

FOREIGN INVESTMENT REVIEW BOARD (FIRB): NAVIGATING THE RULES AND SUCCESSFULLY ENGAGING WITH FIRB

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**CORRS
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lawyers

Investing in Australian Resources Seminar / 投资澳大利亚资源论坛
Beijing, 3 November 2011 / 北京, 2011年11月3日

外国投资审查委员会 (FIRB): 审批规则探寻及 与FIRB成功接洽

韩德理-合伙人 & 联席主席
阔思律师事务所 中国业务部

Introduction / 介绍

- Very short period of time to discuss FIRB issues today / 今天简要讨论外国投资审批问题
- Not going to cover the tests relating to whether your investment needs FIRB approval / 不涉及投资是否需要外国投资审批的判断标准
- Most Chinese investors in the Australian resources sector are State Owned Enterprises; so we assume for today that FIRB approval is required / 在澳投资资源的中国投资者大多是国有企业；因此，我们今天假设该类投资需要外国投资审批
- Today's focus is on the FIRB process and engagement with FIRB / 今日重点是外国投资审批步骤及与FIRB接洽

Introduction (continued) / 介绍 (续)

- Corrs has significant experience in successfully engaging with FIRB for Chinese State Owned Enterprises / 阔思在协助中国国有企业与FIRB 接洽方面拥有丰富的经验
- We have a more detailed FIRB presentation that we are happy to share. Please speak to one of the Corrs members that is with us today to ask for it to be sent to you / 我们有更详细信息可供分享。请随后与我们的团队成员联系，以便将资料发送给您

SECTION 1 / 第1部分:

AUSTRALIA'S FOREIGN INVESTMENT REGIME – OVERVIEW

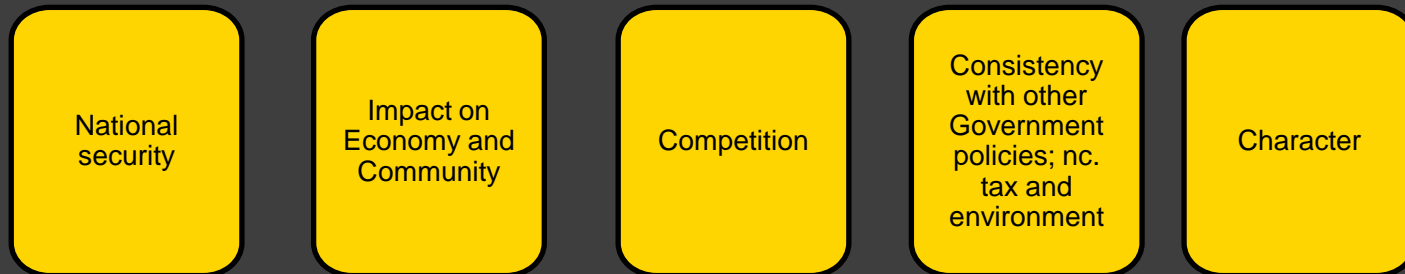
澳大利亚的外国投资体系 - 概述

How is foreign investment regulated / 外国投资如何规管？

- Laws / 法规:
 - *Foreign Acquisitions and Takeovers Act 1975 (Cth)* / 《1975年外国收购和并购法》 (FATA);
 - *Foreign Acquisitions and Takeovers Regulations 1989 (Cth)* / 《1989年联邦外国收购和并购条例》 .
- FI Policy / 外国投资政策:
 - Australian Government “Foreign Investment Policy” (most recently, January 2011) / 《外国投资审批政策》 (最新修订时间为2011年1月)
 - Available in foreign languages including **Chinese** / 以上政策拥有多种外国版本 (包括**中文**版本)
 - However, English deemed correct in case of inconsistency / 若有不一致之处, 英文为准确版本
- General test is whether the investment proposal is ‘**contrary to Australia’s national interest?**’ / 通常的审核标准是: 投资建议是否 “**违背澳大利亚的国家利益**”

5 National Interest Considerations for FGREs

- The Treasurer has declared 5 “**national interest considerations**” to determine national interest for Foreign Government Related Entities (**FGREs**)



- The **national interest** test has broad interpretation and is at the Treasurer’s discretion
- A FGRE FIRB application should actively address each of the 5 national interest considerations in detail

外国政府相关实体相关的5项国家利益审查考量

- 财政部长宣布了5项“国家利益考量”用以审核外国政府相关实体的投资是否符合国家利益



- 国家利益定义广泛，财政部长有权作最终决定
- 外国政府相关实体的FIRB 审批需要针对5项国家利益考量的每一项做出解释

Why Treat FGREs Differently? / 为何以不同的方式对待外国政府相关实体?

