

CHINA'S INVESTMENT IN AUSTRALIA:  
A CRITICAL ANALYSIS OF AUSTRALIA'S FOREIGN  
INVESTMENT REVIEW MECHANISM

JIANG Huiqin\*

ZHOU Weihuan\*\*

Table of Contents

I. INTRODUCTION .....	188
II. CHINESE INVESTMENT IN AUSTRALIA: AN OVERVIEW .....	190
A. Investment Growth .....	191
B. Investment Concentration and Diversification .....	196
C. SOE's Domination .....	199
III. AUSTRALIA'S FOREIGN INVESTMENT REVIEW MECHANISM (FIRM): IMPLICATIONS FOR CHINESE INVESTMENT .....	201
A. Discretion of The Treasurer: The National Interest Test.....	202
1. National interest considerations .....	203
2. Application of "national interest" considerations in selected Chinese investment .....	204
B. Chinese SOEs Investment.....	208
1. Rules regulating foreign government investors ..	208
a) Definition of a Foreign Government Investor .....	208
b) Definition of "Direct Interest" .....	210
c) Definition of "Associate" .....	211
2. Summary .....	213
C. FIRB Notification Thresholds.....	213
D. Penalties on Non-Compliance .....	216
E. Implications for Chinese Investors.....	218
IV. CONCLUSION .....	221

---

\* PhD (University of New South Wales (UNSW Sydney)), LLM & LLB (China University of Political Science and Law). Email: [huiqin.jiang@hotmail.com](mailto:huiqin.jiang@hotmail.com). This article has benefited enormously from the author's fieldwork in Australia (ethics approval: 14160) involving 18 interviews with Australian government officials, legal practitioners, and other experts to whom the author is highly grateful.

\*\* Senior Lecturer, Faculty of Law, UNSW Sydney. Member, China International Business and Economic Law (CIBEL) Initiative. Email: [weihuan.zhou@unsw.edu.au](mailto:weihuan.zhou@unsw.edu.au).

## CHINA'S INVESTMENT IN AUSTRALIA: A CRITICAL ANALYSIS OF AUSTRALIA'S FOREIGN INVESTMENT REVIEW MECHANISM

JIANG Huiqin

ZHOU Weihuan

### *Abstract*

*This article reviews Australia's foreign investment review mechanism (FIRM) and its central element, the Foreign Investment Review Board (FIRB) process. It argues that four factors about the mechanism may remain as barriers to Chinese investment in Australia after the China – Australia Free Trade Agreement (ChAFTA) took effect in December 2015, namely the discretionary "national interest" test, the less favorable treatment to Chinese investors in some major areas of investment, the widespread concerns on investment by Chinese state-owned enterprises, and the strengthened enforcement framework under the FIRM. It recommends that Chinese investors endeavor to observe Australia's foreign investment policy and practice, and actively engage with the FIRB to avoid adverse decisions, unnecessary delays in decision-making, or inadvertent non-compliance. Meanwhile, the Chinese government should seek to reduce or remove these investment barriers in the current review of the investment rules under the ChAFTA.*

### I. INTRODUCTION

After a decade of rapid growth of Chinese investment in Australia, Australia is now the second largest recipient of China's outbound direct investment (ODI).<sup>1</sup> While China is only the seventh largest investor in Australia and the value of Chinese investment remains marginal in comparison to investment from the United States (US) and the United Kingdom (UK), Chinese investment has shown great potential to grow at the fastest pace among all foreign investment in Australia.<sup>2</sup> With the conclusion and implementation of the China – Australia Free Trade Agreement (ChAFTA) in December 2015, the governments, businesses, and other stakeholders of the two countries are becoming increasingly positive towards the bilateral economic relationship and its further development. Overall, the ChAFTA benefits Chinese investors in that it improves market access and the predictability of Australia's regulatory environment. Thus, the ChAFTA serves as an important complement to China's outbound investment policies, which aim to promote Chinese investment in countries including Australia for strategic assets, raw materials, high-

<sup>1</sup> See KPMG and The University of Sydney China Studies Centre (KPMG and USYD Centre), *Demystifying Chinese Investment in Australia: Update May 2017*, KPMG AND USYD CTR. 2, (2017) [www.demystifyingchina.com.au/reports/demystifying-chinese-investment-in-australia-2017.pdf](http://www.demystifyingchina.com.au/reports/demystifying-chinese-investment-in-australia-2017.pdf).

<sup>2</sup> Australian Government, Department of Foreign Affairs and Trade (DFAT), *Which Countries Invest in Australia?*, DFAT (2017), <http://dfat.gov.au/trade/topics/investment/Pages/which-countries-invest-in-australia.aspx>.

quality food and services, advanced technologies and know-hows, and so forth. Three factors including the investment complementarity between China and Australia, the supporting domestic policies of both nations, and the ChAFTA will operate jointly to motivate more Chinese investors to conduct business activities in Australia.

Nonetheless, the challenges that Chinese investors may face in Australia should not be underestimated, among which Australia's foreign investment review mechanism (FIRM) has raised considerable concerns amongst Chinese investors and the Chinese Government during the ChAFTA negotiations.<sup>3</sup> The Chinese Government considered the Foreign Investment Review Board (FIRB) process – the central element of the FIRM in practice – as a major barrier to Chinese investment in Australia, and took great efforts to negotiate a deal with more favorable treatment to Chinese investors. However, the achievements of the negotiations were limited, and the FIRB process is likely to remain a formidable barrier to Chinese investors. Therefore, a good understanding of the FIRM in general and the FIRB review process in particular is essential for prospective Chinese investors.

The principal legislation under Australia's FIRM is the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (FATA 1975) and its implementing regulations, which were introduced in response to the increasing foreign investment and growing foreign ownership in the early 1970s.<sup>4</sup> The legislation is complemented by the Foreign Investment Policy issued and amended by the Australian Treasurer from time to time and implemented by FIRB (FIRB Policy). Most of the existing studies on the FIRB process have focused on its historical development and political justifications.<sup>5</sup> Others have discussed the uncertainties of the FIRB process,<sup>6</sup> which is merely one of the many elements which may affect Chinese investors. Few scholarly works have explained the FIRM in detail by far. This article attempts to fill

<sup>3</sup> DFAT, *Australia – China Free Trade Agreement - News*, DFAT, <http://dfat.gov.au/trade/agreements/chafta/news/Pages/news.aspx>. This page provides (limited) official information on each round of the ChAFTA negotiations. China's concern on Australia's investment regime and approval system can be seen in the second, third, fifth, eleventh and twelfth round of negotiations.

<sup>4</sup> BARRIE DYSTER & DAVID MEREDITH, *AUSTRALIA IN THE GLOBAL ECONOMY: CONTINUITY AND CHANGE* 214 (Cambridge Univ. Press, 2d ed. 2012).

<sup>5</sup> See, e.g., Australian Government, the Treasurer, *Australia's Foreign Investment Policy*, FOREIGN INV. REV. BOARD (FIRB) (January 2013) 1, [http://www.firb.gov.au/content/\\_downloads/AFIP\\_2013.pdf](http://www.firb.gov.au/content/_downloads/AFIP_2013.pdf); Wayne Swan, *Australia, China and This Asian Century*, THE TREASURY (2008), <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=speeches/2008/021.htm&pageID=010&min=wms&Year=2008&DocType=1>.

<sup>6</sup> See, e.g., Jeff Rae, *Counting the Cost of Regulation*, Austl. Open Inv. Future Symposium (Dec. 4, 2008) at 6; Stephen Kirchner, *Capital Xenophobia II: Foreign Direct Investment in Australia, Sovereign Wealth Funds, and the Rise of State Capitalism* 1, 7 (St Leonards, N.S.W. : Centre for Independent Studies, 1st ed. 2008); Andrew Lumsden, *The "National Interest Test" and Australian Foreign Investment Laws*, Corrs Chambers Westgarth (2011), <http://www.corrs.com.au/publications/m-and-a-alerts/national-interest-test-australian-foreign-investment-laws/>.

this gap in the literature by discussing four major factors about the FIRM which may remain as barriers to Chinese investment in Australia despite the existence of ChAFTA, and which the Chinese Government should try to address in the current review of the investment rules under the ChAFTA.

This article proceeds as follows. Section II offers an overview of the pattern of Chinese investment in Australia during the 15 years before the ChAFTA entered into force. It highlights the major trends and notable features of Chinese investment in Australia. It also shows that the investment complementarity between Australia and China and their domestic policies have been the major driving forces for the continued growth of Chinese investment in Australia. Section III introduces the FIRM and the FIRB review process, and then explains the major rules and modifications of the relevant regulations and policies introduced around the time when the ChAFTA came into effect. The section argues that these rules and modifications may pose significant challenges to Chinese investment in Australia. It further provides brief recommendations on how Chinese investors may overcome these challenges. Section IV concludes.

## II. CHINESE INVESTMENT IN AUSTRALIA: AN OVERVIEW

In 2017, Australia secured 26 years of consecutive growth and positioned itself as the world's 13<sup>th</sup> largest economy.<sup>7</sup> Australia has a significant gap between national investment and national savings, and foreign capital is indispensable to sustain its economic growth and prosperity.<sup>8</sup> Therefore, the Australian Government has consistently promoted foreign investment and endeavored to maintain an open and friendly market. For example, in the White Paper titled "Australia in the Asian Century", the Australian Government stated:

The Government welcomes foreign investment into Australia. Foreign investment supplements domestic savings and provides additional capital for economic growth, supports existing jobs, and creates new opportunities. It helps boost productivity by introducing new technology, providing capital for infrastructure, supporting global value chains and markets,

---

<sup>7</sup> Australian Government, Australian Trade and Investment Commission (ATIC), *Why Australia: Benchmark Report*, ATIC (2017), <https://www.austrade.gov.au/International/Invest/Resources/Benchmark-Report>.

<sup>8</sup> Deloitte Access Economics, *Partners in Prosperity: The Benefits of Chinese Investment in Australia*, AUSTL. CHINA BUSINESS COUNCIL (June 2017), at 19, [http://acbc.com.au/admin/images/uploads/Copy 1DIT173216\\_CHN\\_Invest\\_Report\\_05.pdf](http://acbc.com.au/admin/images/uploads/Copy 1DIT173216_CHN_Invest_Report_05.pdf).

and enhancing Australia's skill base through greater knowledge transfer and exposure to more innovative work practices.<sup>9</sup>

China, on the other hand, has a vast stock of national savings and foreign reserves which satisfy Australia's capital needs. Since the 10<sup>th</sup> Five-Year Plan (2001-2005),<sup>10</sup> China has been implementing the so-called "Go Global" policy, which seeks to encourage domestic companies to invest overseas for various strategic policy objectives, such as internationalizing local companies, promoting exports of goods and services, and hunting for raw materials, new markets and advanced technology.<sup>11</sup> In support of the implementation of the policy, the Chinese Government has introduced a host of promotional measures and financial support, and has gradually streamlined the regulatory approval process for ODIs.<sup>12</sup> The policy has had remarkable impacts on China's ODI globally, including a phenomenal and continuous growth of Chinese investment in Australia in the past decade.

China's ODI in Australia has three notable features: (1) despite a rapid growth, the total stock of Chinese investment remains relatively small; (2) Chinese investment had concentrated on natural resources and energy until the abrupt end of the mining boom in 2013, and has since started to diversify into other sectors; and (3) Chinese investment has long been dominated by state-owned enterprises (SOEs), but has seen an increase in private investors during the past three years. These features are demonstrated below through empirical data collected from two major official sources, the Australian Bureau of Statistics (ABS) and the FIRB. When the official sources provide insufficient data, the article refers to the most widely recognized and used unofficial dataset provided by KPMG and the University of Sydney China Studies Centre (KPMG and USYD Centre).

### A. Investment Growth

Figure 1 is based on the ABS data and demonstrates the trend of foreign investment in Australia by Australia's major trading partners

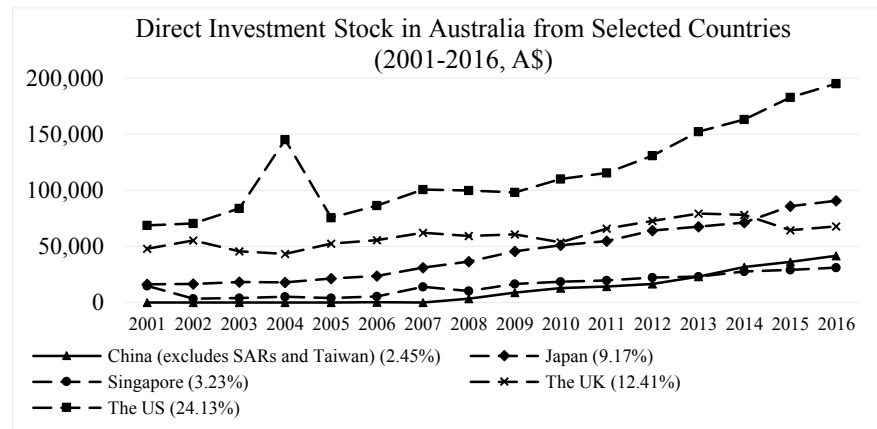
<sup>9</sup> Australian Government, *Australia in the Asian Century*, WHITE PAPER, 199 (2012), [http://www.defence.gov.au/whitepaper/2013/docs/australia\\_in\\_the\\_asian\\_century\\_white\\_paper.pdf](http://www.defence.gov.au/whitepaper/2013/docs/australia_in_the_asian_century_white_paper.pdf).

