



# Guidance Note 5

## Mining

- 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 the value 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 the securities of 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.
- Foreign persons must give notice of certain actions relating to Australian land (including mining or production tenements) and exploration tenements to the Registrar of the Register of Foreign Ownership of Australian Assets. For more information, see the *Register of Foreign Ownership of Australian Assets* Guidance Note.



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## 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<sup>1</sup>. Applications are created and submitted electronically through the Foreign Investment Portal. 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 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.

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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.

## B: Mining or production tenements

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.

Where a foreign person acquires an interest in a mining or production tenement<sup>2</sup>, this will be a notifiable and significant action, if the relevant monetary threshold is met. The monetary thresholds are:

- for foreign government investors, a \$0 threshold applies;
- for private investors (except those from Chile, New Zealand, or the United States), a \$0 threshold applies;
- for private investors from Chile, New Zealand, or the United States, the monetary threshold is \$1,464 million.

For foreign government investors, there are additional rules under section 56(1)(c)(i) of the Regulation that dictate further interests in mining or production tenements as notifiable and significant actions. Under these rules, it is a notifiable and significant action where a foreign government investor acquires a legal or equitable interest in a mining or production tenement, irrespective of the value or duration of the tenement (that is, irrespective of the criteria in section 12 of the Act).

### National security land

Where a foreign person (including a foreign government investor) acquires an interest in a mining or production tenement (as per the criteria in section 12 of the Act), and that mining or production tenement is considered national security land, this will be a notifiable national security action. See section 55B of the Act.

Notifiable national security 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.

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<sup>2</sup> There are a number of ways in which a foreign person may acquire an interest in a mining or production tenement (see section 12 of the Act).

## 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 Act.

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.

This exemption does not apply to security interests over the underlying tenement, for example, where a foreign person (the royalty holder) proposes to obtain security for the royalty payments by taking a mortgage over the underlying tenement. Holding or enforcing such security interests may be subject to the foreign investment framework unless another exemption (e.g. the moneylending exemption under section 27 of the Regulation) applies.

## 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:

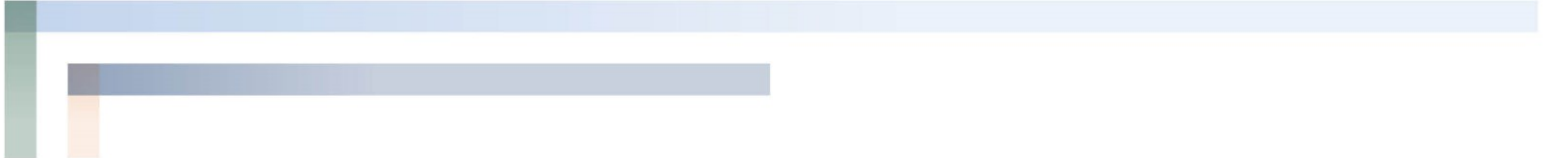
- specify the geographic region of the tenement; and
- specify the type of minerals that can be exploited under the tenement.

Exemption certificates will generally not be granted to foreign government investors to cover a mixture of exploration, and mining or production tenements over substantially the same area and target resource.

For example, 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 alongside the original 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. This would include, for example, a prospecting or an exploration licence.

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.

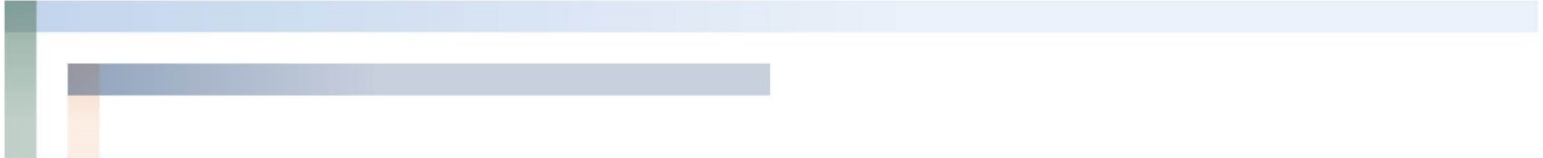
Where a foreign government investor acquires a legal or equitable interest in an exploration tenement (irrespective of the value or duration of the tenement – that is, irrespective of the criteria in section 12 of the Act) this will be a notifiable and significant action. See section 56(1)(c)(i) of the Regulation.

