



FOREIGN INVESTMENT IN MINING

Foreign persons may require approval to acquire an interest in a tenement or the underlying land used to carry on a mining operation. Whether foreign investment approval is required can depend on a range of factors including:

- the type of tenement;
- who the interest in the tenement is being acquired from;
- whether the foreign person is a foreign government investor;
- the type of underlying land; and
- the value of the interest being acquired.

This Guidance Note considers acquisitions of interests in tenements and the different stages of mining projects, and explains whether foreign investment approval is required.

EXPLORATION TENEMENTS

The *Foreign Acquisitions and Takeovers Regulation 2015* (Regulation) provides that an exploration tenement means a right under a law of the Commonwealth, a State or a Territory to recover minerals (such as coal or ore), oil or gas in Australia or from the seabed or subsoil of the offshore area for the purposes of prospecting or exploring for minerals, oil or gas. It also includes a right that preserves such a right, a lease under which the lessee has such a right or an interest in such a right or an interest under such a lease.

While the terms of an exploration tenement will vary by jurisdiction and the type of exploration tenement, they generally will be for a set period and will allow for activities including sampling, testing, drilling, surveys and prospecting.

Acquisitions of interests in an exploration tenement by foreign persons are generally not notifiable and significant actions, regardless of the value of the tenement and who it is acquired from.

- An exploration tenement is generally not considered an interest in Australian land under the foreign investment framework. However, each tenement confers different rights and obligations. If the exploration tenement at the time of acquisition is reasonably likely to exceed five years (including any extension or renewal) and confers the holder with a right to occupy the underlying land, the acquisition of that interest in the land may be a notifiable action and significant action depending on the type of land (for example, agricultural land or commercial land), whether it is being acquired directly from an Australian government or not, and the value of the interest in the land.

MINING OR PRODUCTION TENEMENTS

A mining or production tenement is defined as:

- a right (however described) under a law of the Commonwealth, a State or a Territory to recover minerals (such as coal or ore), oil or gas in Australia or from the seabed or subsoil of the offshore area, other than a right to recover minerals, oil or gas for the purposes of prospecting or exploring for minerals, oil or gas; or
- a right preserving a right as defined above; or
- a lease under which the lessee has a right mentioned above; or
- an interest in a right or lease mentioned above.

Under the foreign investment framework, a mining or production tenement is a type of Australian land. Acquisitions of interests in a mining or production tenement by foreign persons are notifiable and significant actions (regardless of the value — that is, a \$0 threshold applies), except if acquired directly from an Australian government.

- For acquisitions by relevant agreement country investors (Chile, New Zealand and United States investors), there is a higher threshold. See the threshold values below.

Australian land entities

Section 13 of the Regulation prescribes the meaning of particular land entities as generally an entity where the interests in Australian land held by the entity exceeds 50 per cent of the value of the total assets of the entity. As interests in Australian land also includes interests in mining or production licences, such interests must be taken into account in considering if an entity in which a foreign person is proposing to acquire securities is an Australian land corporation or an Australian land trust.

Mining companies both offshore and onshore may be an Australian land corporation. The acquisition of the securities in such an entity will be a notifiable action and significant action, unless otherwise exempt.

FOREIGN GOVERNMENT INVESTORS

In addition to the above requirements, any acquisition of a legal or equitable interest in a mining, production or exploration tenement by a foreign government investor is a notifiable and significant action, regardless of value.

- Acquisitions include when an existing tenement is being converted to a different tenement such as an exploration tenement being converted to a mining tenement.
- It also includes interests in tenements acquired directly from an Australian government (for example, when the exploration tenement or permit is being issued).

The acquisition of an interest of at least 10 per cent in securities in a mining, production or exploration entity is also a notifiable and significant action, regardless of value.

- A mining, production or exploration entity means an entity where the total value of legal or equitable interests in tenements held by the entity, or any subsidiary of the entity, exceeds 50 per cent of the total asset value for the entity.

See section 47 of the Act and paragraph 52(1)(d) and section 56 of the Regulation.

Cash bidding for offshore petroleum exploration acreage releases

In 2014, a cash bidding system was introduced to allocate offshore petroleum exploration permits for mature areas or areas known to contain petroleum accumulations in the search for petroleum in Australia's offshore sedimentary basins.

Foreign government investors require prior foreign investment approval to participate in the cash bidding program. Other foreign persons do not require prior approval as the acquisition of an interest in an offshore petroleum permit is directly from the Australian Government and therefore exempt.

EXEMPTION CERTIFICATES FOR A PROGRAM OF ACQUISITIONS

Foreign persons (including foreign government investors) are able to apply for an exemption certificate to cover a program of acquisitions of interests in tenements.

