

## Questions on Notice to Treasury from Senator O'Neill

Senate Economics References Committee – Inquiry into foreign investment proposals

Response required by 4 June 2020

For Questions 1-12 and Question 16, Treasury has provided the Committee a separate letter setting out the process which Treasury undertakes in assessing foreign investment proposals, particularly with regards to the character of investors. This is protected information as per the *Foreign Acquisitions and Takeovers Act 1975* and is provided for the Committee's information only.

1. ***Did Dr Henry Cheng's membership of the Twelfth Chinese People's Political Consultative Conference of The People's Republic of China (CPPCC) factor into Treasury's analysis of the sale?***
2. ***Was Dr. Henry Cheng's membership of CPPCC included in a briefing to the then Treasurer Scott Morrison in respects to the sale of Alinta?***
3. ***Was Dr. Henry Cheng's membership of CPPCC included in a briefing to the then Minister for the Environment and Energy now Treasurer Josh Frydenberg in respects to the sale of Alinta?***
4. ***Did Treasury do any analysis of the ownership structure including shareholders and shareholding of Directors of Chow Tai Fook?***
5. ***Did Treasury consider Dr. Henry Cheng's links to the Ho family and subsequent connection to organised crime when providing advice to FIRB?***
6. ***Did FIRB consider Dr Henry Cheng's links to the Ho Family when considering the 'National Interest' test?***
7. ***Did Treasury brief the then Treasurer Scott Morrison of Dr Henry Cheng's links to the Ho Family?***
8. ***Does it concern Treasury that the owner of Australia's critical energy infrastructure is also a shareholder of SJM which has been banned from investing in Australia due to their connections to organised crime?***
9. ***Will any actions be taken based upon Dr Henry's links to the Ho Family?***
10. ***In November 2018 it was reported in Nine Newspapers that Treasurer Josh Frydenberg rejected the sale of the Australian energy company APA Group to the Chinese company Cheung Kong Holdings on the grounds of 'national interest'. Can you please outline the decision-making process that led to that decision?***
11. ***Was Mr Victor Li's membership of the Twelfth Chinese People's Political Consultative Conference of the People's Republic of China taken into consideration in the decision-making process for rejecting this takeover?***
12. ***Are there any differences between the approval given to Dr Henry Cheng and the rejection for Mr Victor Li that speaks to the 'National Interest Test'?***
13. ***In 2017 Alinta was a Western Australian focused gas retailer valued at an estimated \$4 billion. Now it is Australia's fastest growing retailer of energy on the East Coast of Australia and in January 2018 it purchased the Loy Yang B Power Station in the La Trobe Valley,***

**Victoria. Did Chow Tai Fook need FIRB's approval to purchase the Loy Yang B Power station in Victoria?**

Yes

14. **Does Chow Tai Fook need approval for any energy infrastructure purchase in Australia through its company Alinta Energy?**

Various criteria apply to determine whether an entity is a "foreign person" under the FATA and is required to seek approval for acquisitions (see Part 2 of the FATA, and the exemptions in Part 3 of the *Foreign Acquisitions and Takeovers Regulation 2015*). In general, an entity in which a foreign corporation holds a substantial interest will be a foreign person. Other criteria apply in relation to the asset being acquired, such as monetary thresholds.

15. **In general, once a foreign entity purchases an Australian company and that locally listed company subsequently acquires additional assets in Australia, do those local purchases come under the 'National Interest' test?**

Various criteria apply to determine whether an entity is a "foreign person" under the FATA and is required to seek approval for acquisitions (see Part 2 of the FATA, and the exemptions in Part 3 of the *Foreign Acquisitions and Takeovers Regulation 2015*). In general, an entity in which a foreign corporation holds a substantial interest will be a foreign person. Other criteria apply in relation to the asset being acquired, such as monetary thresholds.

