



MINING

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This guidance document incorporates content from the pre-1 January 2021 FIRB website and Guidance Notes 21, 24 and 34, as well as new content indicated by the sidebar. Please note, this is a temporary provision to assist reader's transition to these new guidance documents and may be removed in due course.

- Foreign persons generally require foreign investment approval before acquiring an interest in a tenement or the underlying land used to carry on a mining operation.
 - Under the foreign investment framework, a mining or production tenement is a type of Australian land for which acquisitions of interests generally require approval regardless of value or duration of the tenement. A higher monetary threshold applies for private investors from certain free trade agreement partners. However, the acquisition of an interest in a mining or production tenement that is national security land has a \$0 threshold for all foreign investors.
 - From 1 January 2021, acquisitions of royalty interests in respect of mining tenements are exempt from foreign investment screening where they do not provide rights to occupy the land or have control or influence over the land.
 - Exploration tenements are distinct from mining or production tenements and are treated differently under the framework. Acquisitions of interests in exploration tenements generally do not require foreign investment approval, except by foreign government investors or if the tenement is over national security land.
 - Foreign government investors must notify the Treasurer and obtain approval before acquiring an interest of 10 per cent or more in securities in a mining, production or exploration entity, regardless of value.
 - An operational mine is considered to be sensitive developed commercial land. Foreign government investors must notify and obtain approval before acquiring any interest in an operational mine, regardless of value. Other foreign persons must notify if the relevant monetary threshold is met.
 - Foreign persons may need to notify the Treasurer and obtain approval before acquiring an interest in Australian land intended to be used for mining operations. This will generally depend on the type of land proposed to be acquired.

Looking for more?

A: When does an investment in mining require approval?.....	3
B: Mining or production tenement	4
C: Exploration tenements.....	6

D: Mining, production or exploration entity 7

E: Other foreign investment in mining 8

Further information 8

A: WHEN DOES AN INVESTMENT IN MINING REQUIRE APPROVAL?

See also the *Overview, Key Concepts, National Security and Fees* Guidance Notes.

Under Australia's foreign investment framework, foreign persons must notify the Treasurer before taking a notifiable action or a notifiable national security action. Some notifiable actions are also significant actions. A foreign person must not take a notifiable and significant action, or a notifiable national security action, until they have received foreign investment approval for that proposed action.

A foreign person may be taking a notifiable and significant action when investing in Australia's mining sector. Where the investment is in national security land, the action may be a notifiable national security action.

A foreign person must apply for foreign investment approval before taking a notifiable and significant action, or a notifiable national security action.¹ Applications are submitted electronically on the [Foreign Investment Review Board \(FIRB\) website](#), and are supported by further guidance (see, for example, the FIRB application checklist). A fee is payable for all foreign investment applications.

If the proposed investment is a notifiable and significant action, it will be screened for foreign investment approval under the national interest test. If the proposed investment is a notifiable national security action, and is not also a significant action, it will be screened under the narrower national security test. Regardless of which test the investment is screened under, the foreign person must not take the action until they have received foreign investment approval.

Significant penalties (including infringement notices, civil and criminal penalties) may apply for breaches of the foreign investment law.

Exemptions from requiring approval

Part 3 of the *Foreign Acquisitions and Takeovers Regulation 2015* (the **Regulation**) provides a number of exemptions, where a mining investment may not be considered a notifiable action, a significant action, and/or a notifiable national security action, and may thus not need to be notified to the Treasurer. See the *Key Concepts* Guidance Note.

A foreign person is also not obliged to notify the Treasurer that they are proposing to take a significant action unless the action is also a notifiable action or notifiable national security action. However, under the *Foreign Acquisitions and Takeovers Act 1975* (the **Act**) the Treasurer has the power to make a range of orders in relation to a significant action that a person is proposing to take or has already taken (even if they do not inform the Treasurer about it).

Certain foreign investments that are not notifiable actions or notifiable national security actions may be reviewable national security actions. Where a reviewable national security action is not notified to the Treasurer (including as a result of one of these exemptions), the action may be called-in for review if the Treasurer considers that the action may pose a national security concern. Foreign persons can choose to extinguish the Treasurer's call-in power by voluntarily

¹ Foreign persons who want to minimise the risk of an asset they are interested in purchasing being sold to someone else before they receive foreign investment approval can enter into a contract as long as the contract is conditional on receiving foreign investment approval.

notifying of reviewable national security actions. Guidance on investment areas that may raise national security concerns, and where investors are therefore encouraged to voluntarily notify, are outlined in the *National Security Guidance Note*.

