



JONES DAY
COMMENTARY

FOREIGN INVESTMENT IN AUSTRALIA

投资澳大利亚

Foreign investment in Australia is primarily regulated by the Foreign Acquisitions and Takeovers Act 1975 (“FATA”) and associated regulations and policies, subject to the entry into any Free Trade Agreement that may amend the application of the FATA to investments by a certain country.

The FATA grants the Treasury the power to scrutinize, approve or disallow foreign investment proposals. The Australian Federal Treasurer approves each acquisition that is subject to the FATA, with the advice and assistance of the Foreign Investment Review Board (“FIRB”).

FREE TRADE AGREEMENT WITH AUSTRALIA?

In the Joint Feasibility Study prepared by Australia and China in March 2005, it was recommended that the application of the provisions of the FATA be removed or simplified in a possible Australia-China Free Trade Agreement (“FTA”). Both the

外国在澳大利亚投资主要由 1975 年颁布的《外国收购和接管法》以及有关规章、政策来规范。当澳大利亚与另一国家之间存在“自由贸易协定”时，协定条款可能会影响《外国收购和接管法》对外商投资的应用。

《外国收购和接管法》授权财政司审查、批准、禁止外国投资活动。在澳洲“外国投资管理局”的建议和协助下，澳洲联邦财政司司长根据《外国收购和接管法》的条款审核外方投资方案。

与澳大利亚的“自由贸易协定”？

2005 年 3 月，在中澳联合开发的可行性研究报告中表明，中澳自由贸易协定可能废除或简化《外国收购和接管法》中有关外商投资的规定。中澳政

Australian government and the Chinese government have called for a fast tracking of negotiation between the two countries. Just recently, the fourth round of Australia-China FTA negotiations took place in Canberra. One of the main aims of the meeting was to reduce investment barriers and allow better market access for both countries.

GOVERNMENT POLICY OVERVIEW

No sector in Australia is completely closed to foreign investment. The FATA requires certain foreign investment proposals to be approved if the value of the planned acquisition exceeds certain thresholds. While the FATA applies across all industries and sectors, limitations on foreign equity apply in certain strategic or politically sensitive areas. These include real estate, banking, telecommunications, shipping, civil aviation, airports and the media.

While foreign acquisitions in the mining and resources sector may be subject to notification, they do not form part of those “sensitive sectors” that are subject to a specific government’s policies. This is the case even for industries like uranium mining. As indicated by the Treasurer, the Australian government’s attitude toward foreign investment policy in relation to uranium projects will be the same as that for other minerals. This means that while prior approval is still required, no special restrictions will be imposed unless a proposal is judged contrary to the national interest.

DETERMINING THE NATIONAL INTEREST

The “national interest” test is the single most important criterion for qualifying foreign investment proposals in Australia. Generally, a foreign investment proposal will be rejected only if it is considered contrary to the Australian national interest. It is acknowledged by the Australian government that the national interest is best served by liberal foreign investment policies. Foreign capital and technologies allow Australian resources, such as mining assets, to be better exploited.

It is only in rare circumstances that the Australian Treasurer will reject foreign investment proposals on

府都要求尽快进行双边协商。最近，中澳自由贸易协定第四轮谈判在堪培拉举行，其宗旨就是减少投资障碍，使两国更好的进入对方的市场。

澳洲政府政策概述

澳大利亚允许外商在任何一个领域投资。如果计划投资金额超过一定的限额，《外国收购和接管法》规定该投资方案就需要经过有关政府部门的批准。《外国收购和接管法》适用于所有的产业及领域。对于某些具有战略意义或政治敏感领域的外商投资，《外国收购和接管法》设有各种限制措施，这些领域包括：房地产业、银行业、通讯业、海运业、民航业、机场以及传媒业。

虽然外商在矿产和资源领域的投资受到申报底线的限制，它们却不在敏感领域投资的范畴之内。就算铀矿开采这样的领域也不属于敏感领域，正如财政司所强调，澳大利亚对铀矿开采的投资政策与其他矿藏的投资政策是一样的。这意味着，投资铀矿虽然事先需要获得批准，但没有专门的限制措施，除非该投资会危害国家利益。

决定“国家利益”

“国家利益”是判断外商在澳投资是否合格的一项最重要的依据。总的来说，只有当投资会危害国家利益时，澳洲政府才会否决一项投资计划。澳洲政府承认自由外商投资政策对国家利益有莫大的帮助。外国资金及技术让澳洲资源（例如采矿业）得以更好的开发。

澳大利亚财政司司长只有在罕有的情况下依据国家利益拒绝外国投资建议。澳

the ground of the national interest. The rejection of Shell Australia's proposed acquisition of Woodside Petroleum ("Woodside") is an example of an application that was rejected. Central to the Treasurer's decision was Woodside's position as an operator of the North West Shelf liquefied gas project in Western Australia. In his reasoning, the Treasurer emphasized that "it is in the national interest of Australia that the project be developed to its full capacity and that Australia's export sales from the North West Shelf are maximized". It is in the Australian government's interest that production and export of liquefied natural gas would be maximized as quickly as possible. This would allow the maximization of the payment of royalties to the Australian government.