<sup>10</sup> *Zhonghua Renmin Gongheguo Guomin Jingji he Shehui Fazhan Dishige Wunian Jihua Gangyao* (中华人民共和国国民经济和社会发展第十个五年计划纲要) [*Tenth Five-Year Plan for National Economic and Social Development of the People's Republic of China (2001-2005)*] (2001), <http://www.people.com.cn/GB/shizheng/16/20010318/419582.html>.

<sup>11</sup> For a comprehensive review of China's "Go Global" policy and its early development and achievements, see Wenbin Huang and Andreas Wilkes, *Analysis of China's Overseas Investment Policies*, CTR. FOR INT'L FORESTRY RES., WORKING PAPER 79 (2011), [http://www.cifor.org/publications/pdf\\_files/WPapers/WP-79CIFOR.pdf](http://www.cifor.org/publications/pdf_files/WPapers/WP-79CIFOR.pdf); Nargiza Salidjanova, *Going Out: An Overview of China's Outbound Foreign Direct Investment*, USCC STAFF RES. REP. (Mar. 30, 2011), [http://link.law.upenn.edu/portal/Going-out--an-overview-of-Chinas-outward/wXIgnj1\\_LH4/](http://link.law.upenn.edu/portal/Going-out--an-overview-of-Chinas-outward/wXIgnj1_LH4/).

<sup>12</sup> See *infra* note 17.

between 2001 and 2016. It shows that Chinese ODI in Australia has increased significantly since 2007 but remains marginal in terms of value compared with investment from other countries such as the US, the UK and Japan.

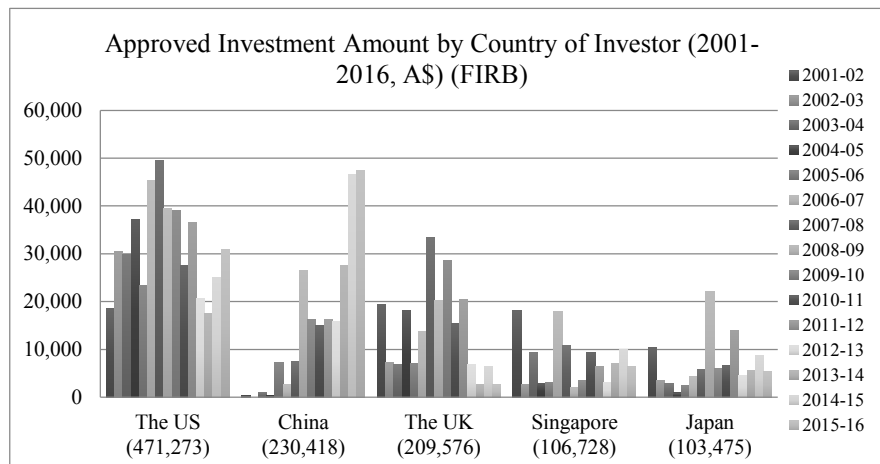


**Figure 1:** Direct Investment Stock in Australia from Selected Countries (2001-2016, millions, A\$) (ABS)<sup>13</sup>

(Note: The percentages shown alongside each nation in this Figure are the respective sizes of each nation's direct investment in proportion to the total direct investment in Australia between 2001 and 2016.)

Figure 2 is based on the FIRB database, which shows the trend of approved foreign investment in Australia by Australia's major trading partners between 2001 and 2016. It shows that the value of approved Chinese investments in Australia had been small before 2006 but increased to the largest in the financial year 2013-14. While the total amount of approved Chinese investment is far behind that of the US, it is comparable to that of the UK, and far exceeds that of Singapore and Japan.

<sup>13</sup> This figure is drawn by the authors based on the source data included in Australian Bureau of Statistics (ABS), 5352.0 - *International Investment Position, Australia: Supplementary Statistics, 2016- Table 2: Foreign Investment in Australia: Level of Investment by Country and Country Groups by Type of Investment and Year (\$million)*, ABS (May 10, 2017), [www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/5352.02016?OpenDocument](http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/5352.02016?OpenDocument).



**Figure 2:** Approved Investment Amount by Country of Investor (2001-2016, millions, A\$) (FIRB)<sup>14</sup>

(Note: The total approved investment amounts are outlined respectively under the name of each nation.)

The two datasets consistently show the gap between Chinese investment and US investment between 2001 and 2016. In this regard, it should be noted that the US investment has enjoyed higher FIRB notification thresholds and thus has been subject to more lenient review since 2005 under the Australia – US Free Trade Agreement.<sup>15</sup> Therefore, the fact that the approved Chinese investment surpassed the US investment in 2013 suggests a significant growth in both the value and number of Chinese investment. In contrast, the inconsistencies between the two datasets regarding the value of investment from China and the other selected countries reflect their different focuses: the ABS data relies on "implemented" investment proposals, and the FIRB data covers "notified" investment only.

The rapid growth of Chinese investment in Australia before the ChAFTA reflected the complementary investment needs of China (as a capital exporter) and Australia (as a capital importer) flagged above. Due to the investment complementarity, the two nations adopted policies in support of their respective needs. Australia maintained a relatively liberal and stable regulatory framework for foreign investment, and China gradually relaxed the regulatory approval process for outbound investment pursuant to its "Go Global" policy.

China's outbound investment regulatory framework requires investors to seek approval from various authorities before undertaking

<sup>14</sup> This figure is drawn by the authors based on the source data included in FIRB annual reports.

<sup>15</sup> Australia–United States Free Trade Agreement, Austl.-U.S., May 18, 2004.

substantive work.<sup>16</sup> Among the authorities, the National Development and Reform Commission (NDRC) plays the most important role. The NDRC approval has been relaxed in the past years in various aspects, including a significant increase in the monetary thresholds triggering the approval process, the delegation of power to NDRC's provincial branches, the simplification of the application procedures, the introduction of an online filing system, etc.<sup>17</sup> In the latest regulatory change which took effect in March 2018, the NDRC further streamlined the procedural requirements to simplify and expedite the approval process.<sup>18</sup>

<sup>16</sup> See, e.g., Yi Wang, *Outbound Chinese Equity Investments – Understanding the Regulatory Approval Process*, NORTON ROSE FULBRIGHT (November 2011), <http://www.nortonrosefulbright.com/knowledge/publications/62023/outbound-chinese-equity-investments-understanding-the-regulatory-approval-process>; Cen Zhaoqi (岑兆琦), *Zhongguo Qiye Duiwai Touzi zhi Zhengfu Shenpi Chengxu Guiding* (中国企业对外投资之政府审批程序规定) [PRC Governmental Approval Steps for Outbound Investment], CGGT (Mar. 10, 2014), <http://www.cggthinktank.com/2014-03-10/100071396.html>.

<sup>17</sup> Successive regulations include: NDRC, *Jingwai Touzi Xiangmu Hezhun Zhanxing Guanli Banfa* (境外投资项目核准暂行管理办法(失效)) [Interim Measures for the Administration of Examination and Approval of the Overseas Investment Projects (Ineffective)] (promulgated by NDRC, Oct. 9, 2004, effective till May 13, 2014) (Chinalawinfo); NDRC, *Guojia Fazhan Gaige Weiyuanhui Guanyu Zuohao Jingwai Touzi Xiangmu Xiafang Hezhun Quanxian Gongzuo de Tongzhi* (国家发展改革委关于做好境外投资项目下放核准权限工作的通知) [Circular of NDRC on Doing a Good Job in Delegating the Examination and Approval Power for the Outbound Investment Projects (Ineffective)] (promulgated by NDRC, Feb. 14, 2011, effective till May 13, 2014) (Chinalawinfo); NDRC, *Jingwai Touzi Xiangmu Hezhun he Beian Guanli Banfa* (境外投资项目核准和备案管理办法) [Measures for the Administration of Confirmation and Recordation of Overseas Investment Projects (Ineffective)] (promulgated by NDRC, May 14, 2014, effective till Feb. 28, 2018) (Chinalawinfo); NDRC, *Guojia Fazhan Gaigewei Guanyu Xiugai Jingwai Touzi Xiangmu Hezhun He Beian Guanli Banfa he Waishang Touzi Xiangmu Hezhun He Beian Guanli Banfa Youguan Tiaokuan de Jueding* (国家发展改革委关于修改《境外投资项目核准和备案管理办法》和《外商投资项目核准和备案管理办法》有关条款的决定) [Decision of the NDRC on Amending the Relevant Clauses of the Measures for the Administration of the Confirmation and Recordation of Overseas Investment Projects and the Measures for the Administration of the Confirmation and Recordation of Foreign-Funded Projects (Effective)] (promulgated by NDRC, Dec. 27, 2014, effective Dec. 27, 2014) (Chinalawinfo). For an analysis of the changes, see Andrew Lumsden, Lizzie Knight & Weihuan Zhou, *Chinese Outbound Investment: The Growing Sophistication of China's "Go Global" Policy*, CTR. FOR L., MKT. AND REG., UNSW AUSTL. (Mar. 18, 2013), [clmr.unsw.edu.au/article/chinese-outbound-investment%3A-the-growing-sophistication-of-china%E2%80%99s-%E2%80%9Cgo-global%E2%80%9D-policy](http://clmr.unsw.edu.au/article/chinese-outbound-investment%3A-the-growing-sophistication-of-china%E2%80%99s-%E2%80%9Cgo-global%E2%80%9D-policy); *Revised NDRC Measures for Approval and Filing of Outbound Investments Projects*, NORTON ROSE FULBRIGHT (Apr. 24, 2014), <http://www.nortonrosefulbright.com/knowledge/publications/115611/revised-ndrc-measures-for-approval-and-filing-of-outbound-investment-projects>; Xiaohu Ma, Thomas Man & Jun Deng, *China Outbound Investment: Beginning of the End of the Approval System?* MORRISON FOERSTER (Feb. 18, 2014), <http://media.mof.com/files/uploads/Images/140217-China-Outbound-Investment.pdf>; *Current Outbound Investment Climate in China*, SLAUGHTER AND MAY (July 2015), <http://www.slaughterandmay.com/media/2534723/current-outbound-investment-climate-in-china.pdf>; Latham & Watkins, *China's NDRC Proposes Changes to Outbound Investment Rules*, LATHAM & WATKINS (Client Alert Commentary, May 25, 2016), <https://www.lw.com/thoughtLeadership/LW-china-NDRC-proposes-changes-to-outbound-investment-rules>.

<sup>18</sup> NDRC, *Qiye Jingwai Touzi Guanli Banfa* (企业境外投资管理办法) [Measures for the Administration of Overseas Investment of Enterprises] (promulgated by NDRC, Dec. 26, 2017, effective Mar. 1, 2018). For an analysis of the changes made in the new measurer, see Kaiping Wang, Mengting Huang and Xinran Tang, *China's NDRC Issued New Outbound Investment Rules*, KING & WOOD



The implementation of the ChAFTA since December 2015 has further contributed to the continued growth of Chinese investment in Australia. In 2016, for instance, Chinese investment in Australia increased by 23.1 percent to a total value of USD 4.178 billion.<sup>19</sup> As will be discussed in Section III.C, the ChAFTA reduced the regulatory barriers to Chinese investment and hence improved the market access for Chinese investors. As a whole, the ChAFTA reinforces the regulatory predictability in Australia as well as the confidence of Chinese investors on the prospects of the two nations' economic relations.

Further regulatory relaxation is likely to be seen in the post-ChAFTA era. As affirmed in China's 13<sup>th</sup> Five-Year Plan (2016-2020), China remains committed to promoting outbound investment in strategic and emerging industries (as further discussed in Section II.B).<sup>20</sup> In particular, while China will continue to streamline the regulatory framework for outbound investment, China has also upgraded the "Go Global" strategy in promoting the Belt-and-Road Initiative (BRI) which treats Pacific as an integral part.<sup>21</sup> In the Benchmark Report 2018, the Australian Trade and Investment Commission shows convincingly that "Australia has the capacity and capabilities to provide high-quality natural resources, food, educations, tourism and financial services to the world."<sup>22</sup> To reap the potential benefits of the BRI, Australia joined the Asia Infrastructure Investment Bank as a major shareholder, and strives to develop its Northern Territory.<sup>23</sup> In addition, an Australia-China BRI has been established to provide advice and assistance to Australian businesses in understanding and utilizing the initiative.<sup>24</sup> In short, the economic

---

MALLESONS (Dec. 26, 2017), <http://www.kwm.com/en/knowledge/insights/analysis-on-no-11-circular-on-crossing-border-investment-20171226>; Herbert Smith Freehills, *China Promulgates New Regulations for Outbound Investment*, LEXOLOGY (Jan. 10, 2018), <https://www.lexology.com/library/detail.aspx?g=b2eaf414-a797-49f8-9294-0281ecb2e10e>.