B: MINING OR PRODUCTION TENEMENT

A mining or production tenement is defined in section 4 of the Act 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. See the definition of Australian land under section 4 of the Act.

Where a foreign person acquires a mining or production tenement (that is, an acquisition of Australian land), this will be a notifiable and significant action, regardless of value or duration of the tenement. See sections 43 and 47 of the Act.

- For acquisitions by foreign government investors, see additional rules under section 56(1)(c)(i) of the Regulation.
- For acquisitions by certain free trade agreement country investors (that is, Chile, New Zealand and United States investors), there is a higher monetary threshold.

Certain exemptions may apply. For example, foreign persons are exempt from the foreign investment framework if they acquire a mining or production tenement directly from an Australian government, for example, when the mining tenement is being issued. However, this exemption does not apply when the foreign person is a foreign government investor, or if the mining or production tenement is national security land. Foreign investment approval is required in either of these circumstances. See section 31 of the Regulation and [National security land](#) below. See also the *Key Concepts* Guidance Note.

National security land

Where a foreign person acquires a mining or production tenement that is national security land, this is a notifiable national security action, regardless of value or duration of the tenement. See section 55B of the Act. These types of actions require approval regardless of the value of the tenement and who it is acquired from. This includes interests in tenements acquired from an Australian government, because the exemption in section 31(1) of the Regulation does not apply to acquisitions of interests in Australian land that is national security land.

Mining royalties

From 1 January 2021, acquisitions of royalty interests in respect of mining tenements are exempt from foreign investment screening where the interest is not a proprietary right and does not

provide a right to occupy the land or control or influence who enters or occupies the land (see section 27A of the Regulation). Royalty streams that offer occupancy, control or influence over the underlying land may still be subject to the FATA.

This exemption does not apply if the interest is an asset of a national security business or the interest is in respect of Australian land that is national security land. Acquiring such interests will require foreign investment approval if they are notifiable national security actions.

Exemption certificates for mining or production tenements

See also the *Exemption Certificates* Guidance Note.

Foreign persons (including foreign government investors) seeking to make multiple acquisitions of mining or production tenements can apply for a *Land Exemption Certificate* under section 58 of the Act. An exemption certificate grants up-front approval for a program of acquisitions, without the need to seek separate individual approval (in the form of a no objection notification) for each investment.

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.

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 later 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.

National security land

Where a program of land acquisitions may include land that is 'national security land' or may otherwise give rise to national security concerns, foreign persons can also apply for a *National Security Exemption Certificate* under sections 43BA and 43BB of the Regulation.

These exemption certificates can cover acquisitions of land that are otherwise notifiable national security actions and reviewable national security actions. In deciding to grant one of these exemption certificates, the Treasurer would need to be satisfied that the taking of the action or kinds of actions by the foreign person would not be contrary to Australia's national security.

A foreign person may apply for multiple exemption certificates (e.g. under sections 58 of the Act and 43BA of the Regulation) in a single application to ensure that they obtain cover across all of their proposed investments.

C: EXPLORATION TENEMENTS

Section 5 of the 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.

From 1 January 2021, an exemption has been included in the Regulation that provides that it is not a significant or notifiable action where a foreign person (who is not a foreign government investor) acquires an interest in land as a result of obtaining a right in an exploration tenement, unless the land is national security land. See the exemption under section 27B of the Regulation.

National security land

Private investors generally require foreign investment approval only if the exploration tenement is in respect of Australian land that is national security land. This is because acquisitions of interests in exploration tenements in respect of Australian land that is national security land are notifiable national security actions (see section 55B of the Act).

Approval is required regardless of the value of the exploration tenement and who it is acquired from. This includes exploration tenements acquired from an Australian government (for example, when the exploration tenement or permit is being issued), because the exemption in section 31(1) of the Regulation does not apply to interests in exploration tenements in respect of Australian land that is national security land.

Foreign government investors

For foreign government investors, any acquisition of a legal or equitable interest in a tenement, including an exploration tenement, is a notifiable and significant action (regardless of value, the period it goes for, or whether it confers a right to occupy) and will require foreign investment approval in all circumstances (see section 56(1)(c)(i) of the Regulation).