- Government considers that FGREs *may not necessarily* operate within normal commercial parameters / 澳政府认为外国政府相关实体的运营未必遵循一般性的商业规范
- Potential for political or strategic (non commercial) control over Australian assets / 对澳大利亚资产形成政治性或战略性（非商业）控制的可能
- Creation of political ‘weakness’ through economic independence / 通过经济独立造成政治性“弱化”
- Creation of ‘global giants’ or price makers in key global markets including commodities markets (undermines Australian export industries) / 在全球主要市场包括大宗商品市场造成“全球巨头”或者价格垄断者（危害澳大利亚的出口行业）

Can FGREs avoid the FI Policy?

- There is very little point in seeking to structure FGRE investments so that they are not caught by the FI Policy
- The FI Policy treats any form of “control” over the target by an FGRE as a “direct investment” whether it is debt, equity, or quasi-equity, offtake etc
- Seeking to structure around the FI Policy is against the spirit and intention of the FI Policy and will damage reputation with the Australian Government
- It is strategically much better to engage with FIRB and the Treasurer on a pro-active and transparent basis and work co-operatively with FIRB

外国政府相关实体能否规避外国投资政策？

- 以规避外国投资政策为目的对外国政府相关实体的投资进行架构毫无意义可言
- 根据外国投资政策，外国政府相关实体对于目标公司任何形式的“控制” - 不论是否是债权、股权、或准股权投资、包销等，均被视为“直接投资”
- 试图为规避外国投资政策而进行架构，有违外国投资政策的主旨和意图，并会损害投资者在澳大利亚政府的声誉
- 与FIRB以及财政部长积极地接洽，在透明的基础上和FIRB主动合作具有更好的战略意义

Concerns over “FIRB” continues in China / 当前外国投资氛围仍然是中国的顾虑

- FIRB approval continues to be a concern to Chinese investors / 外国投资审查委员会审批仍然是中国投资者的一大顾虑
- A view persists that Australians are not genuinely welcoming of foreign investment / 一种观点认为，澳大利亚并未真诚地欢迎外国投资
- The Australian economy is heavily reliant on foreign capital / 澳大利亚经济很大程度上依靠外国资本

Concerns over “FIRB” continues in China (continued) / 当前外国投资氛围仍然是中国的顾虑 (续)

- FIRB issues have not been as effectively managed as they could have been by Australia; this is improving now / FIRB 审批问题未能得到很好的处理； 这一问题正得到改善
- This has lead to a perception that FIRB approval is difficult to obtain. The facts demonstrate that this is not the case / 这导致了 FIRB 批准难以获得的想法。但是事实表明并非如此
- In the resources sector, FIRB approval is granted for the overwhelming majority of Chinese deals / 在资源领域， 绝大多数的交易均获得了FIRB 的批准