<sup>19</sup> Ministry of Commerce of the People's Republic of China (MOFCOM), National Bureau of Statistics, and State Administration of Foreign Exchange, 2016 Nian Zhongguo Duiwai Zhijie Touzi Tongji Gongbao (2016年中国对外直接投资统计公报) [China's Outward Investment Statistics Bulletin 2016], MOFCOM, at 15, <http://images.mofcom.gov.cn/fec/201711/20171114083528539.pdf>.

<sup>20</sup> Zhonghua Renmin Gongheguo Guomin Jingji He Shehui Fazhan Dishisange Wunian Guihua Gangyao (中华人民共和国国民经济和社会发展第十三个五年规划纲要) [Thirteenth Five-Year Plan for National Economic and Social Development of the People's Republic of China (2016-2020)] (13th Five-Year Plan), XINHUA (Mar. 17, 2016), [news.xinhuanet.com/politics/2016lh/2016-03/17/c\\_1118366322.htm](http://news.xinhuanet.com/politics/2016lh/2016-03/17/c_1118366322.htm).

<sup>21</sup> The BRI includes the building of the Silk Road Economic Belt and the 21st Century Maritime Silk Road. *Vision for Maritime Cooperation under the Belt and Road Initiative*, YIDAIYILU (2015), <https://www.yidaiyilu.gov.cn/wcm.files/upload/CMSydy/gw/201706/201706200153032.pdf>.

<sup>22</sup> ATIC, *Why Australia: Benchmark Report 2018*, AUSTRALIA (2018), at 13-24, <https://www.austrade.gov.au/International/Invest/Resources/Benchmark-Report>.

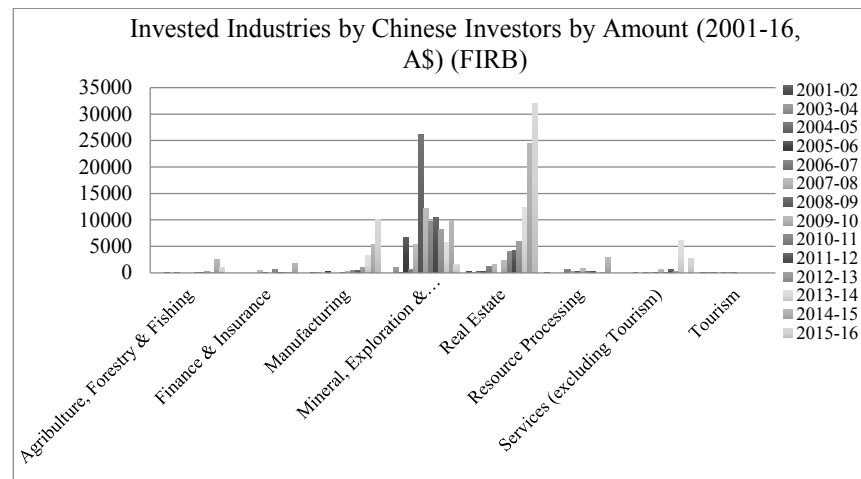
<sup>23</sup> Northern Territory Government, Australia (NT), *Our North, Our Future: White Paper on Developing Northern Australia*, NT (June, 2015), <https://northernaustralia.nt.gov.au/strategic-documents>.

<sup>24</sup> Australia-China Belt & Road Initiative, [www.acbri.org.au](http://www.acbri.org.au).

needs and regulatory developments in both countries indicate that Chinese investment in Australia will continue to grow.

### *B. Investment Concentration and Diversification*

Figure 3 is based on data collected from FIRB annual reports regarding approved Chinese investment in Australia between 2001 and 2016. It shows that Chinese investment in Australia has long concentrated in the "mineral, exploration, and development sector".<sup>25</sup> The trend reflects China's strategic needs for energy and resources<sup>26</sup> to meet its domestic demands in urbanization and industrialization.<sup>27</sup>



**Figure 3: Invested Industries by Chinese Investors by Amount (2001-2016, A\$) (FIRB)<sup>28</sup>**

<sup>25</sup> According to the industry categorization employed by FIRB annual report, the following sectors are included in the "mineral, exploration, development sector": (1) coal; (2) metallic minerals (bauxite, copper-gold, iron ore, nickel, uranium, zinc-lead-silver); and (3) oil and gas. FIRB, *Annual Report 2014-15*, FIRB (April 2016), at 28, <http://firb.gov.au/files/2016/03/FIRB-AR-2014-15.pdf>.

<sup>26</sup> For an overview of the development of China's ODI policy in the energy and resources sector, see Xiaomei Tan, *China's Overseas Investment in the Energy/Resources Sector: Its Scale, Drivers, Challenges and Implications*, 36 *ENERGY ECONOMICS* 750, 752-54 (2013).

<sup>27</sup> East Asian Bureau of Economic Research (EABER) & China Center for International Economic Exchanges (CCIEE), *Partnership for Change: Australia-China Joint Economic Report* (Austl. Nat'l. Univ. Press, August 2016), at 51-54, <http://www.austchamshanghai.com/en/media-center/partnership-change-australiachina-joint-economic-report>; Paul Garvey, *Chinese Investment in Australian Resources Lowest in Decade*, *The Austl.* (June 22, 2015), <http://www.theaustralian.com.au/business/mining-energy/chinese-investments-in-australian-resources-lowest-in-decade/news-story/1a5d8cdab46912d6e99aa35882bad213>; Edmund Tang, *Australia Remains the Second Most Favoured Country for China's Outbound Investors*, *Austl. Trade and Inv. Comm'n* (Apr. 19, 2016), [www.austrade.gov.au/news/economic-analysis/australia-remains-the-second-most-favoured-country-for-china-s-outbound-investors](http://www.austrade.gov.au/news/economic-analysis/australia-remains-the-second-most-favoured-country-for-china-s-outbound-investors).

<sup>28</sup> This Figure is drawn by the authors based on the source data included in FIRB annual reports.

The end of the mining boom in 2013<sup>29</sup> led to the diversification of Chinese investment into other sectors. Since the ABS and the FIRB lacks an in-depth analysis of the diversified investment, we refer to unofficial datasets for more insights. The KPMG and USYD Centre's annual reports, titled "Demystifying Chinese Investment in Australia" (KPMG-USYD Reports), purports to "contain the most detailed and up-to-date information on Chinese [ODI] in Australia."<sup>30</sup>

Table 1 compiles the relevant data in KPMG-USYD Reports and shows that Chinese investors now are not only investing notably in real estate, but also investing in healthcare, agribusiness, renewable energy and unconventional resources. In particular, Chinese investment in commercial real estate increased fourfold between 2013 and 2016, making up more than one-third of the total Chinese investment in 2016. Chinese investment in agribusiness and agricultural land also increased significantly. While large Chinese investment in agribusiness and agricultural land only started in 2013, the amount of investment has increased tenfold by 2016. Chinese investment in renewable energy experienced a sharp increase in 2015, mainly due to the large-scale deals by Chinese SOEs, particularly the State Power Investment Corporations' acquisition of Pacific Hydro for A\$ 3 billion.<sup>31</sup>

**Table 1:** Chinese investment in Australia by Sector  
(KPMG and the USYD Centre, millions)<sup>32</sup>

Sector	Mining		Commercial Real Estate		Agribusiness & Agricultural Land		Energy (Gas and Oil)		Renewable Energy	
	Amount	Ratio	Amount	Ratio	Amount	Ratio	Amount	Ratio	Amount	Ratio
2006-2012	US\$36,874.96	73%					US\$8,867.01	18%	US\$2,212.60	4%
2012	US\$5,471.46	48%					US\$4,785.20	42%	US\$182.60	2%
2013	US\$2,133	24%	US\$1,290	14%	US\$95	1%	US\$1,930	21%		
2014	A\$992.30	11%	A\$4,372.08	46%	A\$140.30	1%	A\$667.00	7%		
2015	A\$1,299.00	9%	A\$6,852.70	45%	A\$375.20	3%	A\$500.00	3%	A\$3,000.00	20%
2016	A\$839	5%	A\$5,549	36%	A\$1,202	8%	A\$1,149	8%	A\$343	2%

The diversification of Chinese investment in Australia is in line with China's economic transformation, consumption growth, and innovation-driven development strategy. China is currently

<sup>29</sup> Greg Jericho, *The Mining Investment Boom is Over, So Where to Now?* THE GUARDIAN, Aug. 29, 2014, [www.theguardian.com/business/grogonomics/2014/aug/29/mining-investment-boom-is-over-so-where-to-now](http://www.theguardian.com/business/grogonomics/2014/aug/29/mining-investment-boom-is-over-so-where-to-now). For an excellent analysis of the future of Australia's economy after the mining boom, see ROSS GARNAUT, *DOG DAYS: AUSTRALIA AFTER THE BOOM* (2013).

<sup>30</sup> KPMG and USYD Centre, *Demystifying Chinese Investment in Australian Agribusiness: Important Choices to Be Made*, KPMG AND USYD CTR. (Oct. 29, 2013), forepage, [www.kpmg.com/AU/en/IssuesAndInsights/ArticlesPublications/china-insights/Documents/demystifying-chinese-investment-australian-agribusiness-october-2013.pdf](http://www.kpmg.com/AU/en/IssuesAndInsights/ArticlesPublications/china-insights/Documents/demystifying-chinese-investment-australian-agribusiness-october-2013.pdf).

<sup>31</sup> KPMG and USYD Centre, *The New Normal: Health, Happiness, Lifestyle and Services- Latest Demystifying Chinese Investment in Australia*, KPMG AND USYD CTR. (Apr. 11, 2016), at 12, 20, [www.demystifyingchina.com.au/reports/demystifying-chinese-investment-in-australia-april-2016.pdf](http://www.demystifyingchina.com.au/reports/demystifying-chinese-investment-in-australia-april-2016.pdf).

<sup>32</sup> This table is compiled by the authors based on the source data included in the statistical analysis covered in KPMG-USYD Reports.

undertaking economic restructuring in furtherance of developing a service and innovation-based economy pursuant to the 13<sup>th</sup> Five-Year Plan. The new growth model is supported by the strong domestic consumption of "China's large and increasingly wealthy middle class" and by the shift of consumption preferences to high-quality goods and services.<sup>33</sup> In the context of the overall economic transformation, China's "Go Global" policy has been gradually upgraded to promote foreign investment and cooperation in a variety of sectors apart from energy and resources, which include agriculture, high-end manufacturing, infrastructure, and services. The "Go Global" policy also aims to further integrate local companies into the global value chain.<sup>34</sup>

Furthermore, the growing domestic demand for high-quality food products and supplements, advanced aged-care facilities and managerial skills, amongst others, have led Chinese investors to acquire assets and supplies of raw materials for manufacturing and companies with advanced technologies and know-hows in Australia. These activities have also enabled Chinese companies to gain international experience, build up their reputation, and achieve cross-border supply chain integration. With the end of the mining boom, in order to further capitalize on China's investment needs, Australia is destined to reform its economic agenda and leverage its advantage in supplying food and services of higher-value and technology-based assets.<sup>35</sup>

Finally, China initiated a National Innovation-driven Development Strategy in May 2016,<sup>36</sup> which "pledges to build China into an innovative nation by 2020, and an international leader in innovation by 2030."<sup>37</sup> In particular, it "puts forward missions for developing technology in information networks, modern agriculture, energy, environmental protection, oceanic and space industries, and health and

<sup>33</sup> EABER & CCIEE, *supra* note 27, at 46, 56–57.

<sup>34</sup> Zhonghua Renmin Gongheguo Guomin Jingji He Shehui Fazhan Dishierge Wunian Guihua Gangyao (中华人民共和国国民经济和社会发展第十二个五年规划纲要) [Twelfth Five-Year Plan for National Economic and Social Development of the People's Republic of China (2011–2015)] (Mar. 16, 2011) (12<sup>th</sup> Five-Year Plan), [news.xinhuanet.com/politics/2011-03/16/c\\_121193916.htm](http://news.xinhuanet.com/politics/2011-03/16/c_121193916.htm) (in Chinese); 13<sup>th</sup> Five-Year Plan, *supra* note 20; Zhengfu Gongzuo Baogao—2012 Nian 3 Yue 5 Ri Zai Dishiyijie Quanguo Renmin Daibiao Dahui Diwuci Huiyi Shang (政府工作报告—2012年3月5日在第十一届全国人民代表大会第五次会议上) [Government Working Paper: At The Eleventh National People's Congress Held on Mar. 5, 2012] (Mar. 15, 2012), [www.gov.cn/test/2012-03/15/content\\_2067314.htm](http://www.gov.cn/test/2012-03/15/content_2067314.htm) (in Chinese).

<sup>35</sup> EABER & CCIEE, *supra* note 27, at 65–70.

<sup>36</sup> Zhonggong Zhongyang Guowuyuan Yinfu Guojia Chuangxin Qudong Fazhan Zhanlue Gangyao (中共中央国务院印发《国家创新驱动发展战略纲要》) [The State Council Issued the Guidelines on the National Innovation-driven Strategy] (National Innovation-driven Strategy), PEOPLE (May 20, 2016), <http://politics.people.com.cn/n1/2016/0520/c1001-28364670.html>.