This includes exploration tenements (and mining or production tenements) acquired from an Australian government, because the exemption under section 31(1) of the Regulation does not apply to interests acquired by foreign government investors.

The conversion of an existing exploration tenement into a mining or production tenement may constitute an acquisition of an interest in a mining or production tenement under the foreign investment framework, and therefore require approval where the investor is a foreign government investor.

Exemption certificates for exploration tenements and/or certain interests in mining, production or exploration entities

See also the *Exemption Certificates* Guidance Note.

Under section 43 of the Regulation, foreign government investors may apply for an exemption certificate for a program of acquisitions of interests in exploration tenements and/or interests in securities in a mining, production or exploration entity, so long as those interests are not interests

in Australian land (for example, mining or production tenements – for land exemption certificates, refer to section 58 of the Act).

The Treasurer may give such a certificate if the Treasurer is satisfied that the acquisitions of those kinds of interests by that foreign person are not contrary to the national interest.

While available to all foreign persons, this certificate is intended for foreign government investors. Its inclusion in the Regulations follows from the inclusion of the significant action and notifiable action for foreign government investors under paragraph 56(1)(c) of the Regulation.

Applications for an exemption certificate will be considered on a case-by-case basis. Should the Treasurer decline to grant a certificate on the basis it would be contrary to the national interest, this is unlikely to have any implications for the foreign person's ability to seek a no objection notification for individual acquisitions.

Nationalsecurity land

For a program of acquisitions of interests in exploration tenements in respect of Australian land that is national security land, or that may otherwise give rise to national security concerns, foreign persons can also apply for a *National Security Exemption Certificate* under sections 43BA and 43BB of the Regulation.

These exemption certificates can cover acquisitions of land that are otherwise notifiable national security actions and reviewable national security actions. In deciding to grant one of these exemption certificates, the Treasurer would need to be satisfied that the taking of the action or kinds of actions by the foreign person would not be contrary to Australia's national security.

D: MINING, PRODUCTION OR EXPLORATION ENTITY

Section 5 of the Regulation provides that 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.

Tenement means an [exploration tenement](#), or a [mining or production tenement](#).

For foreign government investors, the acquisition of an interest of at least 10 per cent in securities in a mining, production or exploration entity is a notifiable and significant action, regardless of value. See sections 52(1)(d) and 56 of the Regulation.

For private investors, acquiring securities in a mining, production or exploration entity may be a notifiable and/or significant action. See the *Business Guidance Note*.

Certain acquisitions are exempt from the requirement to notify and receive a no objection notification, if an exemption under Part 3 of the Regulation applies. See the *Key Concepts Guidance Note*.

Exemption certificates for exploration tenements and/or certain interests in mining, production or exploration entities

See also the *Exemption Certificates Guidance Note*.

Under section 43 of the Regulation, foreign government investors may apply for an exemption certificate for a program of acquisitions of interests in exploration tenements and/or interests in

securities in a mining, production or exploration entity, so long as those interests are not interests in Australian land (for land exemption certificates, refer to section 58 of the Act).

The Treasurer may give such a certificate if the Treasurer is satisfied that the acquisitions of those kinds of interests by that foreign person are not contrary to the national interest.

While available to all foreign persons, this certificate is intended for foreign government investors. Its inclusion in the Regulations follows from the inclusion of the significant action and notifiable action for foreign government investors under paragraph 56(1)(c) of the Regulation.

Applications for an exemption certificate will be considered on a case-by-case basis. Should the Treasurer decline to grant a certificate on the basis it would be contrary to the national interest, this is unlikely to have any implications for the foreign person's ability to seek a no objection notification for individual acquisitions.

E: OTHER FOREIGN INVESTMENT IN MINING

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 (unless the tenement is in relation to national security land). See section 31 of the Regulation.

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 Australian land intended to be used for mining operations. This will generally depend on the type of land that has to be acquired. See the *Agriculture, Commercial Land*, and/or *Residential Land* Guidance Notes.

Acquiring an interest in an operational mine

Under the foreign investment framework, an operational mine is considered to be sensitive developed commercial land (see the *Commercial Land* Guidance Note). Foreign government investors are required to notify before acquiring any interest in developed commercial land, regardless of the value (see section 52(1)(d) of the Regulation). Other foreign persons are only required to notify if the relevant monetary threshold is met.

FURTHER INFORMATION

Further information is available on the [FIRB website](#) or by contacting 1800 050 377 from Australia or +61 2 6216 1111 from overseas.

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.