Exemption certificates for mining or production tenements would generally be granted subject to conditions that:

- specify the geographic region of the tenement; and
- specify the type of minerals that can be exploited under the tenement.

Foreign government investors

Foreign government investors may apply for an exemption certificate to cover exploration, or mining or production tenements. However, exemption certificates will generally not be granted to foreign government investors that cover a mixture of these tenements over substantially the same area and target resource.

- If a foreign government investor is granted an exploration tenement exemption certificate and would also like a mining or production tenement exemption certificate to cover latter potential related mining or production tenements, the inclusion of such tenements in the 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.

ACQUIRING AN INTEREST IN THE UNDERLYING LAND FOR MINING OPERATIONS

Foreign persons may be required to notify and receive a no objection notification before acquiring an interest in land in Australia in which to undertake mining operations. This will generally depend on the type of land that has to be acquired.

- **Agricultural land** means land in Australia that is used, or that could reasonably be used, for a primary production business. This includes land which is partially used for a primary production business, or land where only part of the land could reasonably be used for a primary production business. For more information, see Guidance Note 17.
- **Commercial land** means land in Australia (including any building on the land) or the seabed of the offshore area, other than land:
 - used wholly and exclusively for a primary production business;
 - on which the number of dwellings that could reasonably be built is less than 10; or
 - on which there is at least one dwelling (except commercial residential premises). For more information, see Guidance Note 14.

- **Residential land** means land in Australia on which there is at least one dwelling, or the number of dwellings that could reasonably be built on the land is less than 10. It does not include land that is used wholly and exclusively for a primary production business, or on which the only dwellings are commercial residential premises.

Acquisitions of interests in land are considered on a title-by-title basis. Foreign persons 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 (see Table below).

Threshold values — Land proposals

Foreign person	Action	Value of the proposed investment (AUD)
All foreign persons	Residential land	\$0
Privately owned investors from FTA partner countries ^(a) that have the higher threshold	Agricultural land	For Chile, New Zealand and United States, \$1,154 million
		For Canada, China, Japan, Korea, Mexico and Singapore \$15 million (cumulative)
	Vacant commercial land	\$0
	Developed commercial land	\$1,154 million
	Mining and production tenements	For Chile, New Zealand and United States, \$1,154 million
Others, \$0		
Privately owned investors from non-FTA countries and FTA countries that do not have the higher threshold	Agricultural land	For Thailand, where land is used wholly and exclusively for a primary production business \$50 million (otherwise the land is not agricultural land)
		Others, \$15 million (cumulative)
	Vacant commercial land	\$0
	Developed commercial land	\$266 million
Low threshold land ¹ , \$58 million		
Foreign government investors	Any land ^(b)	\$0
a) Agreement country investors are Canadian, Chilean, Chinese, Japanese, Mexican, New Zealand, Singaporean, South Korean and United States investors, except foreign government investors, and any country for which TPP-11 subsequently comes into force. TPP-11 will come into force for Vietnam on 14 January 2019.		

1 Low threshold land includes mines and critical infrastructure (for example, an airport or port).

Foreign person	Action	Value of the proposed investment (AUD)
b) Interests in Australian land, a legal or equitable interest in a tenement, or an interest of at least 10 per cent in securities in a mining, production or exploration entity.		

For information on how to determine the consideration for leasehold interests in Australian land, which includes tenements granted by an Australian Government, see Guidance Note 33.

ACQUIRING AN INTEREST IN AN OPERATIONAL MINE

Under the foreign investment framework, an operational mine is considered to be low threshold commercial land.

Foreign government investors are required to notify before acquiring any interest in developed commercial land, regardless of the value (\$0 threshold).

Other foreign persons 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.

For more information, see Guidance Note 14.

FEES

The fee is payable at the time of application with statutory processing timelines commencing when the correct fee is paid.

For more information on the fees applying to foreign investment applications, see Guidance Note 30.

PENALTIES

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

FURTHER INFORMATION

Further information is available on the FIRB website at www.firb.gov.au or by contacting +61 2 6263 3795.

Important notice: This Guidance Note provides a summary of the relevant law. As this Note tries to avoid legal language wherever possible it may include some generalisations about the law. Some provisions of the law referred to have exceptions or important qualifications, not all of which may be described here. The Commonwealth does not guarantee the accuracy, currency or completeness of any information contained in this document and will not accept responsibility for any loss caused by reliance on it. Your particular circumstances must be taken into account when determining how the law applies to you. This Guidance Note is therefore not a substitute for obtaining your own legal advice.