ("Fee Regulations") to determine the correct fee payable.

Section 41 of the Fee Regulations specifies that 'internal reorganisation' means an acquisition by an entity (the first entity) of:

(a) an interest in securities in another entity if:

  (i) both entities are subsidiaries of the same holding entity; or

  (ii) the other entity is a subsidiary of the first entity; or

(b) an interest in an asset or Australian land from another entity if:

  (i) both entities are subsidiaries of the same holding entity; or

  (ii) the other entity is the holding entity of the first entity; or

  (iii) the other entity is a subsidiary of the first entity.

The definition of 'internal reorganisations' has been extended to cover interests in mining or production tenements that are not interests in Australian land.

Energy and Resources Investors must seek prior clearance for proposed acquisitions that are notifiable actions (meeting the monetary thresholds). Energy and Resources Investors may also choose to notify actions which are not notifiable actions. These actions may be significant actions. For more information on significant actions and notifiable actions please see our Foreign Investment in Australia guide.

7.2 Fees

Internal reorganisations that include more than one action where at least one is acquiring a legal or equitable interest in a mining or production tenement will only have to pay a single fee. The fee is payable at the time of application. Processing will commence when the correct fee is paid.

8. Variations

The FATA allows foreign persons to apply for variations to:

(a) no objection notifications – section 76;

(b) conditions that are imposed no objection notifications – section 74;

(c) exemption certificates – section 62; and

(d) notices imposing conditions - section 79H.

8.1 Variation to a no objection notification or exemption certificate

The Treasurer may vary the content of a no objection notification or exemption certificate if the Treasurer is satisfied that it is not contrary to the national interest (sections 62 and 76 of the FATA).

The Treasurer may exercise its last resort power, when available, to impose conditions in a no objection notification. The Treasurer may also exercise its last resort power to impose conditions on actions that do not have an existing no objection notification by issuing a notice imposing conditions (section 79H of the FATA).

For exemption certificates, variations may be requested by the Energy and Resources Investor or done at the Treasurer's own initiative.

From 1 January 2021, the Treasurer may revoke an exemption certificate or a no objection notification where a person gives false or misleading information, or omitted a material fact or thing which is relevant and given before it is issued. Certain requirements apply before the Treasurer can exercise this power (sections 62A and 76A of the FATA). The Treasurer will give the person an opportunity to make submissions on the matter before making a revocation or variation decision in these circumstances.

Applications by an Energy and Resources Investor for an extension of a period specified in the no objection notification or notice imposing conditions must be made two months before the end of the period.

8.2 Variations to conditions

The Treasurer may vary a no objection notification by revoking a condition, imposing a new condition, varying an existing condition, or varying certain information provided in the no objection notification. However, the variation may only be made if the person consents, or if the Treasurer is satisfied that the variation does not disadvantage the person.

8.3 Applications for variation

Variation applications will be considered on a case-by-case basis. The Treasurer will consider all factors relevant to the national interest, including the following five factors.

Timing of the request

As above, applications for extension of the validity period must be made two months before the end of the period. For variations to a condition, an Energy and Resources Investor may apply at any time. Nonetheless, investors are encouraged to apply as soon as they are aware that they will not be able to comply with their obligations as delay may put the investor at risk of breaching the condition(s).

The nature of the variation

Variations that are minor in nature and do not substantively change the original no objection notification or certificate would generally be considered as a proposal for a variation.

For example, an Energy and Resources Investor issued with an exemption certificate to cover a series of acquisitions of interests in mining and production tenements but prior to the acquisitions the Energy and Resources Investor

determines, for tax reasons that it wants another Energy and Resources Investor to acquire some of the mining and production tenements may intend to apply for a variation to the existing letter. However, as this would likely substantively change the scope of the foreign persons originally covered, to the extent it may include an Energy and Resources Investor not originally envisaged by the decision maker (for example, the relevant Energy and Resources Investor is an overseas incorporated entity) and may impact the national interest, this would generally not be considered a variation and would require a new application.

In this situation, a further secondary application will need to be lodged with FIRB.

Control over circumstances

A factor which will generally be considered is whether there are unforeseeable factors beyond the foreign person's control.