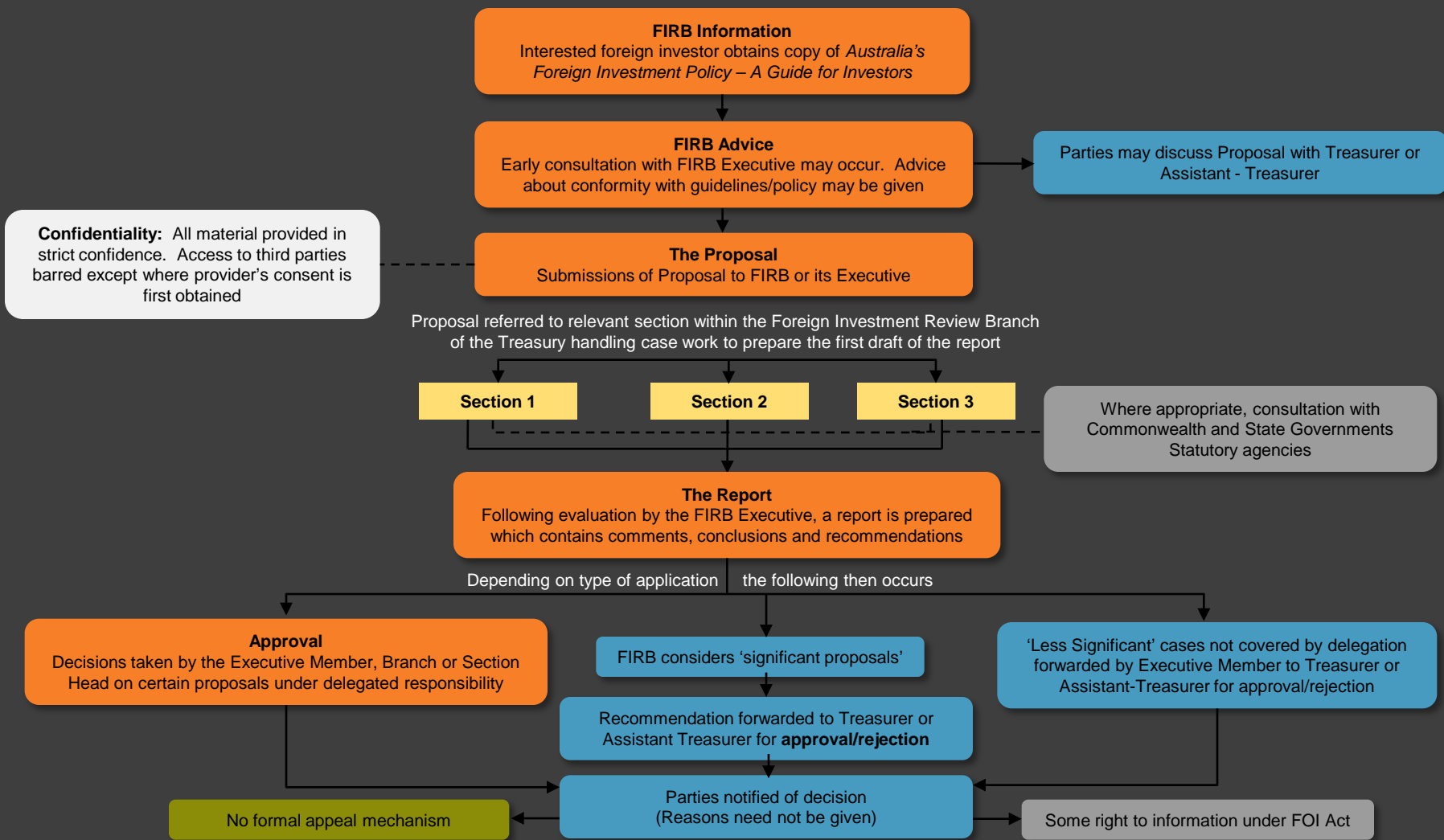
The facts paint a different picture...

- Between the 2007 and 2010 financial years, the Government approved over \$400 billion of proposed foreign investment into Australia
- In the past 4 years, over \$70 billion of that \$400 billion investment was from China. \$70 billion through more than 280 individual transactions
- Less than 5 of those 280 transactions have had any onerous conditions placed on them as a condition of approval
- Of the 5 transactions that had conditions applied, all were from FGRE's (not private sector entities) and all had special circumstances that necessitated conditions being applied