<sup>37</sup> *Id.*; China Unveils Three-Step Strategy for Innovation-driven Development, XINHUA (May 19, 2016) (China's Three-Step Strategy), [http://www.xinhuanet.com/english/2016-05/19/c\\_135372956.htm](http://www.xinhuanet.com/english/2016-05/19/c_135372956.htm).

service industries.”<sup>38</sup> Consistent with China's strategy, Australia issued its National Innovation and Science Agenda in December 2015, aiming to build "a more innovative and entrepreneurial economy" with a focus on "Advanced Manufacturing; Food and Agribusiness; Medical Technologies and Pharmaceuticals; Mining Equipment, Technology and Services; and Oil, Gas and Energy Resources."<sup>39</sup> Given the common goals and areas of development in innovative capacity, Chinese investment in Australia may increasingly diversify into technology-related industries.

### C. SOE's Domination

As will be discussed in Section III, Australia's FIRM treats foreign investors differently according to their character or ownership, that is, whether they are "foreign government investors" or "foreign private investors." The Australian Government is concerned about foreign government investors regarding whether the investment is government-directed or commercially-motivated.<sup>40</sup> Neither the ABS nor the FIRB provides data based on the character of investors. Therefore, we refer to KPMG-USYD Reports. One of the features identified in the KPMG-USYD Reports is that SOE-led investments have dominated Chinese ODI in Australia, although private investors have become increasingly active in recent years, especially after 2014. Table 2 compiles the relevant data in the reports and shows that between September 2006 and June 2012, 79% by deal and 95% by value of the completed Chinese investments were undertaken by SOEs.<sup>41</sup> In 2012, 74% by deal and 87% by value of Chinese investments were from SOEs.<sup>42</sup> The trend continued in 2013 with SOE's investments in Australia reaching 84% by value and 38% by deal.<sup>43</sup> Accordingly, by 2013, SOEs dominated Chinese investment in Australia, undertaking most of the major deals.

<sup>38</sup> National Innovation-driven Strategy, *supra* note 36; China's Three-Step Strategy, *supra* note 37.

<sup>39</sup> Australian Government, *National Innovation and Science Agenda Report* (Dec. 7, 2015), <http://www.innovation.gov.au/page/national-innovation-and-science-agenda-report>.

<sup>40</sup> Australian Government, the Treasurer, *Australia's Foreign Investment Policy*, FIRB (Jan. 1, 2018), at 10, <https://cdn.tspace.gov.au/uploads/sites/82/2017/06/Australias-Foreign-Investment-Policy.pdf>; KPMG and USYD Centre, *Demystifying Chinese Investment: China Outbound Direct Investment in Australia*, KPMG AND USYD CTR. (Aug. 1, 2012), at 9, [www.kpmg.com/au/en/issuesandinsights/articlespublications/china-insights/pages/demystifying-chinese-investment.aspx](http://www.kpmg.com/au/en/issuesandinsights/articlespublications/china-insights/pages/demystifying-chinese-investment.aspx).

<sup>41</sup> KPMG and USYD Centre, *Demystifying Chinese Investment 2012*, *supra* note 40, at 6, 9.

<sup>42</sup> KPMG and USYD Centre, *Demystifying Chinese Investment in Australia*, KPMG AND USYD CTR. (Mar. 15, 2013), at 15, [www.kpmg.com/AU/en/IssuesAndInsights/ArticlesPublications/china-insights/Documents/demystifying-chinese-investment-in-australia-march-2013-v2.pdf](http://www.kpmg.com/AU/en/IssuesAndInsights/ArticlesPublications/china-insights/Documents/demystifying-chinese-investment-in-australia-march-2013-v2.pdf).

<sup>43</sup> KPMG and USYD Centre, *Demystifying Chinese Investment in Australia*, KPMG AND USYD CTR. (Mar. 7, 2014), at 11, [www.kpmg.com/AU/en/IssuesAndInsights/ArticlesPublications/china-insights/Documents/demystifying-chinese-investment-in-australia-march-2014.pdf](http://www.kpmg.com/AU/en/IssuesAndInsights/ArticlesPublications/china-insights/Documents/demystifying-chinese-investment-in-australia-march-2014.pdf).

**Table 2: Chinese investment in Australia by Character**  
(KPMG and the USYD Centre)<sup>44</sup>

Character Year	SOEs By Deal		Private Entities By Deal		SOEs By Value		Private Entities By Value	
	No. of Deals	%	No. of Deals	%	Investment Value (Million)	%	Investment Value (Million)	%
Sep 2006– Jun 2012	92	79%	24	21%	—	95%	—	5%
2007–2013	122	67%	60	33%	US\$52,254.87	89%	US\$6,570.91	11%
2012	20	74%	7	26%	US\$9,927.04	87%	US\$1,456.42	13%
2013	15	38%	25	62%	US\$7,701	84%	US\$1,414	16%
2014	9	15%	51	85%	A\$ 3,228.4	34%	A\$ 6,234.18	66%
2015	13	20%	51	78%	A\$ 7,413	49%	A\$ 7,226.9	48%
2016	25	24%	78	76%	A\$ 7,778	51%	A\$ 7,584	49%

The situation started to change in 2014 when investments by Chinese private investors exceeded SOE investments in both numbers and total value of deals.<sup>45</sup> In 2015 and 2016, the value of Chinese SOE investment and that of private investment were basically equal, with the value of completed SOE investments being 49%<sup>46</sup> and 51%<sup>47</sup> respectively. Notably, the number of Chinese private investment increased significantly in 2016, reaching a record number of 78 deals.<sup>48</sup>

The growing role played by Chinese private entities can be attributed to three main factors. Firstly, the 12<sup>th</sup> Five-Year Plan (2011–2015), in upgrading the "Go Global" policy, for the first time encouraged "investors of all types of ownership" to invest overseas.<sup>49</sup> This policy directive constituted a major driver of China's private investment abroad. Secondly, the implementation of this policy has led to the relaxation of the regulatory approval process as discussed in Section II.A. Amongst other regulatory simplifications, the increase in the monetary threshold triggering the approval process means that a majority of outbound private investment is no longer subject to approval.<sup>50</sup> Thirdly, the increased FIRB review thresholds for Chinese private investors under the ChAFTA from December 2015 may have contributed to the growth.

<sup>44</sup> This table is compiled by the authors based on the source data included in the statistical analysis covered in KPMG-USYD Reports. In the year of 2015, the total is not rounding because there is a third type of investor, that is, SOE and Private Joint Venture. The only one deal has an investment value of A\$ 450.00 million.

<sup>45</sup> Knight Frank, *Demystifying Chinese Investment in Australia, Featuring Commercial Real Estate Analysis*, KPMG AND USYD CTR. (May, 2015), at 29, [www.kpmg.com/AU/en/IssuesAndInsights/ArticlesPublications/china-insights/Documents/demystifying-chinese-investment-in-australia-may-2015.pdf](http://www.kpmg.com/AU/en/IssuesAndInsights/ArticlesPublications/china-insights/Documents/demystifying-chinese-investment-in-australia-may-2015.pdf).

<sup>46</sup> KPMG and USYD Centre, *The New Normal: Health, Happiness, Lifestyle and Services- Latest Demystifying Chinese Investment in Australia*, KPMG AND USYD CTR. (Apr. 11, 2016), at 22, [www.demystifyingchina.com.au/reports/demystifying-chinese-investment-in-australia-april-2016.pdf](http://www.demystifyingchina.com.au/reports/demystifying-chinese-investment-in-australia-april-2016.pdf).

<sup>47</sup> KPMG and USYD Centre, *Demystifying Chinese Investment 2017*, *supra* note 1, at 27.

<sup>48</sup> *Id.*

<sup>49</sup> 12<sup>th</sup> Five-Year Plan, *supra* note 34.

<sup>50</sup> For detailed discussion, see *supra* note 17.

Despite the growth of Chinese private investment in Australia, SOEs continue to play a leading role in large-scale transactions. As shown in the KPMG-USYD Reports, while the number of deals by SOEs has declined significantly, the value of SOE investment remains equal to that of the private investment. This suggests that major deals were still dominated by SOEs. Overall, the pattern of Chinese investment in Australia indicates that SOEs are routinely tasked to lead large-scale and strategic outbound investment, while private investors are encouraged to follow the lead and undertake less significant investment activities. This division of labor is not purely policy-driven, but also has to do with the differences between SOEs and private investors in terms of financial capabilities and commercial decision-making. As SOEs continue to play a significant role in Chinese investment in Australia, Australia's foreign investment review will remain a major obstacle, given the widespread concerns in Australia about state ownership and the non-commercial objectives of such investment.

### III. AUSTRALIA'S FOREIGN INVESTMENT REVIEW MECHANISM (FIRM): IMPLICATIONS FOR CHINESE INVESTMENT

The Australian Government designed the FIRM to review the impact of certain foreign investment on Australia's national interest. It only reviews foreign investment proposals that exceed certain monetary thresholds – generally calculated based on the value of the target Australian entity, or in terms of agribusinesses, the value of investment – as specified in the FIRB Policy. A proposed foreign investment will be rejected or imposed approval conditions if it is found to be contrary to Australia's national interest.

Therefore, the FIRM serves to balance Australia's needs for foreign investment and the protection of national interest by allowing the government to consider various factors of foreign ownership when deciding whether to admit a foreign investment. Since its introduction, the FIRM has evolved over time through various amendments of the FATA 1975 and related instruments to maintain the balance according to changing circumstances. In late 2015, the FIRM went through the latest overhaul, which was aimed at making the review system "strong, effective and enforceable."<sup>51</sup> While maintaining the notification requirement and the existing "national interest" criteria, the FATA 1975 introduced an application fee regime to shift the costs of review from Australian taxpayers to foreign investors.<sup>52</sup> It also sets forth a

---

<sup>51</sup> Scott Morrison, *Stronger Foreign Investment Regime Comes into Force*, THE TREASURY (Media Release, Dec. 1, 2015), [sjm.ministers.treasury.gov.au/media-release/016-2015/](http://sjm.ministers.treasury.gov.au/media-release/016-2015/).

<sup>52</sup> Joe Hockey, *Government Strengthens the Foreign Investment Framework*, THE TREASURY (Media Release, May 2, 2015), <http://jbh.ministers.treasury.gov.au/media-release/034-2015/>. Previously, the review of foreign investment proposals was free of charge. Australian Government, the Treasurer,

lower review threshold for acquisition in specific sectors, clarifies the rules on foreign government investors, and strengthens the enforcement of the Treasurer's decisions.<sup>53</sup>

For Chinese investors, at least four factors about the FIRM are important, namely (A) the discretion of the decision-maker (i.e. the Treasurer or delegate) in applying the "national interest" test; (B) the rules regarding foreign government investors, particularly SOEs; (C) the notification thresholds in certain sectors; and (D) the approaches employed to strengthen the implementation of review decisions. Each of these factors will be discussed below.

#### *A. Discretion of The Treasurer: The National Interest Test*

The Treasurer has the power to decide whether a foreign investment proposal is contrary to Australia's national interest. In conducting the "national interest" test, the Treasurer (or delegate<sup>54</sup>) relies on analysis and recommendations from the FIRB and its secretariat<sup>55</sup> regarding the negative impact of a proposed foreign investment on Australia's national interest.<sup>56</sup> While such recommendations are advisory only, the Treasurer accepts them in most cases.<sup>57</sup>

The undefined but meaningful term "national interest" in the legislation has provided the Treasurer with wide discretion in determining whether a proposed investment is contrary to Australia's national interest.<sup>58</sup> Indeed, the FIRB Policy does provide some guidance on the elements of the "national interest" test in a broad manner. By using policy documents, rather than legal instruments, "the government of the day can control foreign investment without

---

*Australia's Foreign Investment Policy*, FIRB (Feb., 2015), at 5, [http://www.firb.gov.au/content/downloads/AFIP\\_2015.pdf](http://www.firb.gov.au/content/downloads/AFIP_2015.pdf).

<sup>53</sup> Morrison, *supra* note 51.

<sup>54</sup> In practice, a large portion of the decisions are done by delegation. For instance, in the financial year of 2014-15, 97.9% of the decided proposals were decided under this delegation. FIRB, *Annual Report 2014-15*, FIRB (2016), at 14, <http://firb.gov.au/files/2016/03/FIRB-AR-2014-15.pdf>.

<sup>55</sup> That is, the Treasury's Foreign Investment and Trade Policy Division.

<sup>56</sup> FIRB, *Annual Report 2014-15*, *supra* note 54, at 3.

<sup>57</sup> Despite the fact that such advice is advisory only, "the reality is, in most cases, the Treasurer accepts the advice he was provided; occasionally, he might not". Interview with Patrick Colmer, former General Manager, Treasury's Foreign Investment and Trade Policy Division (Canberra, May 5, 2016).