Fees

The integrity of the fee system will be considered as part of a proposal for a variation of a no objection notification or exemption certificate.

Change in circumstances

The Treasurer may consider intervening changes in circumstances since the initial assessment that may be applicable to the assessment of the national interest, such as target sector make-up, market conditions, underlying ownership of the person, and changes in legal frameworks.

9. Further approvals

Energy and Resources Investors need to be aware that obtaining FIRB clearance for one action does not guarantee that further approvals are not required for subsequent actions taken in respect of a mining or petroleum tenement or the acquisition of securities in an Australian entity.

Energy and Resources Investors who may not have required FIRB clearance with respect to the initial acquisition of securities in an Australian entity by virtue of not acquiring what the FATA considers a "substantial interest", will require FIRB clearance where a further acquisition of securities in the same entity, subsequently breaches the applicable threshold. In other words, per section 20(1)(c) of the FATA, notification is not a "one time" obligation of a foreign investor – rather every increase beyond 20 percent is a notifiable transaction.

Similarly, where an exploration permit or a mining or petroleum tenement is the subject of conversion to a different type of tenement (e.g. the conversion of an exploration tenement to a mining tenement), an Energy and Resources Investor may require FIRB clearance as the thresholds in respect of Australian land will likely be triggered.

Energy and Resources Investors who are 'foreign government investors' should be particularly mindful of any subsequent actions taken in respect of Australian mining or petroleum assets or entities that hold them.

10. Critical infrastructure register

Assessments by FIRB must take into account national interest considerations, including national security. A key national security consideration is that of 'Critical Infrastructure', as defined in the SCIA.

The SCIA establishes a confidential register of "operational information" and "interest and control information" regarding "critical infrastructure assets" in the water, electricity, gas and ports industries. Entities operating in affected industries will be required to provide up-to-date information to the confidential register and penalties will apply for failure to make full disclosure. The SCIA will also provide the Minister for Home Affairs with a broad power to issue directions to protect against risks to national security.

Critical Infrastructure under SCIA includes certain energy assets, gas assets as well as critical ports and water assets. The table below outlines what is considered Critical Infrastructure in each industry:

Industry	Critical Infrastructure
Critical electricity assets	• A network, system or interconnector that ultimately services 100,000 or more customers. • Generation stations that are critical to ensuring security and reliability of electricity networks or electricity systems.
Critical gas assets	• Processing facilities with capacity of 300 TJ/day or more. • Storage facilities with capacity of 75 TJ/day or more. • A network or system ultimately distributing to 100,000 or more customers. • Pipelines that are critical to ensuring security and reliability of a gas market.
Critical ports	• Certain large and nationally significant ports listed in the Act. • "Security regulated ports" under the Maritime Transport and Offshore Facilities Security Act 2003 (Cth).
Critical water assets	• One or more water or sewerage systems or networks managed by a single water utility that ultimately services at least 100,000 connections.

The Minister for Home Affairs may prescribe an asset outside of these four sectors as a critical infrastructure asset if satisfied that:

(a) the asset is critical to the social or economic stability of Australia or its people, the defence of Australia, or national security; and

(b) there is a risk, in relation to the asset, that may be prejudicial to security.

The Minister may also privately declare an asset to be a critical infrastructure asset where it affects national security and there would be a risk to national security if it were publicly known.

SCIA is administered by the Critical Infrastructure Centre ("**CIC**"), established in 2017. The CIC works across all levels of government and asset owners to assess the security impacts of the proposed foreign acquisition and provides an assessment for FIRB. Owners and operators of Critical Infrastructure are required to register their details with CIC.

Although it is uncommon, proposed foreign acquisitions of Critical Infrastructure have been blocked by the Treasurer in the past. In 2018, Hong Kong's CK Infrastructure was prevented from proceeding with a A$13 billion takeover of gas pipeline operator APA Group. One of the stated reasons behind the decision was a reluctance to allow the ownership of such a large amount of Critical Infrastructure to be concentrated in a single entity.

It is however more likely that the foreign acquisition of energy infrastructure will be permitted subject to a range of conditions, such as limiting the maximum percentage of foreign ownership or requiring a certain percentage of board members to be Australian citizens. For more information on conditions imposed by the Treasurer, see our 'Foreign Investment in Australia' brochure.

