

Foreign Investment in Australia – reminder of FIRB requirements

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by James Plumb, Senior Associate and Johanna Kennerley, Solicitor

Foreign investment in Australia's resources sector is currently a hot topic, given the recent speculation over China Minmetal Corporation's (**Minmetal**) acquisition of many of Oz Minerals Limited's (**OZ Minerals**) assets, and the media interest in Aluminum Corporation of China's (**Chinalco**) various investment proposals.

With the Foreign Investment Review Board (**FIRB**) releasing an updated Foreign Investment Policy (**Policy**) in March 2009, it is timely to review the requirements for dealing with foreign government controlled entities.

Transactions with foreign investors require prior FIRB approval where the value of the investment proposal exceeds \$100 million (with higher limits for United States investors, and other limitations in respect of sensitive interests). However, all investment by foreign government controlled entities or agencies requires prior approval by FIRB, regardless of the value of the transaction.

Dealing with a government controlled entity requires a more detailed analysis by FIRB and the Federal Treasurer (**Treasurer**) to approve such investment. Accordingly, the level of disclosure and transparency made to FIRB and the Treasurer by the proposed foreign government investor is greater than where the foreign investor merely is a public or private company.

In February 2008, The Federal Treasurer, The Hon. Wayne Swan MP released the Federal Government's *Principles Guiding Consideration of Foreign Government Related Investment in Australia*. These Principles are the guidelines used by FIRB and the Treasurer when determining whether a particular investment by a foreign government controlled company or agency is consistent with Australia's national interest.

Further to the indicia considered to assess foreign investment by a public company, the Principles outline additional factors that must be examined. The Principles are separated into six key issues. Here, we outline those six key issues, and consider the action required by a foreign government controlled investor when applying for investment approval.

In brief

§ A timely review of the Foreign Investment Review Policy and the updated requirements for dealing with foreign government controlled entities.

by Bronwyn Clarkson, Partner

1. An investor's operations are independent from the relevant foreign government

When applying for investment approval, the investing entity must be able to demonstrate that it acts independently from the relevant government body, particularly in relation to funding of the investor's activities.

Accordingly, the foreign government investor will need to provide details in respect of its funding and asset base (and the means by which it acquired such assets and income), and provide details in respect of the company's acquisition policies.

2. An investor is subject to and adheres to the law and observes common standards of business behaviour.

The foreign government investor must be able to demonstrate clear commercial objectives, transparency in its structure and that it is subject to, and complies with, the laws and regulations of the relevant country.

This may be demonstrated by providing information regarding prior transactions with other international companies.

3. An investor may hinder competition or lead to undue concentration or control in the industry or sectors concerned.

These issues are examined by the Australian Competition and Consumer Commission in accordance with its competition policy at the relevant time.

4. An investment may impact on Australian Government revenue or other policies.

The Government will consider the proposal's impact on Australia's revenue streams, and examine the investment's impact on other key issues, such as environmental protection.

5. An investment may impact on Australia's national security.

The Government will assess the location and extent of the investments in relation to Australia's security and strategic interests.

FIRB's recent approval of Minmetal's acquisition of the majority of OZ Mineral's assets was subject to the exclusion of the Prominent Hill copper-gold project, owing to the location of the project close to the Woomera Prohibited Area weapons testing range in South Australia.

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6. An investment may impact on the operations and directions of an Australian business, as well as its contributions to the Australian economy and broader community.

FIRB will take particular note of this issue in instances where the foreign government investor is acquiring shares in a large Australian entity, or where the acquisition of assets is likely impact the economy and community, particularly where the acquisition may affect important local and regional issues such as employment, manufacturing, production and infrastructure.

If the acquisition is likely to affect local or regional concerns, FIRB has the ability to implement conditions on the incoming foreign government investor that ensures the development and protection of the economy and the community.

FIRB's recent approval of Anshan Iron & Steel Group's (**Ansteel**) investment in Gindalbie Metal Limited's Karara Iron Ore Project in Western Australia is an example of FIRB's powers in this respect, as FIRB's approval of this transaction was contingent on Ansteel's undertaking to support the development of the Oakajee Port, a major infrastructure project in the area.

A foreign government investor should also consider:

- providing information relating to its future plans for the acquired assets or company, particularly in respect of potential restructure;
- providing information in respect of the continuation or increase of potential imports and exports; and
- providing information relation to its future plans to ensure that local processing and the use of locally produced materials are retained.

Representing the Australian party?

When involved in transactions where the counter party is a foreign investor, care must be taken to ensure that the appropriate due diligence is performed in respect of the status of the potential investor.

If the investing company is listed on the relevant country's stock exchange, it is easier to determine the level of government involvement. Most countries have an equivalent to ASIC (such as Companies House in the UK, and the Securities Exchange Commission in the United States of America) that can provide information in respect of listed companies.

However, in many instances, discovering the true extent of a foreign government's involvement with any particular transaction can be problematic, and due diligence can be difficult where the relevant entity is not a listed company, or is based in a country where the independent regulation of companies is limited.

Accordingly, other measures should be used in order to ensure that the transaction is compliant with FIRB's requirements.

The use of warranties in respect of the independent status of the company is a viable option to protect your Australian client.

Also, representatives should ensure that all transactions involving foreign entities are entered subject to FIRB approval, and that any agreement confirms that the incoming party is responsible for making the necessary application for approval.

In the current economic climate, it is timely to consider FIRB's requirements in respect of foreign investment, and in particular, foreign government investment. Companies must ensure that all transactions are compliant with the relevant legislation and that disclosure to FIRB and the Treasurer complies with all relevant policies.

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