<sup>58</sup> DAVID UREN, TAKEOVER: FOREIGN INVESTMENT AND THE AUSTRALIAN PSYCHE (2015), at 193; Lumsden, *supra* note 6, at 2; Vivienne Bath, *Foreign Investment, the National Interest and National Security—Foreign Direct Investment in Australia and China*, 34(1) SYDNEY L. REV. 5, 12 (2012); Greg Golding, *Australia's Experience with Foreign Direct Investment by State Controlled Entities: A Move Towards Xenophobia or Greater Openness?*, 37 SEATTLE U. L. REV. 533, 544 (2014); Julie Novak, *Australia as a Destination for Foreign Capital*, AUSTRALIA'S OPEN INVESTMENT FUTURE SYMPOSIUM (Dec. 4, 2008), at 7.



being hamstrung by 'inflexible rules'.<sup>59</sup> This is in line with the Australian Government's position that "each investment proposal tends to have its unique circumstances" so that a case-by-case approach is essential.<sup>60</sup> This approach has been criticized by scholars and stakeholders as it has created considerable ambiguity and uncertainty in the FIRB.<sup>61</sup>

#### 1. National interest considerations

The "national interest" test was initially introduced in 1986 to liberalize the controls over foreign investment,<sup>62</sup> which contrasts with the current application of the test to tighten the review of foreign investment. It concerns whether a proposed foreign investment would impose a negative impact on, and hence is contrary to, Australia's national interest.

The FIRB Policy provides a non-exhaustive list of elements that may be considered under the "national interest" test, which have largely remained unchanged since 2010. The most recent and currently applicable FIRB Policy was released on 1 January 2018. It sets out the general elements of the "national interest" test which apply to all sectors. These include (1) national security, (2) competition, (3) other Australian government policies (including tax and environment), (4) impact on the economy and the community, and (5) the character of investors.<sup>63</sup> Furthermore, proposals of foreign government investors are subject to an additional consideration of their commercial, political or strategic objectives,<sup>64</sup> and whether the pursuit of such objectives may be contrary to Australia's national interest.<sup>65</sup> For this purpose, the Australian Government considers the governance arrangements of the foreign government investor in assessing whether such arrangements "could facilitate actual or potential control by a foreign government".<sup>66</sup> Other factors to be considered include whether they operate on a commercial basis, the status (including the size, nature and composition) of non-government interest in the foreign government

<sup>59</sup> AUSTRALIAN GOVERNMENT, TREASURY, *AUSTRALIA'S FOREIGN INVESTMENT POLICY: A GUIDE FOR INVESTORS* (1990), at iv.

<sup>60</sup> Treasurer, *Australia's Foreign Investment Policy 2013*, *supra* note 5, at 1; Wayne Swan, *Australia, China and This Asian Century*, THE TREASURY (Speech to the Australia-China Business Council, Melbourne, July 4, 2008), <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=speeches/2008/021.htm&pageID=010&min=wms&Year=2008&DocType=1>; Treasurer, *Australia's Foreign Investment Policy 2018*, *supra* note 40, at 1.

<sup>61</sup> Rae, *supra* note 6, at 6; KIRCHER, *supra* note 6, at 1, 7; Lumsden, *supra* note 6, at 2; Editorial, *Scrap the FIRB*, FIN. TIMES, Feb. 10, 2005, <http://www.ft.com/intl/cms/s/0/e94b0012-7b0d-11d9-a3ea-00000e2511c8.html#axzz2kP7KJVpJ>; Bath, *supra* note 58, at 16–17.

<sup>62</sup> DYSTER & MEREDITH, *supra* note 4, at 214.

<sup>63</sup> Treasurer, *Australia's Foreign Investment Policy 2018*, *supra* note 40, at 8–9.

<sup>64</sup> *Id.* at 10–11.

<sup>65</sup> UREN, *supra* note 58, at 196.

<sup>66</sup> Treasurer, *Australia's Foreign Investment Policy 2018*, *supra* note 40, at 10.

investment, etc.<sup>67</sup> In addition, some sector-specific considerations apply. For example, regarding foreign investment in Australia's agricultural sector, the Australian Government will consider, in addition to the general factors above, the effect of the investment on "Australia's capacity to remain a reliable supplier of agricultural production, both to the Australian community and [its] trading partners."<sup>68</sup> In relation to foreign investment in residential land, the investment should ensure an increase in Australia's housing stock.<sup>69</sup>

Accordingly, while the FIRB Policy provides some clarity on the elements of the "national interest" test, these elements are set out in a broad manner that gives the regulators much flexibility in the decision-making process. As will be discussed below, the wide discretion of the regulators in applying the "national interest" test has rendered the FIRM uncertain and a potential barrier to foreign investment, especially in high-profile transactions. Some selected examples below offer an illustration of how the "national interest" test may be applied against Chinese investment.

## 2. Application of "national interest" considerations in selected Chinese investment

One of the most high-profile Chinese investments in Australia was China Minmetals Non-ferrous Metals Co Ltd's (Minmetals) proposal to acquire 100% of OZ Minerals Ltd (OZM) in 2009. This investment proposal was initially rejected based on national security concerns,<sup>70</sup> but was later approved with legally enforceable conditions when such concerns were properly addressed.<sup>71</sup> Minmetals' original proposal included an acquisition of Prominent Hill mining operations, situated in the Woomera Prohibited Area (i.e. the weapons testing range) in South Australia.<sup>72</sup> The proposal was first rejected because this area is unique and sensitive to Australia's national defence.<sup>73</sup> Afterwards, Minmetals modified its proposal to exclude the Prominent Hill mine, and had it resubmitted. A month later, the modified proposal was approved by the Treasurer with legally enforceable conditions in order

---

<sup>67</sup> Treasurer, Australia's Foreign Investment Policy 2018, *supra* note 40, at 10–11.

<sup>68</sup> *See id.* at 9–10.

<sup>69</sup> *See id.* at 10.

<sup>70</sup> Wayne Swan, *Foreign Investment*, THE TREASURY (Media Release, Mar. 27, 2009), <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/029.htm&pageID=003&min=wms&Year=2009&DocType=0>.

<sup>71</sup> Wayne Swan, *Foreign Investment Decision No. 043*, THE TREASURY (Media Release, Apr. 23, 2009), <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/043.htm&pageID=003&min=wms&Year=2009&DocType=0>.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

to ease other "national interest" concerns.<sup>74</sup> These conditions require Minmetals, for example,

1. to operate the acquired assets as a separate business unit according to commercial objectives, including the maximisation of product prices and long-term profitability and value.
2. to have the OZM Assets in Australia owned by and publicly acknowledged to be owned by companies incorporated, headquartered and managed in Australia under a predominantly Australian management team, with:
  - a. the Chief Executive Officer and Chief Financial Officer of the Australian operations having their principal place of residence in Australia;
  - b. the Boards of those companies each having at least two directors whose principal place of residence is in Australia;
  - c. the majority of all regularly scheduled board meetings of those companies in any calendar year being held in Australia; and
  - d. an annual financial report in accordance with section 295 of the Corporations Act 2001, together with an annual director's report ... being lodged with the Australian Securities and Investments Commission and being made accessible to the Australian public on the Group's Australian website.
3. that products produced by OZM Assets in Australia will be sold on an arms-length basis by the Australian Group's sales team headquartered in Australia, with base and precious metals prices being determined by reference to international observable benchmarks (e.g., LME and COMEX) in line with market practice...<sup>75</sup>

Admittedly, the "national security" concern in relation to the Woomera Prohibited Area seems valid in a general sense. Practitioners are nevertheless concerned about the lack of transparency on what "national security" actually means.<sup>76</sup>

The conditions imposed on Minmetals' acquisition of OZM also create uncertainties. These conditions appear to be related to the transparency of price, corporate governance, and operational requirements. However, the Treasurer did not clarify which elements of the "national interest" test these conditions relate to; nor did the

---

<sup>74</sup> Wayne Swan, Foreign Investment Decision No. 043, *supra* note 71.

<sup>75</sup> *Id.*

<sup>76</sup> Interview with Michael Harrison, Partner, Ashurst, in Sydney (Jan. 6, 2016).

Treasurer provide any reason for imposing these conditions. Based on interviews with experienced lawyers, some tentative observations can be made. For instance, the reasons for the requirement of local directors in the holding companies incorporated in Australia may be twofold. Firstly, directors that are ordinarily residents in Australia have a better understanding of directors' duties and responsibilities, standard corporate governance, and the management and operation of the companies.<sup>77</sup> Furthermore, local directors "at least have ... access to advisers with knowledge of the Australian law on directors' duties."<sup>78</sup> Therefore, this condition provides more comfort to the Australian Government on the composition of the company board and hence the governance and decision-making of the company.<sup>79</sup> Secondly, with local directors, it is easier to enforce an order imposed on them when things go wrong. Therefore, this condition may allow the Australian Government to gain a sense of having "jurisdiction link".<sup>80</sup> In other words, it gives the Australian Government greater confidence in enforcing penalties or otherwise taking steps against breaches of conditions. That would be difficult if a director stays overseas such as in China.<sup>81</sup>

The uncertainties of the FIRB review in general and the "national interest" test in particular are not limited to SOEs (e.g. Minmetals), but also private investors. In November 2015, the Treasurer rejected a proposal by a Chinese-led consortium to acquire S. Kidman and Co. Limited (Kidman) – Australia's largest private landholder – on the grounds that the total portfolio of Kidman properties was too sizeable and significant for Australia's national interest and that the properties on sale involved the Woomera Prohibited Area.<sup>82</sup> While the Treasurer kept the door open for alternative proposals that address these concerns, the decision above did not clarify how the "national interest" concern could be addressed to his satisfaction. In April 2016, the Treasurer blocked a revised proposal in which Chinese-based Dakang Australia Holdings (Dakang) and Australian Rural Capital proposed to acquire, respectively, an 80% and 20% interest in Kidman, with the Woomera Prohibited Area excluded. The proposal again failed to pass muster based on the "national interest" test, as the Chinese investor

---

<sup>77</sup> Interview with Anthony Latimer, Partner, Norton Rose Fulbright, in Sydney (Sep. 16, 2015); Interview with Andrew Lumsden, Partner, Corrs, in Sydney (Oct. 5, 2015); Interview with Marcus Clark, Partner, Johnson Winter & Slattery, in Sydney (Dec. 10, 2015); Telephone interview with an anonymous expatriate Chinese SOE officer (Oct. 20, 2015).

<sup>78</sup> Interview with Anthony Latimer, *supra* note 77.

<sup>79</sup> Interview with Marcus Clark, *supra* note 77.

<sup>80</sup> Interview with Kylie Brown, Partner, Allens, in Sydney (Dec. 1, 2015).

<sup>81</sup> Telephone interview with Liming Huang, Special Counsel, Corrs (Dec. 11, 2015).

<sup>82</sup> Treasurer of the Commonwealth of Australia, *Statement on Decision to Prevent Sale of S. Kidman & Co. Limited*, THE TREASURY (Media Release, Nov. 19, 2015), [sjm.ministers.treasury.gov.au/media-release/011-2015/](http://sjm.ministers.treasury.gov.au/media-release/011-2015/).

was to obtain a majority ownership.<sup>83</sup> In December 2016, a further revised proposal was lodged and eventually approved by the Treasurer, whereby the "national interest" concern was removed with Kidman's largest station being acquired by a local farming family (i.e. the Williams), and the remainder of the business by Australian Outback Beef Pty Ltd, held by Australia's Hancock Beef Pty Ltd (67%) and China's Shanghai CRED Real Estate Stock Co. Ltd (Shanghai CRED) (33%).<sup>84</sup> This deal "ensured that control of the board and the day-to-day operations would remain Australian".<sup>85</sup>

The protracted Kidman transaction suggests that a majority foreign ownership of high-profile Australian farmland may well raise "national interest" concerns. Notably, the Chinese bidder in this transaction, Dakang, is a private company owned by Shanghai Pengxin Group Co., Ltd. (also a private company holding 51% interest) and Shanghai CRED (a Shanghai stock exchange listed company holding 49% interest). Accordingly, "national interest" concerns about foreign ownership are not limited to state ownership, but may also target private ownership depending on the significance of the business or assets involved. However, the Treasurer's decision does not provide sufficient guidance for investors, as it is unclear on which of the five national interest criteria the rejection was based. More importantly, the position of the government on issues such as the ownership structure and exact shareholding may vary from case to case. In this case, the Australian Government's position on these issues was not communicated to the investors until the third proposal, despite the investors' regular liaison with the FIRB during the process (which is common in significant investment transactions). The uncertainties associated with the FIRB process created substantial financial and administrative burdens for the investors in terms of employing professional advisors, preparing bids and negotiating with Kidman's board and potential partners, managing internal decision-making and Chinese government approvals, etc. Once the investment was made public during the Treasurer's first decision, new investors could join the tendering process, increasing competition and bidding price for the initial investors. For listed companies, the loss of confidentiality of proposed investment can also affect share prices and consequently the prospects of their business.

---

<sup>83</sup> Treasurer of the Commonwealth of Australia, *Preliminary Decision of Foreign Investment Application for Purchase of S. Kidman & Co Limited*, THE TREASURY (Media Release, April 2016), [sjm.ministers.treasury.gov.au/media-release/050-2016/](http://sjm.ministers.treasury.gov.au/media-release/050-2016/).

<sup>84</sup> Treasurer of the Commonwealth of Australia, *Approval of S. Kidman & Co. Limited Sale to Increase Australian Ownership*, THE TREASURY (Media Release, Dec. 9, 2016), [sjm.ministers.treasury.gov.au/media-release/130-2016/](http://sjm.ministers.treasury.gov.au/media-release/130-2016/).