The CIC assets can include:

(a) airports, railways, ports, roads and inter-modal transfer facilities;

(b) telecommunication networks and nuclear facilities; and

(c) securities exchanges, key minerals, agriculture and financial sector.

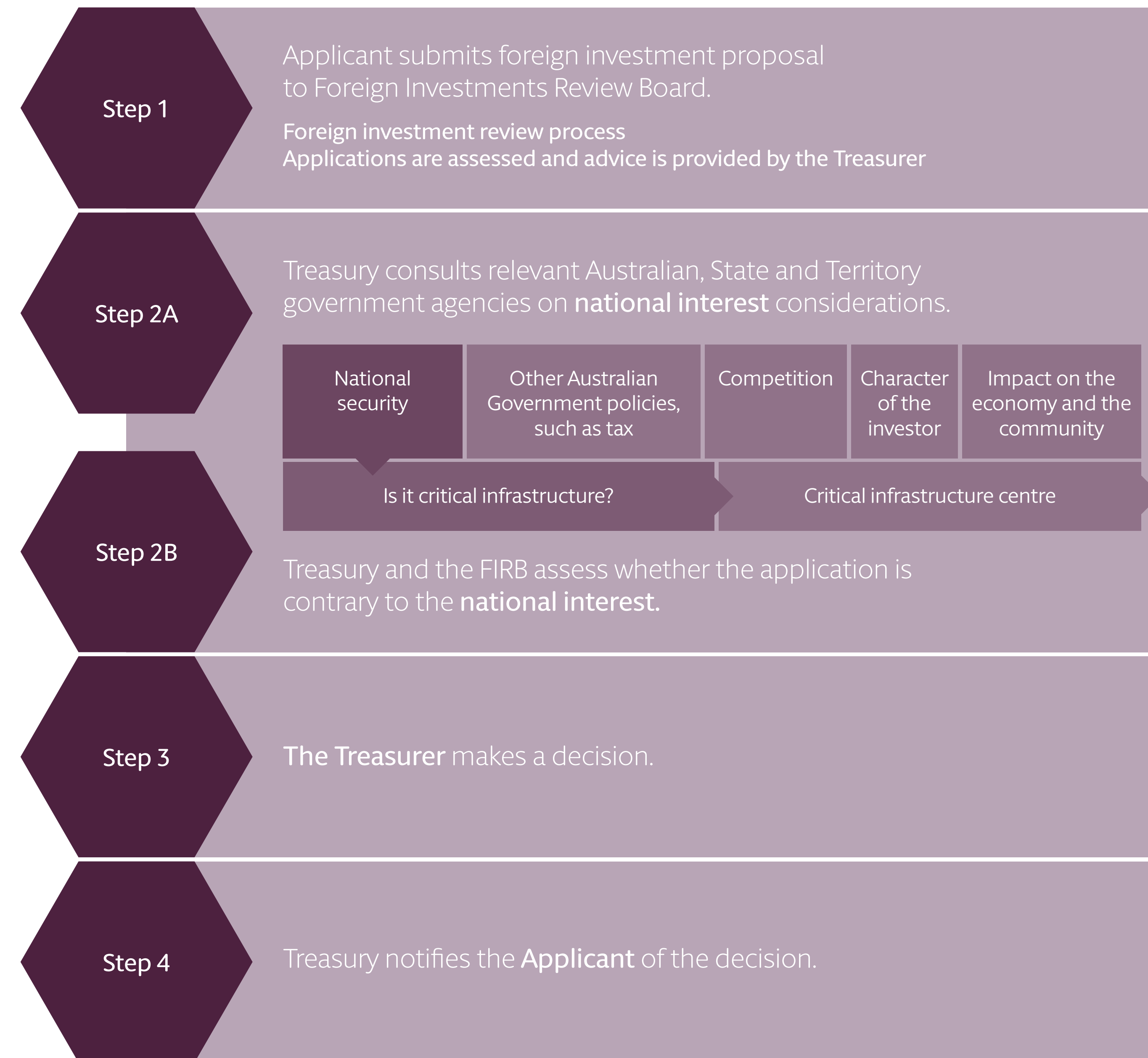
Where the Treasurer considers necessary (due to matters including increased national security, competition, economic, community or other concerns) approval may be subject to other conditions. Such conditions are at the Treasurer's discretion and are often deal specific. Please see section 11 following regarding conditional approval.