- From 1 January 2021, an exemption has been included in the Regulation that provides that it is not a notifiable or significant action where a private foreign person (who is not a foreign government investor) acquires an interest in an exploration tenement. See the exemption under section 27B of the Regulation. This exemption also has the effect of excluding exploration tenements that would normally meet the definition of 'an interest in Australian land' under section 12 of the Act (i.e. because it confers a right to occupy for over five years), from the value attributed to interests in Australian land when considering whether an entity is a land entity. This exemption does not however apply where the land entity that holds the exploration tenement is a foreign government investor.

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

### National security land

Where a foreign person (including private investors and/or foreign government investors) acquires a legal or equitable interest in an exploration tenement (irrespective of the value or duration of the tenement – that is, irrespective of the criteria in section 12 of the Act), over national security land, this will be a notifiable national security action. See section 55B of the Act.



Notifiable national security 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.

## 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.

### National security 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 entities

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 the securities of 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 Investments* Guidance Note.

## Exemption certificates for interests in mining, production or exploration entities (and/or exploration tenements)

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 the securities of a mining, production or exploration entity (and/or exploration tenements), 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.

## 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.

### Tenements involving critical minerals

Some minerals, due to their uses, scarcity and geographical concentration, are often considered more sensitive than others. These are commonly referred to as 'critical minerals'.

While investments involving 'critical minerals' are subject to the same screening thresholds as all other minerals, they are generally subject to closer scrutiny in the foreign investment screening process.

In addition, voluntary notification of a reviewable national security action is encouraged for foreign persons proposing to invest in a business or entity involved in the extraction, processing or sale of a number of 'critical minerals'. For further information, see the *National Security* Guidance Note.

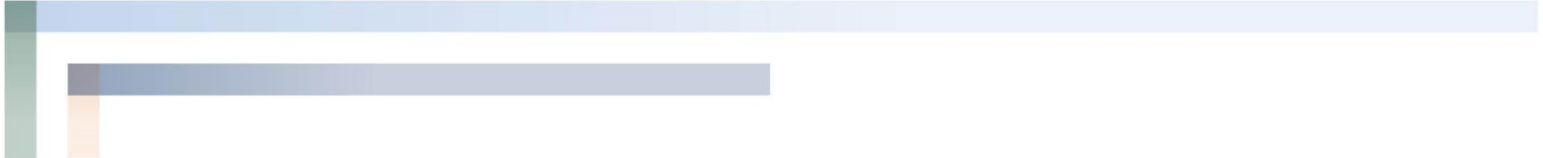
### Acquiring an interest in the underlying land for mining operations

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.

## Acquiring securities in land entities that hold mining and production tenements

Section 13 of the Regulation prescribes the meaning of land entities as an entity where the interests in Australian land held by the entity exceed 50 per cent of the value of the total assets of the entity. As interests in Australian land, as per the criteria in section 12 of the Act, also includes interests in mining or production tenements, 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.

A mining company, whether offshore or onshore, may be an Australian land corporation. Unless otherwise exempt, the acquisition of the securities in such an entity may be a notifiable and significant action, notifiable national security action, or reviewable national security action.

See also the *Business Investments* Guidance Note.

## Other forms of mining rights

For acquisitions of other types of mining rights, such as retention licences, general purpose leases or miscellaneous licences, investors should consider whether the interest acquired is an 'interest in Australian land' within the meaning of section 12 of the Act, and whether the relevant monetary threshold is met, when determining if foreign investment approval is required.

While retention licences generally do not satisfy the requirements of section 12 of the Act, specifically the requirement that the licence or lease confers a right to occupy land, this will depend on the facts of each case. For instance:

- Where, subject to the general purpose licence, a foreign person takes an action on the land which excludes others from using the land, they may have an interest in the land under the Act and therefore require foreign investment approval. An example would be where the investor builds a road for private use only.
- Where a retention licence or similar licence also provides the licensee a mining licence without further approval, the licensee may require foreign investment approval.
- Although it will depend on the facts of each case, a retention licence that only confers a right to explore (including assessing economic feasibility) generally will not satisfy the requirements of s12 of the Act.



## Further information

Further information is available on the [Foreign Investment 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.