Australia's foreign investment policy presumes that foreign investment proposals are generally in the national interest. Therefore, the majority of foreign investment proposals have been approved by the Australian Treasury despite resistance from certain parts of the Australian community. For instance, in 2002, Japan's Mitsui & Co ("Mitsui") made a proposal to acquire Coal and Alliance Industry Ltd's 55 percent interest in the Moura Mine in Queensland. This acquisition allowed Mitsui to on-sell a 51 percent stake to London-based South African company Anglo American. The Treasurer approved the purchase in spite of strong oppositions by rival bidders and some MPs to the Mitsui takeover. Similarly, when the London-listed Swiss firm Xstrata Plc ("Xstrata") revealed its plan to take over the Australian-based miner MIM Holding Ltd ("MIM"), there was strong resistance from the Queensland community and MIM's small shareholders. Nevertheless, the Treasurer raised no objection to the proposed acquisition by Xstrata on the ground that the proposal was not contrary to the national interest.

FOREIGN PERSONS

The FATA and its associated regulations and policies apply to foreign persons. A foreign person is defined as any of the following:

- A natural person not ordinarily resident in Australia (for a person other than an Australian citizen, "ordinarily resident" means that person has resided in Australia for 200 days or more in the immediately preceding 12 months).

大利亚 Shell 投资有限公司（以下简称“Shell”）收购 Woodside 石油有限公司（以下简称“Woodside”）是一个外国投资被拒绝的例子。Shell 的投资建议被澳大利亚财政司司长拒绝。做出这种决定的原因主要是 Woodside 公司经营西澳大利亚的西北大陆架液化天然气业务。财政司司长认为“凭借自身的实力发展该业务是符合澳大利亚国家利益的，可以最大程度控制西北大陆架的天然气出口”。澳大利亚政府关心液化天然气的生产和出口最大化，生产和出口的最大化能够大幅度地提高澳大利亚政府的收入。

澳洲的外国投资政策假设所有的外国投资建议都是对国家利益有帮助的。所以，尽管有时澳洲的一些群体对某些外国投资建议有抵制，澳大利亚财政司司长一般都会批准那些建议。例如：2002 年，日本 Mitsui 公司（以下简称“Mitsui”）提出要收购昆士兰州 Moura 煤矿 Coal and Alliance Industry 公司 55% 的股份。这一收购将允许 Mitsui 公司有权将该公司的 51% 股份进一步卖给总部设在伦敦的 Anglo American 公司。Mitsui 的竞争对手和一些众议员都反对这项收购。同样的，当在伦敦交易所挂牌的瑞士公司 Xstrata PLC（以下简称“Xstrata”）透露将购买澳大利亚 MIM Holding 有限公司（以下简称“MIM”）时，Xstrata 受到了当地社区以及 MIM 小股东的强烈抵制。尽管如此，财政司长还是同意了 Mitsui 和 Xstrata 的购买方案，原因是这些方案不会危害国家利益。

外国人/外商

依照《外国收购和接管法》以及有关规章、政策的规范，“外国人/外商”定义为：

- 未经常在澳洲居住的自然人（对非澳洲公民来说，经常在澳居住的自然人

- A corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds 15 percent or more of the corporation.
- A corporation in which two or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold 40 percent or more of the corporation.
- The trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a beneficial interest of 15 percent or more of the trust.
- The trustee of a trust estate in which two or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold a beneficial interest of 40 percent or more of the trust.

NOTIFICATION THRESHOLD

The FATA requires notification to the Australian Treasurer and the FIRB for the following transactions:

- Acquisition threshold: The acquisition of a *substantial interest* (15 percent or more by a foreign individual or 40 percent or more by several foreign individuals) in the existing business where the total assets exceed A\$50 million.
- New business threshold: The establishment of a new business where the total investment exceeds A\$10 million.
- Offshore takeover threshold: The takeover of offshore companies whose downstream Australian assets have a value exceeding A\$50 million or account for more than 50 percent of the target company's global assets. The notification threshold is A\$800 million for applicable US investors.