<sup>85</sup> KPMG and The University of Sydney China Studies Centre, *supra* note 1, at 14.

### *B. Chinese SOEs Investment*

One of China's attempts in the ChAFTA negotiations was to relax the FIRB review process for SOEs investment by raising the review threshold from zero to A\$1 billion.<sup>86</sup> This attempt was unsuccessful due to the lasting and widespread concern in Australia about China's state ownership and government-driven non-commercial objectives.<sup>87</sup> Given China's failure to raise the screening threshold for SOEs in the ChAFTA negotiations, the situation remains such that all direct investment by Chinese government investors in Australia, *regardless of value*, is subject to FIRB scrutiny. Arguably, the 2015 amendments of FATA 1975 have strengthened the framework for reviewing Chinese government investment.

#### *1. Rules regulating foreign government investors*

The modified FATA 1975 brought foreign government investment within the legislative framework,<sup>88</sup> and confirmed that investment proposed by foreign government investors is subject to review. Further, it clarified the scope of reviewable transactions by (1) revising the definition of foreign government investors, (2) clarifying the meaning of "direct interest", and (3) introducing the concept of "associate" when calculating the amount of "direct interest." These modifications may affect the treatment of Chinese government investors under Australia's FIRM.

##### *a) Definition of a Foreign Government Investor*

The modified legislation defines a foreign government investor as an entity that satisfies any of the following criterion:

- (a) the person is a foreign government or separate government entity;
- (b) the entity (i.e. a corporation, a trustee of a trust, a General Partner at a limited partnership), in which a foreign government

---

<sup>86</sup> Lingling He, *On Re-invigorating the Australia-China Free Trade Agreement Negotiation Process*, 14 JWIT 672, 684–85 (2013).

<sup>87</sup> See John Larum and Jingmin Qian, *A Long March: The Australia-China Investment Relationship*, AUSTL. CHINA BUS. COUNCIL (October 2012), 10–11, [http://acbc.com.au/admin/images/uploads/Copy\\_3news\\_nat\\_fdi\\_report\\_oct.pdf](http://acbc.com.au/admin/images/uploads/Copy_3news_nat_fdi_report_oct.pdf); Jeffrey Wilson, *Managing the Controversies over Chinese Foreign Investment – Lessons from Australia* 1(1) CHINA'S WORLD 9, 15–16 (2015); Peter Drysdale, *A New Look at Chinese FDI in Australia* 19(14) CHINA & WORLD ECON. 54, 63–65 (2011); He, *supra* note 86, at 685–86.

<sup>88</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 20 August 2015, 8983–85 (Tony Smith).

or separate foreign government entities (together with any one or more associates), holds at least a 20% interest in the entity;

- (c) the entity (i.e. a corporation, a trustee of a trust, a general Partner at a limited partnership), in which a foreign government or separate foreign government entities of more than one foreign country (or parts of more than one foreign country), together with any one or more associates, holds at least a 40% aggregate interest in the entity;
- (d) a corporation, a trustee of a trust, or a general partner at a limited partnership in (b) and (c) including the one when assuming the references to foreign government (or foreign governments) in those paragraphs included references to a foreign government investor (or foreign government investors) (i) within the meaning of those paragraphs; or (ii) as a result of a previous application of this paragraph.<sup>89</sup>

Compared with the previous FIRB Policy, three major modifications can be identified in the latest definition:

(1) the FATA 1975 introduced a higher threshold of 20% in terms of government interest in an entity (as opposed to 15% under the previous FIRB Policy);

(2) it is clarified that the definition of "foreign government investor" is based on the interest held by a government-related shareholder. That shareholder could be either a foreign government or a foreign government investor. Furthermore, the latter type of shareholder includes an investor whose interest is not directly held by a foreign government, but held by another foreign government investor.<sup>90</sup> In practice, an assessment of a "foreign government investor" traces back to the "ultimate owner" or "ultimate investor";<sup>91</sup>

(3) the precondition of "being controlled by the foreign government" in the old definition of "foreign government investor" is removed from the legislation. This precondition means that a corporate-type entity is still treated as a foreign government investor if it is controlled by a government entity.<sup>92</sup> While this precondition no longer appears in the modified definition, one should not overstate the

<sup>89</sup> *Foreign Acquisitions and Takeovers Act 1975* (Cth) (amended 2015, effective Dec. 1, 2015), s 4; *Foreign Acquisitions and Takeovers Regulations 2015* (Cth), reg 17.

<sup>90</sup> *Foreign Acquisitions and Takeovers Regulations 2015* (Cth), reg 17(e)(ii).

<sup>91</sup> Interview with Andrew Lumsden, *supra* note 77; Interview with Liming Huang, *supra* note 81; Interview with Anthony Latimer, *supra* note 77; Interview with Michael Harrison, *supra* note 76.

<sup>92</sup> *Foreign Acquisitions and Takeovers Act 1975* (Cth) (before 2015 amendment, effective till Nov. 30, 2015), s 17F; *Foreign Acquisitions and Takeovers Regulations 1989* (Cth), reg 10. Without questioning the validity of FIRB Policy in expanding the meaning of foreign government investors, precondition (d) is expanded by FIRB Policy in 2015. Treasurer, *Australia's Foreign Investment Policy 2015*, *supra* note 52, at 17.

practical implication of its absence. It is suspected that this precondition may remain applicable such that a corporate-type entity controlled by a government entity will continue to be treated as a "foreign government investor".<sup>93</sup> In this regard, control of an entity can be established by holding a substantial interest in the entity or a particular share with the ability to appoint directors.<sup>94</sup> Such control may also be established even if the government does not have any shareholding but has the authority to appoint directors.<sup>95</sup>

*b) Definition of "Direct Interest"*

The definition of "direct interest" in share or asset acquisition has been added. As mentioned earlier, FIRB approval is required only when a foreign government investor proposes to acquire a direct interest in Australian businesses or assets. While the FIRB Policy sets out a threshold of 10% as a "direct interest", there was no statutory definition until the 2015 amendments (as listed below). Previously, an interest lower than 10% may still be treated as a "direct interest" if control of the target is established by other circumstances.<sup>96</sup>

The amended *Foreign Acquisitions and Takeovers Regulations 2015* (Cth) defines "direct interest" as follows:

- (a) an interest of at least 10% in the entity or business; or
- (b) an interest of at least 5% in the entity or business if the person who acquires the interest has entered a legal arrangement relating to the businesses of the person and the entity or business; or
- (c) an interest of any percentage in the entity or business if the person who acquired the interest is in a position:
  - (i) to influence or participate in the central management and control of the entity or business; or
  - (ii) to influence, participate in or determine the policy of the entity or business.<sup>97</sup>

Accordingly, this definition clarifies that "direct interest" could be less than 10%, and that 5% or more may be considered as "direct interest" if a particular condition is met. Paragraph (c) serves as a

---

<sup>93</sup> Telephone Interview with Malcolm Brennan, Partner, KWM (Jan. 7, 2016). He has more than 20 years working experience in dealing with Australia's FIRM.

<sup>94</sup> Interview with Michael Harrison, *supra* note 76.

<sup>95</sup> *Id.*

<sup>96</sup> Treasurer, *supra* note 52, at 16.

<sup>97</sup> *Foreign Acquisitions and Takeovers Regulations 2015* (Cth), reg 16.



catch-all clause and provides the Treasurer with broad discretion in deciding whether an acquisition of "direct interest" is proposed. Investment falling outside of paragraphs (a) and (b) may nevertheless be covered by this catch-all paragraph.<sup>98</sup>

*c) Definition of "Associate"*

Finally, the amended legislation provides the concept of "associate" of foreign government investors. The lack of such a definition before led to practical uncertainties as to whether the rules that apply to the associates of a foreign *private* investor also apply to a foreign government investor.<sup>99</sup> With respect to foreign *private* investors, the "associate" rules suggest that the total amount of interest held by a foreign *private* person includes the interest held by any "associates" of that private investor. In practice, this accumulated interest determines whether FIRB review is required.<sup>100</sup>

The amended FATA 1975 draws on the definition of "associates" of a foreign private investor and provides that a foreign government investor's associates include any partner in a partnership, and any holding entity or senior officer of the entity.<sup>101</sup> However, the range of "associate of a foreign government investor" is much broader than that of a "foreign private investor", because all government investors from *the same country* are treated as being associated. The relevant part of the legislation reads:

(1) Each of the following persons is an *associate* of a person:

- ...(1) if the person is a foreign government, a separate government entity or a foreign government investor in relation to a foreign country (or a part of a foreign country):
  - (i) any other person that is a foreign government in relation to that country (or any part of that country); or
  - (ii) any other person that is a separate government entity in relation to that country (or any part of that country); or
  - (iii) any other foreign government investor in relation to that country (or any part of that country).<sup>102</sup>

<sup>98</sup> Telephone Interview with Adam Handley, Managing Partner, Minter Ellison; Director, Australia China Business Council; President, Australia China Business Council in Western Australian (Jan. 20, 2016).

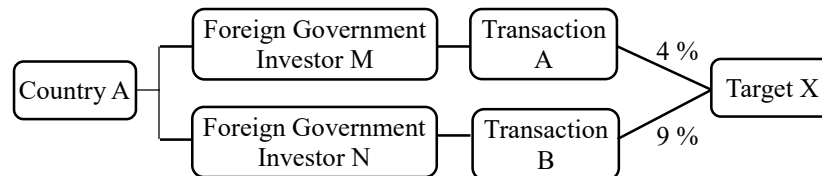
<sup>99</sup> Interview with Marcus Clark, *supra* note 77.

<sup>100</sup> *E.g., Foreign Acquisitions and Takeovers Act 1975* (Cth) (before 2015 amendment, effective till Nov. 30, 2015), s 18(3).

<sup>101</sup> See *id.* para ak, sub-s 6(1).

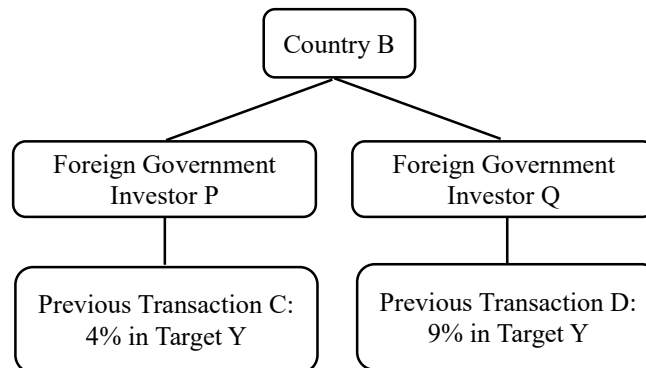
<sup>102</sup> *Foreign Acquisitions and Takeovers Act 1975* (Cth) (amended 2015, effective Dec. 1, 2015), para 1 sub-s 6(1).

The practical effect of the accumulation of the interest held by a foreign government investor and its associates may be explained by the two examples below. In the first example illustrated in Figure 4, two *simultaneous* transactions by foreign government investors from the same country will be accumulated. This has the effect of making both transactions notifiable, even though neither of the individual transactions are notifiable.<sup>103</sup>



**Figure 4:** Extended Scope due to the Associate Concept: Two Simultaneous Transactions by Foreign Government Investors from Country A<sup>104</sup>

In the second example illustrated in Figure 5, two *subsequent* transactions by foreign government investors from the same country will be accumulated. This means that the latter transaction is notifiable, although it is not if considered as a separate transaction.



**Figure 5:** Extended Scope due to the Associate Concept: Two Subsequent Transactions by Foreign Government Investors from Country B<sup>105</sup>

This definition of "associate" and the resultant accumulative approach to determining "direct interest" is unfriendly to Chinese SOEs investment, as it may require more FIRB notifications by SOEs. Furthermore, it creates compliance issues for SOEs. In the figures

<sup>103</sup> This example simplifies the discussion by assuming an investment acquiring less than 10% of the target (i.e. the general notifiable threshold for foreign government investors) is not notifiable.

<sup>104</sup> This figure is drawn by the authors.

<sup>105</sup> This figure is drawn by the authors.

above, it may be technically impossible for foreign government investors M, N, and Q to know the existence of transactions B, A and C respectively. For instance, an investor holding less than 5% (i.e. Transaction C) is unlikely to be disclosed to investor Q, as such disclosure is not required.<sup>106</sup> This may result in a failure of investor Q to comply with the notification requirement.<sup>107</sup> Given the issue of compliance,<sup>108</sup> the FIRB issued a Guidance Note in July 2016, declaring that the Australian Government will not impose fines or pursue penalties or offenses for this kind of breach, as the foreign government investor in concern is "not privy to information on such holdings."<sup>109</sup> This position has also been confirmed by a Treasury officer.<sup>110</sup> Despite this, the likely lack of information on a previous SOE investment means that a subsequent SOE investor may not be able to engage in the FIRB process at an early stage to seek FIRB's guidance on any potential issues of "national interest".