**In 2017 Treasury imposed several conditions of sale of Alinta to Chow Tai Fook. Of noting are:**

**Condition 2.2**                      **Data must be stored within Australia**

**Condition 2.3 -**                      **Data must only be accessible within Australia**

**Condition 2.4 -**                      **Export of data and Security controls for export of data**

**Condition 2.5 -**                      **Cloud storage use**

**In addition, it is stated that Data Sovereignty and Security conditions apply to Alinta when they enter into a contract with a third party and that all Alinta Energy contractual arrangements need to be compliant with the FIRB conditions.**

16. **Are these conditions of sale correct?**

See separate letter.

17. **Is it a requirement for Alinta Energy's Australian operations to be compliant with these FIRB Conditions?**

Chow Tai Fook and its investment vehicle Pioneer Sail Holdings are required to comply with all the conditions imposed on their acquisition of Alinta, including those which stipulate requirements as to the conduct of Alinta Energy.

18. ***Can Alinta contract out of FIRB conditions?***

No

19. ***Must Alinta ensure that the use and access of data and systems are compliant with FIRB conditions?***

Yes. Chow Tai Fook and its investment vehicle Pioneer Sail Holdings must ensure that Alinta Energy complies with each relevant condition, noting that the requirement is to use their best endeavours and within their power.

20. ***Did Alinta breach conditions of sale when customer data was stored and accessed outside of Australia?***

Under the FATA, conditions were imposed on the investor Chow Tai Fook and its vehicle Pioneer Sail Holdings. The compliance report provided in 2018 did not identify any instances where Alinta was directly storing data outside Australia, though it stated that elements of third party service provision of Alinta customer data was occurring offshore. Data storage and access through third party providers is being addressed as part of the remediation plan. As previously advised to the Committee, Alinta is considered to be in compliance while they are meeting the requirements of the remediation plan.

***In an internal email from Alinta's legal department it is stated that from 2017 to 2019 Australian data is stored internationally using Electricity Monster and it is a breach of the conditions of sale.***

21. ***Is Alinta liable for the breach of these conditions through the actions of Electricity Monster?***

Treasury has been advised that Energy Monster obtains data from individuals as part of providing its energy broking service. This may include information on individuals who are currently customers of a range of energy providers, including Alinta. However, this data is not held by, or on behalf of Alinta. On that basis, Treasury does not consider that data held by Energy Monster is "Alinta customer data" and no breach of the conditions arises. When an individual using Energy Monster services select Alinta as their preferred provider, Electricity Monster passes relevant information to Alinta. At that point it becomes Alinta's data and is subject to relevant FIRB conditions.

22. ***When was Treasury made aware that Alinta were in breach of these conditions in respects to Australian customer data being stored overseas via electricity monster?***

See response to Question 21

23. ***Was the Treasurer made aware of these breaches of contract in respects to data storage?***

See response to Question 21

***It is a FIRB condition that Alinta must provide an independent audit that audits Alinta's compliance with Conditions 1 to 5 on an annual basis to Treasury.***

24. ***Can you confirm?***

Yes

25. ***Did Alinta provide an independent audit to Treasury in 2018?***

Yes.

26. ***What did Treasury do when Alinta's did not comply with this condition?***

See response to Question 25

27. ***Did Treasury inform the Treasurer's office about Alinta's non-compliance?***

See response to Question 25

28. ***Did Alinta provide an independent audit to Treasury in 2019?***

A report in respect of 2018-19 has been provided. A report with respect to 2019-20 is due to be provided after 1 July 2020.

29. ***Was Treasury aware that EY wrote the annual 'independent' compliance report***

Yes

30. ***Were you aware at the time that EY is Alinta's internal auditor?***

No

31. ***Does it concern Treasury that EY as Alinta's internal auditor wrote the independent report?***

Guidance Note 52 on the FIRB website describes factors that Treasury takes into account when considering the suitability of a proposed independent auditor.