Special types of foreign investment proposals are subject to more stringent government scrutiny:

- Foreign government investment: Direct investments by foreign governments and their agencies, or companies with greater than 15 percent direct or indirect holding by a foreign government or agency, are notifiable irrespective of size.
- Proposed investments in the sensitive sectors: Proposed foreign investments in residential real estate, banking, telecommunications, shipping,

指，在过去12个月内在澳洲实际居住满200天的自然人)。

- 任何单一未经常在澳洲居住的自然人或外国公司持有达15%股权的企业。
- 任何两名或两家以上未经常在澳洲居住的自然人或外国公司，合计拥有达40%股权的企业。
- 任何单一未经常在澳洲居住的自然人或外国公司持有达15%信托受益权益的信托的托管人。
- 任何两名或两家以上未经常在澳洲居住的自然人或外国公司，合计拥有达40%信托受益权益的信托的托管人。

申报底线

根据《外国收购和接管法》，下列投资计划必须向澳洲财政司司长以及投资审查委员会申报：

- 收购申报底线：收购澳洲企业的“**相当股权**”，该企业之资产总值超过 5000 万澳元（“相当股权”指外商个人要收购其 15%以上的资产或者以上的资产或者多个外商要收购其 40%以上的资产）。
- 新企业申报底线：要成立总投资超过 1000 万澳元的企业。
- 离岸接管申报底线：拟接管离岸公司在澳大利亚分支机构，只要分支机构资产超过 5000 万澳元，或分支机构资产超过离岸公司全球总资产 50%以上。

下列投资会接受澳政府的严格审查：

- 外国政府投资：外国政府、外国政府的代理机构、或由外国政府及其代理机构直接或间接持有 15% 以上

civil aviation, airports and the media are subject to more rigid notification requirements.

The Australian government registers but normally raises no objections to proposed transactions above the relevant notification thresholds where the gross assets or investments fall below A\$100 million. For acquisitions of existing businesses (with A\$100 million or more) or the establishment of new businesses (with a total investment of A\$100 million or more), the Australian government will fully examine the proposals, but it will usually raise no objections unless the proposals are contrary to the national interest.

APPLICATION AND ASSESSMENT

Application. To notify the Australian government, foreign investors need to submit foreign investment proposal applications in letter form along with the appropriate notice.

- Compulsory notification: For any acquisition of a substantial shareholding (equal or above 15 percent), unless the total assets are below the A\$50 million threshold, the submission of a Section 26 Notice is required.
- Voluntary notification: For any acquisition of an interest that is less than a substantial shareholding (below 15 percent), a Section 25 Notice should be submitted.
- For real estate acquisition proposals, other forms and statutory notices may be required.

Assessment. Approval by the Australian government is normally given only for a specific transaction. Generally, the FIRB is required to make a decision within 30 days with 10 extra days to advise the parties of the decision. The formal notification activates a time clock so that if the Australian Treasurer does not take action against the proposal within 30 days, the Australian government loses its ability to block or impose conditions. However, the normal 30-day examination period may be extended to a further 90 days by the issuance of an interim order.

If an approved transaction does not proceed at that time and/or the parties enter into new agreements at that time and/or at a later date, or if a transaction is not

股份的公司 在澳进行投资，不管规模大小，都必须申报。

- 对于敏感领域的投资：如住宅房地产业、银行业、通讯业、海运业、民航业、机场和传媒业。

对于总资产或投资低于 1 亿澳元的投资，除了上述底线外，澳洲政府注册部门一般是批准的。对于收购或新建资产超过 1 亿澳元的企业，澳洲政府将仔细审查该项目，除非会危害国家利益，一般情况下该项目也会被批准。

申请和审批

申请：外国投资者须向澳洲政府递交外商投资计划书面申请和相关通告。

- 强制性通告：收购大量股份（等于或超过 15%），除非总资产低于 5000 万澳元，必须递交第 26 号通告。
- 自愿通告：收购资产较少（低于 15%），可以递交第 25 号通告。
- 对于房地产的投资，可能需要递交其他表格和司法通告。

审批：澳洲政府通常只对某一特定投资交易进行批准。一般而言，外国投资管理局需要 30 天时间做出决定，另外用 10 天时间通知投资方。如澳洲政府在 30 天内对某投资计划未做出反应，政府就不得阻拦该投资计划的实施。然而，通过签发临时命令，澳洲政府可以将审核期从 30 天延长至 90 天。

如果投资计划经过批准，却没有即刻实施，或者当时以及后来签定了新的投资协议，或者在 12 个月内没有完成该项投资，投资方必须为该投资计划重新申请审批。

completed within 12 months, further approval needs to be sought for the transaction.

Approval for share acquisition involving a full or partial takeover bid under the Corporations Act 2001 applies only to the shares acquired during the bid period. Any plan of further acquisition will require additional approval.

Prior approval is required to acquire options for the purchase of relevant shares, assets or property. Normally, approvals for options will also extend the exercise of those options, provided that the option is exercised within 12 months of approval. Subsequent approval for the exercise of the options may be sought on an annual basis.

