HERBERT SMITH FREEHILLS

FIRB CHANGES: IMPACT ON THE ENERGY AND RESOURCES SECTOR

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Legal Briefings – By **Paul Branston**

SUMMARY

The recent changes include some important changes which will have an effect on the way in which the Foreign Acquisitions and Takeovers Act (**FATA**) applies to the energy and resources sector.

- Guidance confirms that exploration tenements and permits are generally exempt from the Foreign Investment Review Board (FIRB) approval.
- Distinct approval regimes apply for acquisitions by foreign persons, agreement country investors and foreign government investors in operational and producing mining and petroleum projects.
- Exemption certificates are available for acquisitions that are part of a program to acquire mining tenure.
- Up-front, non-refundable fees for applications to FIRB now apply.

ADDITIONAL CLARITY ON EXPLORATION TENEMENTS AND PERMITS

Under the previous regime there was a degree of uncertainty as to how FATA applied to exploration tenure. The general proposition was that acquisitions of interests in 'Australian urban land' (as distinct from 'Australian rural land', being land used for primary production purposes) by foreign persons were regulated under FATA.

Mining or production tenure was not specifically referred to in the previous version of FATA and, despite the name, were considered Australian urban land if they carried with them a right to occupy Australian urban land and had a term likely to exceed 5 years. FIRB's previous Policy listed prospecting, exploration, production or mining tenements as tenure for which approval would be required if the occupy and 5 year requirements were satisfied.

Under the previous approach, the general view was that the acquisition of mining or production tenure usually required approval, but the position in relation to exploration tenure was less clear, particularly as to whether it provided a right to occupy. Given the uncertainty associated with the treatment of exploration tenure, the typical approach was for foreign persons seeking to acquire exploration licences to apply for FIRB approval out of an abundance of caution.

The revised FATA refines the approach to tenements significantly. It uses the term 'Australian land' in place of the former 'Australian urban land' and 'rural land' concepts. The definition of 'Australian land' specifically refers to mining or production tenements or permits, which are clearly distinguished from exploration tenements or permits.

Consistent with this changed approach, FIRB's new Guidance Note on 'Foreign Investment in Mining' (which also applies to the energy sector) provides that acquisitions of mining or production tenements by foreign persons are notifiable and that, generally speaking, acquisitions of interests in exploration tenements or permits are not notifiable and do not require FIRB approval, regardless of the value or consideration in question and from who the interest is acquired. Additionally, foreign persons (with the exception of foreign government investors – see further below) do not require prior approval for acquisitions of new tenements directly from an Australian government i.e. new acreage releases in an energy context.

However, the Guidance Note makes it clear (as is also clear from the detail in the legislation) that the former test still has application. Where an exploration tenement or permit confers the holder with a 'right to occupy' and the underlying land and the term of that tenement or permit is likely to exceed 5 years, the acquisition of such an interest may require approval.

Whether a holder is conferred with a 'right to occupy' will require an analysis of the particular terms to which that tenure is granted and the relevant governing legislation. However the changes, and in particular FIRB's statements in its guidance, provide market participants with a degree of comfort that FIRB agrees that the majority of exploration licences are not Australian land (or formerly, Australian urban land).

APPROVAL REGIME FOR ACQUISITIONS IN MINING AND PETROLEUM PROJECTS BY FOREIGN GOVERNMENT INVESTORS

There is no change to the position on direct acquisitions in mining or petroleum production tenure (other than for acquisitions by US, NZ or Chile investors where the threshold for such acquisitions has been lifted to $1,094m from $0 previously). Approval is still required for these acquisitions, whether by foreign persons, other agreement country investors (i.e. Japan, Korea and China) or foreign government investors.

For foreign government investors only, approval is required (regardless of value) for any acquisition of:

- any legal or equitable interest in exploration, mining or production tenure, or
- an interest in at least 10% of the securities in an exploration, mining or production entity.

Foreign government investors also need approval for :

- conversion of an existing tenement/permit into a different tenement/permit (exploration licence to mining lease, or exploration licence to retention licence), and
- acquisition of tenements/permits from an Australian government (i.e. new tenements/permits).

This distinct approval regime for foreign government investors as opposed to other foreign persons effectively means that foreign government investors need approval not only for acquisitions of direct interests in all forms of tenure (exploration, production or retention) but also for a corporate-level acquisition of shares in an 'exploration, mining or production entity' (defined as an entity where such tenure constitutes at least 50% of the total asset value of that entity).

The approach is different from the regime for acquisitions of tenements, or interests in corporations with significant interests in tenements, which applies to non-foreign government investors. For those foreign persons, approval is generally not required for acquisitions of exploration licences, and exploration licences are generally not included as interests in Australian land for the purposes of the 50% of total asset value test that applies in determining whether a corporation is an Australian land corporation. However, foreign persons generally do not receive the benefit of being able to obtain up to 10% of an Australian land corporation – the acquisition of share one requires approval (subject to the applicable thresholds).

LAND USED IN CONNECTION WITH MINING OPERATIONS

Foreign investors may also need approval for acquisitions of Australian land used in connection with mining operations, such as ancillary parcels acquired alongside a mining or production tenement. Of particular importance is interests in agricultural land, given the definition of agricultural land is broad, and includes land that could reasonably be used for a primary production business. The Regulations helpfully clarify that while land is being fully utilised as a mining and production tenement in respect of an operating mine for example, it cannot simultaneously constitute agricultural land (and trigger the different regime that applies in respect of agricultural land) simply because it may be used as agricultural land in the future (eg. once it is remediated).

EXEMPTION CERTIFICATES

While there has previously been the capacity for property developers to obtain approval of annual programs, the reforms extend an analogous concept to the energy and resources sector by introducing the ability for foreign persons to apply to the Treasurer for an exemption certificate (exempting them from obligations under the FATA) to cover a program of acquisitions in tenements if that is not contrary to the national interest.

As a condition of obtaining an exemption certificate, the applicant would need to specify the geographic region of the program and the type of minerals the program would cover.

INTRODUCTION OF NEW FEES

Applicants must now pay new upfront fees before an application is assessed by FIRB. Acquisitions of interests in multiple tenements as part of the same transaction are charged a single fee. In recognition of the fact the fee may be material in smaller transactions, where a fee otherwise would be more than 25% of the consideration for the interest to be acquired, a de minimis rule lowers the fee to $1,000.

Other than the above, there is limited information as to how complex transactions are to be dealt with, particularly regarding fees which are paid up-front for applications no longer required through no fault of the applicant (i.e. due to a third party exercising a pre-emptive right or failure of an another condition precedent).

The quantum of the fees and fact they are non-refundable raises two issues which may affect how transactions develop following the reforms:

- staging of conditions precedent may become necessary so as to build in a buffer allowing for third party consents and pre-emptive rights to be navigated before applying for FIRB approval (for example under the AIPN 2012 JOA, the pre-emptive right period is 30 days), and
- considering how the timing for other governmental approvals (i.e. NOPTA and ACCC) affect, or are affected by, FIRB approvals (NOPTA, for example, will not process an application for approval and registration until FIRB approval is secured).

This poses some interesting transaction and approval sequencing questions which will now need to be factored in and carefully considered as the impact of the reforms filters through the sector.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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