## 2. Summary

In short, the amendments of FATA 1975 have clarified the concepts of importance to the determination of whether FIRB review is required in practice. The clarifications seem to have broadened the coverage of a "foreign government investment" and have provided the Treasurer with wide discretion in determining whether an investment is undertaken by a foreign government investor. This is significant because once an investor is considered as a foreign government entity, the FIRB review is obligatory, regardless of the value of a proposed investment. Moreover, "national interest" factors beyond those applicable to private investment are applied, such as the commerciality and independence of an investment. These additional factors and the enduring concern about foreign state ownership are likely to increase the complexity of the review of, and result in the imposition of more and stricter conditions on, a proposed investment.

### *C. FIRB Notification Thresholds*

As mentioned earlier, Australia's FIRM only reviews foreign investment proposals that exceed certain monetary thresholds. Such thresholds vary according to the targeted businesses (i.e. sensitive or non-sensitive sectors), the country of origin (based on free trade agreement (FTA) commitments), the value of investment, and the character of investors (i.e. government or private investor). For instance, prior approval is required for foreign private investors that

<sup>106</sup> Interview with Malcolm Brennan, *supra* note 93.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Australian Government, *Foreign Government Investors [Guidance Note 23]*, FIRB (last updated on Jul. 1, 2017), <http://firb.gov.au/resources/guidance/gn23/>.

<sup>110</sup> Interview with Anonymous Treasury Officer, in Canberra (May 5, 2016).

propose to acquire a substantial interest (at least 20 per cent) in an Australian entity that is valued above A\$261 million.<sup>111</sup> A higher threshold of A\$1,134 million applies to private investment from Australia's FTA partners (officially named as "agreement country investors") in non-sensitive sectors, whereas the A\$261 million threshold applies if the investment involves sensitive businesses.<sup>112</sup> A A\$0 threshold applies to foreign government investors acquiring a direct interest in an Australian entity or asset.<sup>113</sup>

While the ChAFTA neither liberalizes the FIRB notification requirements on foreign government investors (particularly SOEs) nor simplifies the "national interest" test, it does lead to an increase in the notification thresholds for Chinese private investors. Table 3 summarizes the current thresholds for Chinese investors.

**Table 3: Review Thresholds for Chinese Investors**<sup>114</sup>

Type of Chinese Investor	Business Acquisition	Threshold
Private investors	Non-sensitive business	A\$1,134 million
	Sensitive business	A\$261 million
	Media sector (more than 5%)	A\$0
	Agribusinesses	A\$57 million
Government investors	All direct interest in an Australian entity or Australian business	A\$0
	Starting a new Australian business	A\$0
Type of Chinese Investor	Land Acquisition	Threshold
Private investors	Residential land	A\$0
	Agricultural land	A\$15 million (cumulative)
	Vacant commercial land	A\$0
	Developed commercial land	A\$1,134 million
	Mining and production tenements	A\$0
Government investors	All types of land	A\$0

Specifically, three major changes have been introduced as a result of the ChAFTA, including (1) an increase of the threshold from A\$261 million to A\$1,134 million for private investment in non-sensitive sectors; (2) an increase from A\$261 million to A\$1,134 million for private investment in developed commercial land such as hotels, commercial offices, tourist resorts; and (3) an increase from A\$57 million to A\$1,134 million for so-called low threshold commercial land, which includes mines and critical infrastructure such as airports and ports. Most Chinese private investments may not reach the

<sup>111</sup> Treasurer, *supra* note 40, at 3.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*, at 5.

<sup>114</sup> *Id.*, at 14–5.

increased thresholds,<sup>115</sup> and hence would not be subject to FIRB approval.

However, as these screening thresholds increase, the FIRB review process has also tightened in several aspects. Firstly, a A\$57 million screening threshold for foreign investment in agribusiness was introduced.<sup>116</sup> Thus, "acquiring a direct interest (generally at least 10%, or the ability to influence, participate in or control) in an Australian agribusiness where the value of the investment is more than [A\$57] million (regardless of the value of the agribusiness)" must seek FIRB approval.<sup>117</sup> Previously, the threshold was A\$252 million for investors from non-FTA partners.<sup>118</sup> In comparison, a much higher threshold of A\$1,134 million applies to investment from FTA partners such as Chile, New Zealand and the US. This higher threshold does not apply to Chinese investors. Therefore, the introduction of this regime requires more Chinese investment in agribusinesses to undergo FIRB scrutiny.

Secondly, the screening threshold for foreign investment in agricultural land was lowered from A\$252 million to A\$15 million.<sup>119</sup> In contrast, investors from Chile, New Zealand, and the US enjoy a threshold of A\$1,134 million and investment from Singapore and Thailand (i.e. both FTA partners) a threshold of A\$50 million. Furthermore, the A\$15 million threshold is calculated based on the cumulative value of agricultural land owned by a foreign person, while the higher thresholds are on the contrary not cumulative. Consequently, Chinese investment is disadvantaged and will need to seek FIRB approval in many more cases. In addition, the FIRM requires registration for holding of agricultural land. According to the *Register of Foreign Ownership of Water or Agricultural Land Act 2015* (Cth), the following events should be notified to the Australian Taxation Office (ATO), including: a foreign person (1) starting to hold agricultural land; (2) ceasing to hold agricultural land; (3) an investor becoming a foreign person while holding agricultural land; (4) ceasing to be a foreign person while holding agricultural land; (5) land becoming agricultural land while held by a foreign person; or (6) land ceasing to be agricultural land while held by a foreign person.<sup>120</sup> This registration requirement was brought into the FIRM to increase the transparency of the levels of foreign ownership of agricultural land in

<sup>115</sup> Private Chinese entrepreneurs' ODI investments tend to be less than US\$300 million. Ma, Man & Deng, *supra* note 17, at 2.

<sup>116</sup> Hockey, *supra* note 52; Morrison, *supra* note 51.

<sup>117</sup> Treasurer, *supra* note 40, at 4.

<sup>118</sup> Treasurer, *supra* note 52, at 3.

<sup>119</sup> Joe Hockey, *Strengthening Scrutiny and Transparency around Foreign Investment in Agricultural—Land Register Starts 1 July*, THE TREASURY (Joint Media Release with the Hon Barnaby Joyce, Jun. 29, 2015), [jhb.ministers.treasury.gov.au/media-release/066-2015/](http://jhb.ministers.treasury.gov.au/media-release/066-2015/); Morrison, *supra* note 51.

<sup>120</sup> *Register of Foreign Ownership of Water or Agricultural Land Act 2015* (Cth), ss 2126.

Australia.<sup>121</sup> According to the data collected by the ATO, Chinese investors became the second largest foreign agricultural holder in 2016-2017.<sup>122</sup> The total amount of agricultural land held by Chinese investors was 9.1 million hectares, which is only 0.6 million hectares behind that of the UK.<sup>123</sup> The sharp increase in the level of Chinese ownership of agricultural land had much to do with large transactions such as the Kidman deal discussed above.<sup>124</sup> The high level of Chinese ownership has raised growing concerns from the Australian Government and the community about "China buying Australian land." These concerns may lead to tougher FIRB review of Chinese investment in agricultural land and businesses in Australia.

Thirdly, with respect to investment in mining and production tenements, all Chinese investment is required to notify FIRB regardless of value, while investment below A\$1,134 million from Chile, New Zealand and the US is not required. As China's urbanization and industrialization continues and accelerates under its new development model,<sup>125</sup> mining investment will remain a substantial portion of Chinese investment in Australia despite the investment diversification. Thus, the FIRB notification is likely to remain a significant barrier to Chinese investment in the mining sector.

In short, despite the ChAFTA, Chinese investors are not treated as favorably as Australia's other FTA partners but are rather treated the same as investors from Australia's non-FTA partners in several major areas of investment. The less favorable thresholds above would reduce the benefits from the increased thresholds for private investors, as Chinese private investment in these sectors is still likely to trigger the FIRB process. The requirement of FIRB review places Chinese investors in an unfavorable position given the financial and administrative burdens involved, the possibility of an investment proposal losing confidentiality during the period of FIRB assessment, the commercial ramifications for investors, and the uncertainties associated with the review process as discussed above.

#### *D. Penalties on Non-Compliance*

As a general rule applicable to every decision, order or notification given by the Treasurer (or the Treasurer's delegate), the modified FATA 1975 confirms that non-compliance with the FIRM will incur

---

<sup>121</sup> Hockey, *supra* note 52.

<sup>122</sup> Australian Taxation Office (ATO), *Register of Foreign Ownership of Agricultural Land – Report of registrations as at 30 June 2017*, ATO, at 4, 8 (June 30, 2017), <http://firb.gov.au/about/publication/register-of-foreign-ownership-of-agricultural-land-report-of-registrations-as-at-30-june-2017/>.

<sup>123</sup> ATO, *supra* note 123, at 4, 8.

<sup>124</sup> EABER & CCIEE, *supra* note 27, at 65; KPMG and USYD Centre, *supra* note 1, at 31.

<sup>125</sup> EABER & CCIEE, *supra* note 27, at 65; KPMG and USYD Centre, *supra* note 1, at 31.

strict civil and criminal penalties. The penalty regime has been tightened in several aspects.

Firstly, the penalty regime applies to a wide range of people who fail to comply with the FIRM, including a foreign investor,<sup>126</sup> a corporate officer of the foreign investor,<sup>127</sup> and third parties who knowingly assist another person to breach the civil or criminal penalty provisions of statutory requirements on foreign investment.<sup>128</sup> Secondly, criminal penalties are increased to A\$157,500 fines or three years imprisonment for individuals and A\$787,500 for companies.<sup>129</sup> Thirdly, disposal or divestment orders are supplemented by civil pecuniary penalties and infringement notices for less serious breaches.<sup>130</sup> A disposal order may be issued where the Treasurer is satisfied that a significant action has been taken and the result of it is contrary to national interest.<sup>131</sup> For example, if a foreign investment in Australia's agribusiness fails to notify the FIRB and is considered to be inconsistent with Australia's national interest, then the Treasurer may order the investor "to dispose of the interest within a specified period to one or more persons who are not associates of the person."<sup>132</sup> Fourthly, enforcement of the foreign investment rules is strengthened by the transfer of all of the residential real estate functions to the ATO. These functions include the registration of agricultural land,<sup>133</sup> the review of real estate acquisition proposals,<sup>134</sup> and some duties in the enforcement of the FIRM.<sup>135</sup> It is believed that the ATO is in a better position to "identify possible breaches" and pursue the identified investors,<sup>136</sup> through its "data-matching systems and specialized staff with compliance experts."<sup>137</sup> To enhance enforcement and transparency, the Australian Government has also started "negotiations with the states and territories to use their land titles data to expand the register to include all land (including residential real

<sup>126</sup> *Foreign Acquisitions and Takeovers Act 1975* (Cth) (amended 2015, effective Dec. 1, 2015), pt 5 div 2.

<sup>127</sup> *Id.*, ss 102, 103.

<sup>128</sup> Australian Government, *Third Party Obligations [Guidance Note 13]*, FIRB (Jul. 1, 2016), [firb.gov.au/files/2015/12/13\\_GN\\_FIRB\\_2016.pdf](http://firb.gov.au/files/2015/12/13_GN_FIRB_2016.pdf); Hockey, *supra* note 52.

<sup>129</sup> Treasurer, *supra* note 40, at 16-9.

<sup>130</sup> *Id.*

<sup>131</sup> *Foreign Acquisitions and Takeovers Act 1975* (Cth) (amended 2015, effective Dec. 1, 2015), s 67.

<sup>132</sup> *Id.*

<sup>133</sup> Foreign persons (including foreign government investors) holding interests in agricultural land (freehold interests and leasehold interests likely to exceed 5 years) must register those interests with ATO (regardless of value of that land) through an online portal ([www.ato.gov.au/aglandregister](http://www.ato.gov.au/aglandregister)) within 30 days of changes in foreign holdings. *Register of Foreign Ownership of Agricultural Land Act 2015* (Cth).

<sup>134</sup> Treasurer, *Australia's Foreign Investment Policy*, FIRB (Jul. 1, 2016), at 2, <http://firb.gov.au/files/2015/09/Australias-Foreign-Investment-Policy-2016-2017.pdf>; Interview with Anonymous Treasury Officer, *supra* note 111.

<sup>135</sup> *Foreign Acquisitions and Takeovers Act 1975* (Cth) (amended 2015, effective Dec. 1, 2015), s 100; Commonwealth, *supra* note 88, at 8985.

<sup>136</sup> Hockey, *supra* note 52.

<sup>137</sup> *Id.*

estate).”<sup>138</sup> Fifthly and most recently, the Treasury announced several compliance arrangements to enhance foreign investment compliance with the FIRM. They include: “[1] placing additional resources into foreign investment compliance, [2] develop[ing] a revised compliance framework, [3] undertak[ing] a rolling annual compliance audit program and [4] establish[ing] a clearer compliance framework.”<sup>139</sup> While the details of these arrangements have not yet been released, the Treasury has sent a clear signal to foreign investors that it is the Australian Government’s priority to ensure strong compliance with the FIRM,<sup>140</sup> including compliance with conditions imposed by the FIRB on proposed investment resulting from the “national interest” test.

### *E. Implications for Chinese Investors*

As discussed at length above, Australia’s FIRM has been strengthened and applied in a way that may create significant obstacles to Chinese investments. One important way to address these obstacles is for the Chinese Government to negotiate higher thresholds for notifiable investment in the ongoing renegotiation of the ChAFTA investment rules. However, there has been no official statement which explains or indicates how long this negotiation may take and whether it may achieve the intended outcome.