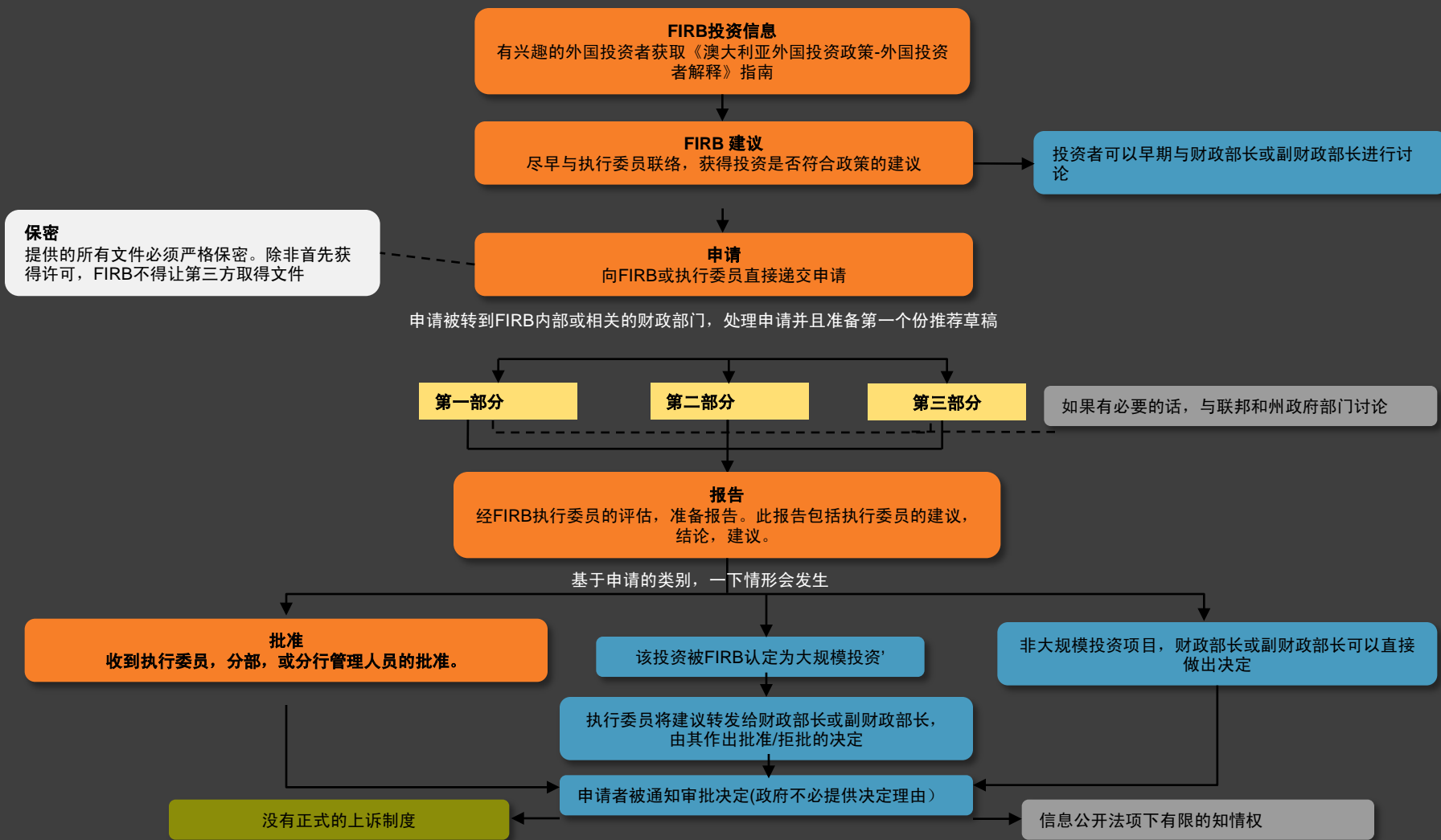
事实表明不同的实际情形...

- 自2007年11月以来，政府已经批准了超过4000亿元的对澳外国投资
- 过去4年里，4000亿元中的700亿元投资来自中国；这700亿元来自超过280个单项交易
- 220项交易中不到5项交易被附加了审批限制条件
- 被附加了限制条件的5项交易全部是外国政府相关实体投资（非私有企业），并且全部都存在特殊情形需要附加必要的限制条件