As a national security business includes an Australian business that is a responsible entity or a direct interest holder (greater than 10%) in relation to a critical infrastructure asset, acquisitions of such businesses are subject to greater oversight by reason of the national security provisions introduced in the FATA from 1 January 2021.

The review process

The CIC's role in the foreign investment review process.

The Treasury encourages early engagement on foreign investment cases.



11. Exemption certificates

Foreign investors (including foreign government investors) can apply to the Australian Treasurer for an exemption certificate to cover a program of acquisitions of interests in tenements (section 43 FATA).

11.1 Tenement exemption certificates

The exemption certificate exempts the foreign investor from obligations under the FATA to cover a program of acquisitions in tenements if it is not contrary to the national interests. The foreign investor can undertake a program of acquisitions of securities in Australian mining, production or exploration entities or tenements without having to obtain FIRB clearance for each individual acquisition.

Conditions of obtaining an exemption certificate include:

(a) specification by the applicant of the geographic region of the program; and

(b) the type of minerals the program would cover.

Exemption certificates can benefit large investment funds, especially those with low-risk foreign government investors and investors that intend to make a series of passive investments in the energy and resource sector.

11.2 Foreign government sectors

Foreign government investors can apply for an exemption certificate with regards to exploration, mining or production tenements. Exemption certificates will usually not be granted to foreign government investors that cover more than one tenement over substantially the same area and target source.

If a foreign government investor is granted an exemption certificate over an exploration tenement and would also like an exemption certificate to cover later potential related mining or production tenements, the inclusion of these tenements in the exemption certificate would generally be considered contrary to the national interest. The related mining or production tenements would normally be expected to be covered by a later exemption certificate application or notice, once the exploration activities have been substantially progressed.

12. Conditional approval

As part of the FIRB clearance process, the Treasurer may impose conditions on the foreign investor. These conditions are determined on a case-by-case basis and are often framed as behavioural undertakings designed to preserve the national interest.

Some examples include:

Sensitive Sector or Critical Infrastructure Operation Conditions	Acquisition of Vacant Commercial Land Conditions
Require the target's business to be undertaken solely from within Australia.	Continuous construction within 5 years of the date of clearance.
Limit foreign ownership to less than 50 percent.	Not to sell the land until construction is complete.
To require half of the target's board to comprise Australian citizens.	
Require the target's Chairman to be an independent director who is an Australian citizen and resident.	
Local employees and local sales/reservations.	
Require divestment of certain assets or ownership interests within a specified timeframe post acquisition.	

12.1 Tax and other conditions

In the process of considering the application, FIRB will consult with the Australian Tax Office ("**ATO**") on the tax impact of the investment. In most circumstances, foreign investors should expect that the standard tax conditions will be imposed. Sometimes, specific or additional tax conditions may also be imposed and preliminary ATO views on the proposed investment may be noted as part of the conditions.

Please see our Foreign Investment in Australia guide for further discussion around conditional clearance.

12.2 Compliance framework

FIRB has developed the *Foreign Investment Compliance Framework* ("**Compliance Framework**") to provide strengthened assurance that foreign investors are meeting their compliance obligations, including supporting foreign investors to understand their compliance obligations, while minimising the regulatory burden.

The Compliance Framework sets out the compliance activities undertaken by the Treasury to meet its objectives (as stated above) which can be categorised into four key areas:

(a) conducting compliance assurance activities such as audits;

(b) undertaking enforcement activities under the legislative provisions;

(c) educating foreign investors and their advisors on compliance obligations; and

(d) using data and information to better understand and address non-compliance.

Treasury's compliance efforts are focused on areas of risk to the national interest and aim to achieve a balance between providing assurance, detecting and remedying non-compliance while limiting the impact and supporting foreign investors to meet their compliance obligations.

13. Fees

The fee for lodging an application with FIRB is payable at the time of application with statutory timeliness commencing when the correct fee is paid.