Pending the ChAFTA renegotiations, Chinese investors will need to take appropriate steps to overcome the challenges posed by Australia’s FIRM and particularly the FIRB review process. Given the uncertainties associated with the “national interest” test, it is recommended that Chinese investors adopt the following approaches to deal with the FIRB.

Firstly, Chinese investors should actively engage in the FIRB process. The FIRB and its secretariat encourage foreign investors to engage with them before submitting a proposal.<sup>141</sup> This allows Chinese investors to discuss with the FIRB their investment proposals and potential “national interest” concerns so that these concerns can be clarified and addressed at an early stage. For instance, Chinese investors have raised questions on how the criterion of “impact on the community” may be applied under the “national interest” test.<sup>142</sup> Specifically, this criterion provides the flexibility for the Australian Government to consider “the interests of employees, creditors and

---

<sup>138</sup> Hockey, *supra* note 52.

<sup>139</sup> FIRB, *Enhancing Foreign Investment Compliance*, FIRB (Sep. 2017), <http://firb.gov.au/slide/enhancing-foreign-investment-compliance/>.

<sup>140</sup> *Id.*

<sup>141</sup> Treasurer, *supra* note 40, at 12.

<sup>142</sup> During a seminar that the authors have attended, some representatives of large Chinese SOEs expressed such uncertainty has raised their concern before investing in Australia.



other stakeholders.”<sup>143</sup> For example, Archer Daniels Midland Company's proposed acquisition of 100% of the shareholding in GrainCorp Limited in 2013 was rejected partly because of "a high level of concern from stakeholders and the broader community... [and] allowing it to proceed could risk undermining public support for the foreign investment regime and ongoing foreign investment more generally.”<sup>144</sup> This suggests that the consideration of "the impact on the community" may involve a wide range of stakeholders and issues which may well vary in different transactions and in different economic and political environment. Another example is foreign investment in agricultural land and agribusiness, in which the Australian Government takes into account the effect of a transaction on "Australia's capacity to remain a reliable supplier of agricultural production.”<sup>145</sup> The ambiguities in the above and the other criteria of the "national interest" test provide considerable discretion to the Australian authority and are likely to lead to unpredictable outcomes. Therefore, an early communication with FIRB would help Chinese investors to understand the potential issues in a particular transaction, to structure the transaction in a way that addresses these issues, and to avoid a lengthy review process with the FIRB issuing interim orders which would undermine the confidentiality of investment proposals.

Secondly, Chinese investors may attempt to reduce "national interest" concerns by limiting control of the target company, involving domestic management teams, and/or introducing domestic investors through joint ventures. In this regard, it is important for Chinese investors to realize that a majority ownership of a target company is not necessarily the best investment strategy. A majority ownership will trigger the FIRB approval process,<sup>146</sup> and requires investors to make substantial contributions and commitments to a target company before the investors have gained sufficient knowledge and experience in managing and operating a business in Australia. If a majority shareholding is preferred, this can be achieved gradually. For example, a Chinese investor may start by acquiring a minority interest and then increase its equity incrementally through further acquisitions. Such an approach has been adopted by some Chinese private investors such as in Chengdu Tianqi Industry (Group)'s acquisition of Talison Lithium Limited.<sup>147</sup> Furthermore, the Minmetals and Kidman cases discussed

---

<sup>143</sup> Treasurer, *supra* note 40, at 9.

<sup>144</sup> Treasurer, *Foreign Investment Application: Archer Daniels Midland Company's Proposed Acquisition of GrainCorp Limited*, THE TREASURY (Media Release, Nov. 29, 2013), <http://jbh.ministers.treasury.gov.au/media-release/026-2013/>.

<sup>145</sup> Treasurer, *supra* note 40, at 10.

<sup>146</sup> As is shown in Sections III.B & C, a direct interest of 10% by a Chinese SOE or of 20% by a Chinese private investor is generally notifiable to FIRB.

<sup>147</sup> See Bryan Frith, *US, Chinese Firms Battle to Buy Tailison Lithium*, THE AUSTL., 30 (2012); Bryan Frith, *Late Bid A Game-Changer for Talison Shareholders*, THE AUSTL., 20 (2012); Sarah-Jane Tasker, *Talison Backs Chinese Takeover*, THE AUSTL., 26 (2012); Bryan Frith, *China's State-Owned Enterprises*

above suggest that the Australian Government is inclined to involving domestic management teams and local investors in major transactions. Chinese investment with an initial minority shareholding will usually satisfy this as the management team of the target company may not change substantially after the transaction. While joint ventures are not traditionally the preferred way of investment for Chinese companies, this has changed in some sectors to allow for more flexible investment structures.<sup>148</sup> For example, besides the Kidman case, in Shandong RuYi Scientific & Technological Group Co. Ltd's (Shandong Ruyi) proposal to acquire the asset of Cubbie Group Limited in 2012, the proposal was submitted jointly with a local company Lempriere Pty Ltd (Lempriere), with Shandong Ruyi owning an 80% interest in the target company and Lempriere owning 20%.<sup>149</sup> The involvement of local companies in large transactions through joint ventures provides another way to ease "national interest" concerns.

Thirdly, Chinese investors should respect Australia's foreign investment policy, and lodge FIRB applications in a proper and timely manner with a complete and genuine disclosure of their proposed investment. To achieve this, it is recommended that Chinese investors seek advice from local law firms in dealing with FIRB. In practice, while large Chinese investors tend to involve Australian law firms from the very beginning of a proposed transaction, smaller and individual investors often do not do so due to lack of knowledge of Australia's regulatory framework and unwillingness to spend on legal services. This has resulted in violations of Australia's foreign investment laws, particularly in real estate transactions. In 2015, for example, 302 foreign persons declared their illegal holding of properties in the context of the Australian Government's enforcement of foreign investment laws, and 206 of them were found illegal.<sup>150</sup> While the data does not show how many Chinese investors were involved, it suggests strongly that the possibility of inadvertent breach remains high and therefore that advice from local law firms is essential for Chinese investment in Australia. A good record of compliance with Australia's foreign investment laws will build a positive image of

---

*Obtains FIRB Approval by Stealth*, THE AUSTL., 28 (2013); Matt Chambers, *Growth in Chinese Private Investment*, THE AUSTL. 20 (2014).

<sup>148</sup> For instance, when the first wave of Chinese investment came in around 2007-2008, "there was very strong desire to acquire 100% of a project or an asset, and not joint ventures". But nowadays, some SOEs started to study quite carefully joint venture model, and in "more sensitive sectors like agriculture... [there is] a much greater willingness to joint ventures and partner with local Australian business in some of those sectors." Interview with Adam Handley, *supra* note 99.

<sup>149</sup> Wayne Swan, *Foreign Investment Decision*, THE TREASURY (Media Release, Aug. 31, 2012), <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2012/079.htm&pageID=003&min=wms&Year=&DocType=0>.

<sup>150</sup> FIRB, *Annual Report 2015-16*, FIRB 44 (2016), available at [cdn.tspace.gov.au/uploads/sites/79/2017/04/1516-FIRB-Annual-Report.pdf](http://cdn.tspace.gov.au/uploads/sites/79/2017/04/1516-FIRB-Annual-Report.pdf).

Chinese investors and provide long-term benefits for Chinese investment in Australia as a whole. In the long run, it may also contribute to dispelling the Australian Government's concerns about Chinese investment and persuading Australia to further liberalize its foreign investment regime for Chinese investors under the ChAFTA.

The recommendations above also apply to Chinese SOE investors. In addition, it is worth pointing out that while the zero notifiable threshold applies to all foreign government investors, its impact on Chinese investors tends to be more significant as SOEs, which as the essential part of Chinese government investors, continue to play a leading role in China's ODI in Australia. Like private investors, it is advisable for Chinese SOEs to actively engage with the FIRB at an early stage of a proposed investment, so as to clarify the position of the FIRB and the structure of the investment that is most acceptable to the FIRB.

#### IV. CONCLUSION

China's "Go Global" policy has been the major driving force of the exponential growth of Chinese outbound investment including in Australia over the past decade. While this policy may be amended, upgraded according to China's economic and strategic objectives, its continuing application suggest that the Chinese Government remains committed to promoting ODIs. Indeed, China has recently tightened regulations over outbound investment by private companies to address capital flight and irrational investments.<sup>151</sup> However, this tightened scrutiny seems to be intended to control the over-heated investment in real property and entertainment industries overseas. Significantly, the regulation reiterated the fundamental importance of the "Go Global" policy, including through investment diversification into non-mining sectors, the implementation of the BRI, and the pursuit of building China into an innovative nation and an international leader in innovation. Therefore, the recent regulatory changes should be seen as an adjustment of the "Go Global" policy for China to pursue the new development goals, better manage the quality of outbound investment, and improve the implementation of the policy in the long run.

---

<sup>151</sup> The relevant Chinese regulation is Guowuyuan Bangongting Zhuanfa Guojia Fazhan Gaigewei Shangwubu Renminyinhang Waijiaobu Guanyu Jinyibu Yindao he Guifan Jingwai Touzi Fangxiang Zhidao Yijian de Tongzhi (国务院办公厅转发国家发展改革委 商务部 人民银行 外交部关于进一步引导和规范境外投资方向指导意见的通知) [Notice of the General Office of the State Council on Forwarding the Guiding Opinions of the National Development and Reform Commission, the Ministry of Commerce, the People's Bank of China and the Ministry of Foreign Affairs on Further Guiding and Regulating the Directions of Outbound Investment] (promulgated by General Office of the State Council, Aug. 4, 2017, effective Aug. 4, 2017) (Chinalawinfo). See also Wade Shepard, *Xi Jinping To China's Private Sector: Go Home, The New Silk Road Is Not For You*, FORBES (July 26, 2017), <https://www.forbes.com/sites/wadeshepard/2017/07/25/xi-jinping-to-chinas-private-sector-go-home-the-belt-and-road-is-not-for-you/>.

Consequently, Chinese investment in Australia will continue to be influenced by the "Go Global" policy, as well as the needs of China as a capital-exporter and Australia as a capital-importer.

As Chinese investment in Australia continues to grow and diversify into non-mining sectors such as agriculture, infrastructure, etc., Australia's foreign investment laws and practice remain of vital importance to Chinese investors. Despite the conclusion of the ChAFTA, Australia's FIRM, and particularly the FIRB review process, is likely to remain restrictive of Chinese investment. Four restrictive factors may remain as barriers, namely the discretionary "national interest" test, the less favorable treatment to Chinese investors in some major areas of investment (compared with investors from Australia's other major FTA partners), the widespread concerns on investment by Chinese state-owned enterprises, and the strengthened enforcement framework under the FIRM. It is therefore important for Chinese investors to observe Australia's foreign investment policy and practice, and actively engage with the FIRB to avoid adverse decisions, unnecessary delays in decision-making, and inadvertent non-compliance.

Meanwhile, the Chinese Government should endeavor to reduce or remove the aforesaid investment barriers in the current review and renegotiations of the investment rules under the ChAFTA.<sup>152</sup> The two governments should recognize that the current ChAFTA investment rules are quite limited due to low level of commitments from both sides. However, as China has adopted a negative list approach to the review of inbound foreign investment,<sup>153</sup> China is now in a position to offer more in the ChAFTA renegotiation in exchange for an enhanced market access for its investors. As a work-in-progress, the ChAFTA

---

<sup>152</sup> Premier Li Keqiang's visit to Australia in March 2017 led to an agreement between the two governments to bring the review of the investment chapter (amongst others) forward by one year commencing sometime in 2017 (instead of 2018 as scheduled under the ChAFTA). See *Declaration of Intent by the Government of Australia and the Government of the People's Republic of China regarding Review of Elements of the China-Australia Free Trade Agreement*, DFAT (2017), <http://dfat.gov.au/trade/agreements/chafta/official-documents/Documents/declaration-of-intent-review-elements-chafta.pdf>.

<sup>153</sup> See Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Xiugai <Zhonghua Renmin Gongheguo Waizi Qiyefa> Deng Sibü Falü de Jueding (全国人民代表大会常务委员会关于修改《中华人民共和国外资企业法》等四部法律的决定) [Decision of the Standing Committee of the National People's Congress on Amending Four Laws including the Law of the People's Republic of China on Wholly Foreign-Owned Enterprises] (promulgated by the Standing Committee of the National People's Congress, Sep. 3, 2016, effective Oct. 1, 2016) (Chinalawinfo), stating that the formation of foreign-funded (including Taiwan compatriot-funded) enterprises is subject to recordation administration, unless otherwise required to follow special assess management measures. These special assess management measures are prescribed in the Waishang Touzi Chanye Zhidao Mulu (外商投资产业指导目录) [Catalogue of Industries for Guiding Foreign Investment] (promulgated by the State Planning Commission, State Economic and Trade Commission and Ministry of Foreign Trade and Economic Cooperation (current MOFCOM), effective Jun. 20, 1995, amended 2017).

must be improved to achieve greater investment liberalization that serves the shared interests of both countries.