The FIRB Process – External



外国投资审批外部流程



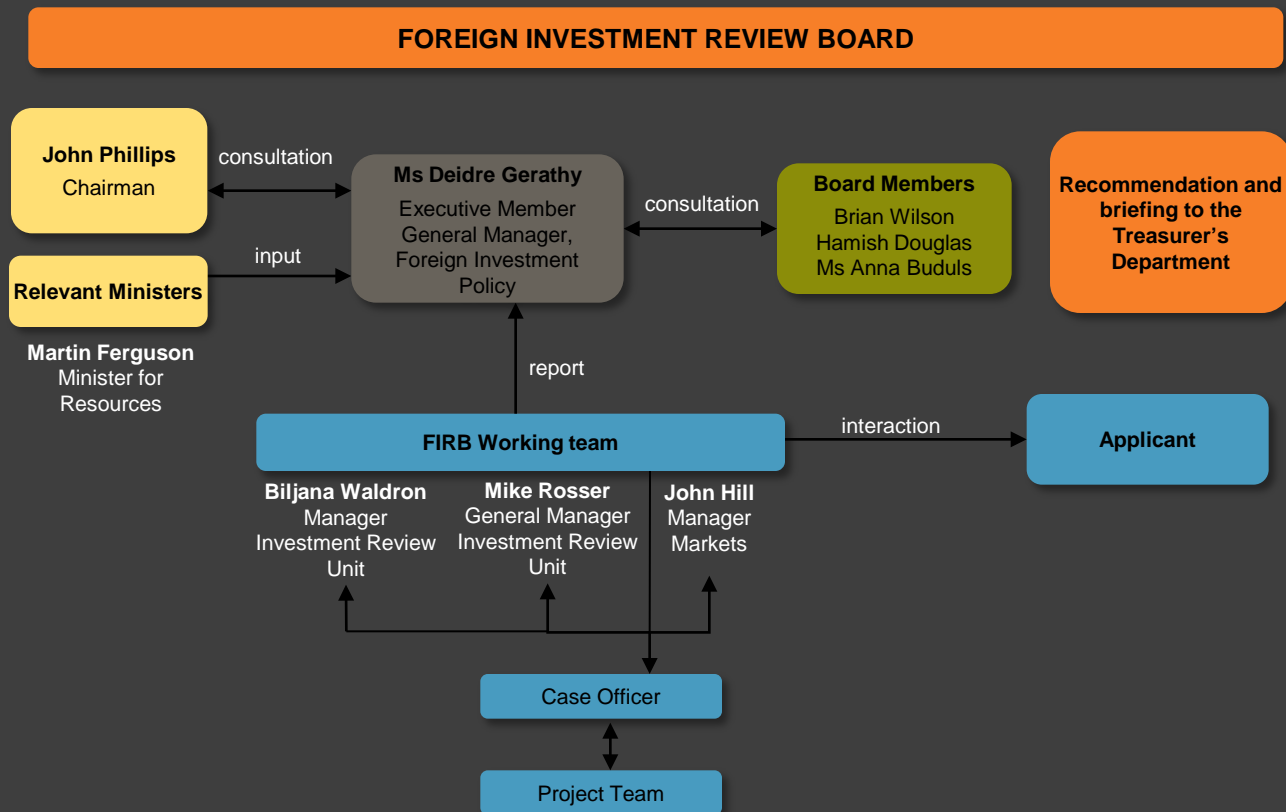
The FIRB Process - Internal

Majority of applicant's interaction is likely to be with the FIRB working team, with the Executive Member joining key meetings

Foreign investment policy is administered by the Treasurer who is advised by FIRB. FIRB is an advisory rather than a statutory body

FIRB has two main functions in relation to foreign investment proposals:

- Examine investment proposals by foreign interests and, against the background of the Government policy, make recommendations
- Give guidance, where required, to foreign investors so that their proposals can conform with Government policy



