

Article Information

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Resources sector to be affected by new foreign investment (FIRB) rules

Foreign investment in the Australian resources sector will be affected by proposed changes to Australia's foreign investment regime, set to be introduced at the start of 2021. The changes, focused around national security, enforcement powers and simplifying some investment processes, will likely impact on resources projects involving certain critical minerals, gas assets and more. The changes will also provide some clarity around the application of the foreign investment regime to the purchase of revenue streams in relation to mining and production tenements as well as making exploration licences in all Australian states and territories exempt from screening. This article summarises the proposed changes and their likely impact on the resources sector.

On 5 June 2020 the Federal Treasurer announced major proposed changes to Australia's foreign investment regime, focused on three broad themes:

1. protecting Australia's national security
2. stronger penalties, compliance and enforcement powers
3. streamlining less sensitive investments.

While the mooted changes are still in the form of a discussion booklet, and the detailed legislative amendments are yet to be released, the changes are said to be the most comprehensive reforms since the introduction of the *Foreign Acquisitions and Takeovers Act (Act)* in 1975.

Notably, the announcement does not immediately affect the temporary measures announced on 29 March 2020 (reducing the monetary screening thresholds for all foreign investments subject to the Act to \$0). Subject to developments in relation to Australia's COVID 19 situation, the Government is targeting a smooth transition from the current temporary arrangements to the new system on 1 January 2021.

What will the key changes look like?

Protecting Australia's national security

1. New National Security Test

A new national security test will be introduced which will require foreign persons to inform the Foreign Investment Review Board (**FIRB**) if they are proposing to acquire a direct interest (usually 10% or more) in a "sensitive national security business" or if they intend to start carrying on activities of a "sensitive national security business".

This is intended to ensure that acquisitions of interests by foreign persons in critical or sensitive assets must be screened by FIRB, irrespective of value.

The definition of "sensitive national security business" will be the subject of consultation but is expected to include businesses in the telecommunications, electricity, gas, infrastructure and defence industries and potentially those that handle sensitive data.

At this stage there has been no express indication that this will include businesses operating in the resources sector (beyond those currently regulated as critical infrastructure assets, which includes critical gas assets such as storage, processing and distribution assets above a certain capacity). However, the increased focus of the Australian Federal Government on the critical minerals sector, together with several recent unsuccessful FIRB applications in this sector, suggest that this is an area of interest for FIRB and may well be included.

Geoscience Australia's [assessment](#) of the criticality of certain minerals includes exotic minerals such as Rhenium (for manufacturing high-temperature turbine engines), but also extends to other base metal minerals such as zinc, lead, silver and copper.

1	REE	High criticality
2	Gallium	
3	Indium	
4	Tungsten	
5	PGE	
6	Cobalt	
7	Niobium	
8	Magnesium	
9	Molybdenum	
10	Antimony	
11	Lithium	
12	Vanadium	
13	Nickel	
14	Tantalum	
15	Tellurium	
16	Chromium	
17	Manganese	
18	Selenium	Moderate criticality
19	Titatnium	
20	Strontium	
21	Graphite	
22	Tin	
23	Germanium	
24	Beryllium	
25	Zirconium	
26	Bismuth	
27	Fluorine	

Category 1 resource potential

Category 2 resource potential

Category 3 resource potential

2. Call in power

Any investment that is otherwise beyond the scope of the Act will be able to be “called in” if the Treasurer considers the investment raises national security concerns. The Government has indicated that this power will be subject to a time limit and that foreign persons will have the ability to voluntarily notify of a transaction to eliminate the risk of later being called in.

3. “Last resort” review power

A national security “last resort” review power will be introduced which will enable the Treasurer to reassess approved foreign investments where new national security risks emerge. This power will allow the Treasurer to impose conditions, vary existing conditions, or, as a last resort, require the divestment of foreign interests in a business, entity or land in a limited number of exceptional circumstances. This power will not apply to investments approved before the changes are introduced.

Stronger penalties, compliance and enforcement powers

The Government will have increased monitoring and investigative powers and powers to give directions to investors in order to prevent or address suspected breaches of conditions or of the foreign investment laws.

Further, civil and criminal penalties for breaches of the Act will be significantly increased to ensure that they act as an effective deterrent.

Streamlining less sensitive investments.

In recognition of the fact that Australia competes globally for capital, the definition of “foreign government investor” will be relaxed so that entities which have more than 40% foreign government ownership in aggregate (without influence or control) but less than 20% from any single foreign government, will no longer be a foreign government investor (which ordinarily attracts a \$0 threshold).

Other amendments focused on the resources sector

The Government has also committed to making a series of amendments to address ambiguity, inconsistencies and unintended consequences in the Act.

Importantly for the resources sector, these measures include changes that will expressly exempt the acquisition of revenue streams in relation to mining and production tenements from the operation of the Act where they do not provide rights to occupy land or direct control or influence over land.

This will be helpful clarity for many clients, particularly given the significant increase in investment into early stage royalties in so called ‘battery minerals’ from North American investors that we have seen over recent years, noting that there has often been an inconsistent approach as to whether such royalties constituted an interest in Australian land.

Finally, the measures will also make exploration licences in all Australian states and territories exempt from screening under the Act (noting that interests in exploration licences in the Northern Territory and offshore exploration licences are currently considered “interests in Australian land” where the 5 year test is met). This exemption will not extend to foreign government investors or acquisitions that are subject to the new national security test.

Observations

Whilst the scope of the changes will depend on the final form of the legislation (drafts of which are yet to be seen) that is passed by the Government, initial observations are that:

- the proposed changes will introduce a greater level of uncertainty for foreign investors in critical or sensitive assets (which could potentially involve some investments in the resources sector)
- the introduction of the “call in” power is likely to influence the conditions to be attached to transactions that have the potential to raise national security concerns
- private equity funds with passive foreign government investors that are privately controlled should be able to more freely invest in Australian assets
- the devil will be in the detail and striking the right balance between protecting Australia’s national interests and ensuring Australia remains an attractive investment destination for foreign investors will be the Government’s key challenge.