The time period for an approval may be varied where it can be shown that an extended period is fundamental to the proposal's success and that extending the timing of the proposal does not involve an activity that would be contrary to the national interest.

CONFIDENTIALITY

The Australian government respects the confidential status of commercial information and ensures that appropriate security is given to the information provided to the FIRB. Confidential commercial information held by the Australian government will not be made available to a third party unless the applicant gives permission. The exception is where there is an order of a court of competent jurisdiction.

Additionally, the Australian government is required to respect the privacy of personal information provided by applicants to the FIRB. The FIRB may pass relevant personal information to government agencies only when such information is required to ensure that applicants comply with the FATA.

POST-INVESTMENT COMPLIANCE

There are situations where the Treasurer may approve a foreign investment conditional upon the foreign investor's complying with conditions that the Treasurer

根据 2001 年颁布的《公司法》，通过全部或部分接管招标而收购的股份，必须在招标规定的期限内收购完毕。以后的股份收购计划必须获得另外的批准。

对于有关股份、资产或财产的买卖期权的收购必须事先获得批准。一般而言，期权获得批准后，投资方在 12 个月内必须履行完该期权。如未完成，投资方以后每年履行该期权时都要经过一次审批。

当延长投资期限对于某些项目的成功与否至关重要时，审批结果的有效期可以被适当地延长。当然，这不得违背国家利益。

保密性

澳洲政府考虑到商业信息的保密性，确保提交给外国投资管理局的信息不被泄露出去。除非得到申请人的允许，第三方不会由澳洲政府获得任何机密商业信息。但如果收到有效的法院命令，则另当别论。

另外，澳洲政府还必须对申请人提交给外国投资管理局的个人信息保密。只有当澳洲政府审核申请人是否符合《外国收购和接管法》的要求时，外国投资管理局才能将个人信息递交给有关政府机构。

投资后是否符合规定

为了确保某项投资不会危害澳洲国家利益，澳财政司可以有条件批准该投资计划，以确保该计划不会和国家利益冲突。如 2005 年 Xstrata 欲收购 WMC 公司，澳财政司批准该投资活动时，附带了几个

considers necessary to ensure that the proposal is not contrary to the national interest. For instance, Xstrata's bid to take over WMC Resources Limited in 2005 was approved by the Treasurer with several conditions attached. Xstrata was required to comply with those conditions indefinitely, subject to amendment of the FATA or any other revocation or amendment by the Treasurer. A foreign investor will be liable under the FATA for breaching the attached conditions, and the Treasurer is able to make an order requiring the disposal of the asset.

BENEFITS OF US-AUSTRALIA FREE TRADE AGREEMENT

Chinese investors may be able to take advantage of certain provisions of the US-Australia Free Trade Agreement. Under this FTA, US entities are exempt from the application of the FATA in relation to certain transactions. For instance, for applicable US acquisitions in Australian companies, instead of a A\$50 million threshold for an investment proposal in a nonsensitive sector, the threshold becomes A\$800 million. More importantly, there is no tracing to determine whether an entity is ultimately owned by a US entity. As a result, Chinese investors may take advantage of privileges enjoyed by US investors by acquiring assets in Australia through US entities. A US entity owned by a Chinese corporation will still have the benefit of the increased threshold afforded to other US entities, provided that the US entity is the entity making the direct investment in Australia. Also, this rule applies to trusts (*i.e.*, where the legal interest is owned by one company, and the benefit is owned by another).

LAWYER CONTACT

For further information, please contact your principal Firm representative or the lawyer listed below. General e-mail messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

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必须遵守的条款。除非《外国收购和接管法》变动或财政司司长变动或撤销这些条款，Xstrata 必须永久性地遵守这些条款。如果外国投资者违反这些条款，澳财政司有权责令外方转让其投资财产。

利用澳美自由贸易协定

中国投资商也可以利用澳大利亚与美国签定的自由贸易协定。澳美自由贸易协定授予美国某些投资商一系列的特权。比如说，当收购澳洲非敏感领域企业“相当股权”时，如被收购澳洲企业的资产总值低于 8 亿澳元，美国投资商将不需要申报。而按照《外国收购和接管法》正常规定，只有企业资产低于 5 千万澳元时，投资计划才不需要申报。更重要的是，澳大利亚财政司不追查是否美国投资商的最终拥有者是否是美国公司。中国投资商可以通过美国公司在澳进行投资。只要是美国公司在澳进行直接的投资，就算该美国公司是某中国企业的下属公司，此美国公司同样可以享受放宽了的申报要求。这个办法对信托(当法律利益和权益利益分别由不同国家的公司拥有)同样适用。

联系律师

如果您需要更多的信息，请联系以下所列律师。您可以使用我们提供的“与众达联系”表格向我们发送电子邮件。“与众达联系”表格可以在 www.jonesday.com 上找到。

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