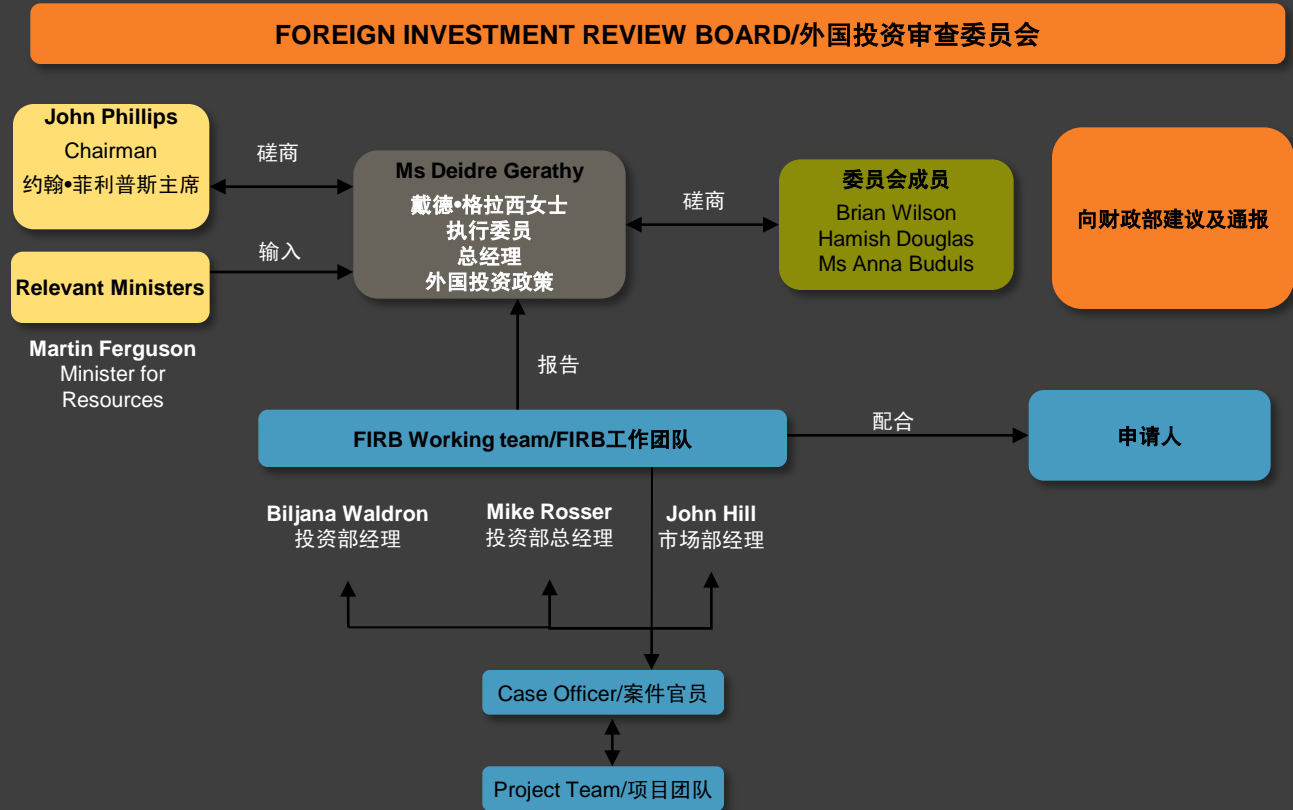
外国投资审批内部流程

申请人的大部分申请活动将可能与FIRB工作团队配合，FIRB执行委员将参加关键的会议

外国投资政策由联邦财政部长在FIRB的建议下管理执行。FIRB是一个咨询建议机构而不是法定团体。

FIRB审查外国投资建议有两个主功能：

- 根据政府的政策审查外国投资者的投资计划，并做出建议
- 在必要时向外国投资者给予指导，使其投资计划符合政府的政策



SECTION 2 / 第2部分:

STRATEGIES FOR WORKING SUCCESSFULLY WITH FIRB

与FIRB成功接洽的战略

Our strategies for navigating FIRB / 我们的FIRB 审批战略

- Understand the Australian political dynamics of your investment / 了解您的投资具有的澳大利亚政治动态
 - Is it located in an area of influence relevant to the Independent Members of Parliament who have a lot of influence in Australian politics today? / 投资是否位于议会独立议员（其对当今的澳大利亚政治具有极大影响）的相关影响力区域
 - Is it in an environmentally sensitive area (what will the Australian Greens Party position be?) / 投资是否位于环境敏感区域（澳大利亚绿党是何立场）
 - **Will the project** affect large amounts of rural and agricultural farming land? / 项目是否将影响大面积的农业和农牧用地？
- Engage in early and frank dialogue with FIRB to discuss proposal / 与FIRB 进行早期和坦诚的接洽讨论投资建议

Our strategies for navigating FIRB (continued) / 我们的FIRB 审批战略 (续)

- Deal with FIRB directly and confidentially / 在保密的基础上直接与FIRB 联系
- Every proposal is different and requires careful management / 每个投资项目的建议各不相同， 需要缜密管理
- Avoid media involvement prior to engaging with FIRB / 与FIRB 接洽前 避免媒体介入
- Maintain some flexibility and always search for a “win-win” solution / 保持适当的灵活性并且寻求“双赢”机会

Recommended FIRB process / FIRB的建议流程

- Identify Target business and analyse FIRB deal drivers / 确认目标公司的业务并分析FIRB交易的推动因素
 - Do you need 100% control / 是否需要100%控制权?
 - Do you need to control 100% of the product / 是否需要100%的产品控制?
 - Equity or project level investment / 股权或项目投资程度?
 - What market share will you have post acquisition / 收购后市场份额?
 - What is the impact on domestic and export markets / 对国内和国际市场的影响?
 - Will you maintain listing or re-list / 维持上市地位还是退市?