***According to communications between Treasury and Alinta, a Moratorium was entered into for existing contractual arrangements and a remediation plan was put in place in October 2019.***

32. ***Is it standard practice for Treasury to enter remediation plans when organisations are non-compliant?***

As previously explained to the Committee (see IQ20-000038), and as reflected in the

Compliance Framework Policy Statement on the FIRB website and the approaches of many business regulators, Treasury's approach to non-compliance is to work with the foreign investor to achieve compliance.

As described in IQ20-000037, it is current practice that all no-objection notifications imposing conditions include a requirement for regular compliance reporting, either by an officer of the investor in a prescribed form (for lower risk investments) or by independent audit (for higher risk investments). If non-compliance is identified in either the prescribed form report, or an independent audit, a remediation plan must be submitted for approval. Where it was not appropriate for the non-compliance to be addressed through a remediation plan, or the investor was unable to provide an acceptable remediation plan, other enforcement options remain available.

33. ***Why was a moratorium entered with Alinta in respects to their compliance with these FIRB conditions?***

No moratorium was entered into with Alinta.

34. ***Did Treasury let any regulatory agencies know of their potential breaches when you became aware?***

In assessing Alinta's compliance status and in the draft remediation plan, Treasury engaged closely with consult partner agencies that had recommended relevant conditions.

35. ***Did Alinta attempt to negotiate the existing conditions of sale?***

Treasury does not negotiate conditions with applicants. As part of the natural justice process, applicants are notified of proposed conditions. Conditions may be amended by Treasury to reflect new information provided by applicants.

36. ***Did Alinta inform the Treasurer or Treasury that they cannot comply with the conditions of sale due to their existing business arrangements?***

In the natural justice process, Alinta on behalf of its investor noted that it may not be compliant with conditions from the date of acquisition.

In these circumstances it was understood that Alinta would possibly need to implement changes. This was reflected in the conditions which provided for a remediation plan that would permit transition to full compliance in a manner and timeframe acceptable to the Commonwealth.

37. ***Did Jeff Dimery meet with Josh Frydenberg to discuss a remediation plan or the conditions of sale?***

Mr Dimery met the Treasurer on 17 September 2019 to discuss a range of matters

38. ***Did Treasury email Alinta about Jeff Dimery meeting with the Treasurer or the Treasurer's office?***

In an email from a Treasury official to Alinta, a meeting between Mr Dimery and the Treasurer was referenced.

39. ***If so, what did that correspondence say?***

On 23 September 2019, an email was sent to Alinta executives principally addressing the remedial implementation plan and the arrangements for the 2018-19 compliance audit.

It noted that there had been a meeting between Mr Dimery and the Treasurer since the last officer level meeting between Alinta and Treasury.

40. ***Please provide all communication between Treasury and Alinta in respects to the Moratorium.***

See response to question 33.

***On Friday 18 October 2019 the then Minister for Northern Australia Senator Matt Canavan awarded an interest free loan of \$90 million and Angus Taylor as Minister for Energy awarded \$24.2 million grant both to Alinta Energy to build a solar power plant to power Andrew Forest's mine in the Pilbara.***

41. ***Was Treasury ever concerned about this interest free loan and grant to Alinta?***

The Northern Australia Infrastructure Fund is the body charged with making decisions on the suitability of applicants. The Clean Energy Finance Corporation determines applications for grants under its programs.

42. ***Did Treasury have any communications between the Northern Australia Infrastructure Fund (NAIF) in relation to the awarding of this money?***

Yes

43. ***Did Treasury inform NAIF of Alinta's ownership structure and connections to mainland China?***

No

44. ***Did Treasury inform the then Minister of Alinta's ownership structure and connections to mainland China?***

No

45. ***Did Treasury inform NAIF and the then Minister that Alinta were in breach of their conditions of sale and they were in a remediation plan to remedy those breaches?***

Treasury had not received the first audit report at the time of the initial consultation with NAIF.

46. ***Was there any communication between Treasury, the Treasurer's office NAIF and the then Ministers office about the awarding of this money to Alinta?***

Questions regarding communications between Ministerial offices should be directed to those offices.