If the applicant applies for acquisition of interests in multiple tenements in the same transaction, the applicant is still charged a single fee. The fees payable by all foreign persons (including foreign government investors) when lodging an application to acquire an interest in a mining tenement or securities in a mining entity are outlined in the table below.

Action	Fee Payable
Action involving tenements and mining, production or exploration entities (that is not a reviewable national security action).	Where consideration is less than A$75,000, A$2,000 Fees start at A$6,350 for where consideration is more than A$75,000 and less than $50 million. Then, fee tiers increase every A$50 million of consideration. Where consideration is more than A$2 billion, $503,000 maximum fee.
Action involving tenements and mining, production or exploration entities that is a reviewable national security action.	25% of the fee for an equivalent notifiable action (see above)
Internal reorganisation (that is not a reviewable national security action)	A$12,700
Internal reorganisation that is a reviewable national security action.	A$3,175

14. Penalties

15. Record keeping

14. Strict penalties (including civil and criminal penalties) may apply for breaches of Australia's foreign investment rules.

Offences may include failing to seek approval for foreign investments which meet the legislative thresholds, or for non-compliance with conditions imposed on a foreign investment proposal. The Treasurer may also order a foreign investor to dispose of interests in assets, a business or land.

These provisions are designed to deter non-compliance and ensure that Australia's national interest is safeguarded.

Treasury, and the Treasurer as the decision maker, will ensure that any pursuit of any penalties for non-compliance with FATA is commensurate with the breach and the degree of non-compliance, and is consistent with all other Treasury obligations. In general, Treasury may take a more lenient view of non-compliance and seek to work with the foreign investor to achieve compliance in cases where non-compliance is inadvertent, self-reported by the foreign investor, the breach is administrative, and the investor is willing to remediate the breach as quickly as possible.

15. Records relating to FIRB applications and clearance must be kept for specified time periods. These obligations apply to records of:

(a) actions taken by a person to the extent the records are relevant to an order or decision made by the Treasurer under the FATA (for five years after the action is taken);

(b) actions specified in an exemption certificate which are notifiable (for five years after the action is taken);

(c) compliance with conditions in a no objection decision, notice imposing conditions and an exemption certificate (for two years after the condition ceases to apply);

(d) certain disposals of interests in residential land (for five years after the interest is disposed); and

(e) any register notice that the person is required to give to the Registrar (for five years after the notice is given).

16. Foreign influence transparency scheme

Under the Foreign Influence Transparency Scheme Act 2018 (Cth) ("Scheme") which commenced on 10 December 2018 Energy and Resources Investors could be classified as covert agents acting on behalf of foreign governments and state-owned entities to exert political influence in Australia.

The Scheme is one of the Australian government's recent attempts to curtail covert foreign interference in its political system. Since its inception on 10 December 2018, 89 companies, groups or people have voluntarily added themselves to the public register established by the Scheme.

The requirement to register under the Scheme arises where a person (defined broadly to include companies, partnerships, associations, organisations and any combination of individuals who together constitute a body) engages in registerable activities on behalf of a foreign principal. "Foreign principal" is defined to include foreign governments and foreign government related entities, political organisations and individuals.

Registrable activities include parliamentary lobbying for the purpose of political or governmental influence and general political lobbying, communications activities or disbursement activities for the purpose of political or governmental influence.

On this basis, upon the conservative interpretation of the provisions of the Scheme, it appears that Woodside has registered its general political lobbying activities on the basis that it may from time to time engage in the development and review of legislation and policy that affects projects it operates on behalf of joint venture participants who qualify as foreign principals under the Scheme. Similarly, Shell has registered its general parliamentary lobbying activities in its capacity as the appointed operator of the Prelude project, in which it acts on behalf of joint venture participants who qualify as foreign principals under the Scheme. It appears that, out of the abundance of caution, numerous other entities who would similarly be classified as Energy and Resources Investors have registered under the Scheme on the basis that they conduct similar activities.

While it may not have been the intention of the Scheme to capture Energy and Resources Investors and mandate registration of their activities on behalf of the joint venturers they represent, these Energy and Resources Investors should ensure they are aware of the extent to which the joint venture participants are connected to the relevant Foreign principal in order to avoid failing to register where they are technically required to do so by the Scheme.

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