Recommended FIRB process / FIRB的建议流程

- Confidential and informal dialogue with FIRB regarding investment / 与 FIRB 进行保密及非正式的投资建议对话
 - Informal clearance letter with offer to meet FIRB face to face / 非正式的认可信提议与FIRB进行面对面对话
 - Keep interest in target confidential until dialogue with FIRB is completed / 在完成与FIRB 的对话前 应对目标公司的投资兴趣保密
 - Early, frank and transparent engagement is critical / 及早、坦率与透明的接洽至关重要



Recommended FIRB process / FIRB的建议流程

- Confidential and informal dialogue with other Government stakeholders (after initial dialogue with FIRB) / 与其它政府层面利益相关方的非正式保密对话
 - Treasurer and Deputy Prime Minister / 财政部长和副总理
 - Prime Minister / 总理
 - Assistant Treasurer etc / 助理财长等
- Other stakeholders (at the right time) / 其它利益相关方(在适当时候):
 - Independent Members of Parliament / 议会独立议员
 - State and Local Governments / 州和地方政府
 - Industry bodies (Farmers Federation etc) and local communities / 行业机构(农场主联盟等) 及地方社区
 - Local industry etc / 地方工业等



Recommended FIRB process / FIRB的建议流程

- Lodge formal FIRB application / 提交FIRB正式的审批申请:
 - Ensure it is lodged as “commercial in confidence” / 确保申请按“商业机密”提交
 - Follow up with FIRB regularly in the first 7 days to **encourage** review of the application and determine if further information required / 首个7天内，经常性地与FIRB跟进，**促进**申请的审查并确定是否需提供额外信息
 - **For sensitive transactions**, follow up with Treasurer’s office to confirm that application has been lodged and make timing expectations clear / 对于敏感性交易，与财政部长办公室跟进以便核实申请已经提交，并明确预期的审批时间
 - The first 5-7 days after formal lodgment are critical **if your transaction is time critical** / **如果您的投资时机至关重要，则申请提交后的首个5-7天是非常重要的时间段**



SECTION 3 / 第3部分:

Corrs Chambers Westgarth - How
can we help you?

阔思律师事务所 - 我们的服务范围

About Corrs Chambers Westgarth

- One of Australia's leading commercial law firms
- One of "Big 8" national law firms in Australia
- Operating for more than 150 years
- Voted *Best Australian Law Firm* 2008 and 2009 (International Legal Alliance Awards)
- Leading adviser to Energy & Resources sector
- Leading legal adviser to Chinese State Owned Enterprises (**SOE's**) investing in Australia and overseas
- Dedicated "China Business Group" focusing on acting for Chinese SOE's investing in Australia
- Strong links to Federal Government and resources rich State Governments (WA, Qld, SA, NT, NSW)



澳大利亚阔思律师事务所概述

- 澳大利亚顶尖的商业律师事务所之一
- 澳大利亚“8大”全国性事务律师事务所之一
- 具有150多年的历史
- 2008及2009年度“最佳澳大利亚律师事务所”（国际法律联盟奖）
- 能源与资源领域的一流法律顾问
- 中国国有企业进行澳大利亚和海外投资的一流法律顾问
- 专门的中国业务部为中国企业对澳大利亚的投资提供法律服务
- 和澳大利亚联邦政府及资源丰富的各个州政府保持紧密联系（西澳，昆士兰，南澳，北领地，新南威尔士）



Corrs: Key Legal Services

- **Corporate and commercial**
 - FIRB/Foreign investment review
 - Mergers & acquisitions
 - Equity and asset capital markets
 - Regulated takeovers and schemes
 - Acquisition due diligence
- **Banking and finance**
 - Acquisition finance
 - Structured finance
 - Project finance
 - Foreign lending
 - Reconstruction
- **Major projects including infrastructure**
 - Mining projects
 - Power
 - Ports and shipping
 - Roads and railways
 - Water and waste
- **Government and regulatory**
 - Tax
 - Competition
 - Planning and environment
 - Native title

阔思：主要服务范围

■ 公司法和商业法

- 外国投资审查委员会/外国投资审查
- 兼并与并购
- 股权与资本市场
- 监管收购与计划安排
- 收购尽职调查

■ 银行与金融

- 收购融资
- 结构性融资
- 项目融资
- 境外贷款
- 重组

■ 重大项目包括基础设施

- 矿产项目
- 电力
- 港口与船运
- 公路与铁路
- 水和废弃物

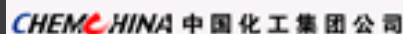
■ 政府和监管部门

- 税务
- 竞争
- 规划与环境
- 土著权

Our China Business Group / 我们的中国业务部

- **Dedicated China Business Group / 专门的中国业务部**
 - Assisting Chinese SOEs and private Chinese companies investing and operating in Australia / 协助中国国企与民营企业在澳大利亚的投资与经营
 - Particular focus on Energy & Resources sector / 特别专注于能源与资源领域
 - Bilingual lawyers providing legal advice and legal documents in English and Chinese and assisting with negotiations / 双语律师以中英文提供法律服务与法律文件以及协助谈判
 - Experience in working with Chinese client teams; understand how to explain the Australian legal and operating environment / 与中国客户团队共同工作的经验；理解如何解释澳大利亚法律与经营环境
 - Good relationships with Chinese major law firms / 与中国大型律师事务所的良好关系

Some of our China Business Group clients / 我们中国业务部的部分客户



Some of our recent transactions / 部分近期交易:

- Baosteel's \$300m strategic alliance with Aquila Resources (coal) / 宝钢对 Aquila资产（煤炭）公司3亿澳元的战略投资
- Confidential Chinese SOE on planned Hong Kong listing of its Australian mining assets / （保密）某中国国企计划将其澳大利亚矿业资产在香港上市
- China Metallurgical ("MCC") \$400m acquisition of Cape Lambert magnetite project / 中冶以4亿澳元收购兰伯特角铁矿项目
- MCC's \$5bn+ development of Cape Lambert mine, rail and port project / 中冶超过50亿澳元的兰伯特角矿业、铁路及港口开发项目
- MCC's acquisition of interest in Cape Preston magnetite project and EPC contract for development of project / 中冶收购普雷斯顿角铁矿项目以及项目开发的EPC合同
- MCC on Australian aspects of Hong Kong and Shanghai Listing / 中冶在香港与上海上市的澳大利亚部分

Some of our recent transactions / 部分近期交易:

- Creat Group acquisition of 20% stake in Galaxy Resources / 科瑞集团收购银河资源20%股份
- Galaxy Resources' proposed listing on the Stock Exchange of Hong Kong / 银河资源拟议在香港证交所上市
- Minmetals: Acquisition of two chrome projects in South Africa / 五矿集团收购南非的两个铬矿项目
- (Confidential) Chinese SOE on planned acquisition of 3 x uranium projects (two in Australia and one in Middle Europe) / (保密) 中国国企计划收购3个铀矿项目 (两个在澳大利亚、一个在中欧)
- Jinchuan on its bid to acquire BHP Billiton Ravensthorpe project / 金川投标收购必和必拓Ravensthorpe项目
- ChemChina on its acquisition of Quenos chemicals / 中化收购Quenos化学

Some of our recent transactions / 部分近期交易:

- ChemChina on Blackstone's investment in China National Bluestar / 中化与百仕通战略合作, 百仕通入股中国蓝星集团
- Top 5 SOE on implications of BHPB's proposed takeover of Rio Tinto / 排名前五的国企介入必和必拓对力拓的拟议收购
- Sichuan Hanlong on acquisition of controlling interest in Moly Mines / 四川汉龙收购Moly矿业的控制股份
- (Confidential) SOE on proposed takeover of ASX listed coal company / (保密) 某国企拟议收购澳大利亚上市煤炭公司

Corrs Chambers Westgarth China Business Group



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