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| [\*\*\*] 2021 |  |
| **STRICTLY PRIVATE AND CONFIDENTIAL**  The Executive Member  Foreign Investment Review Board  C/- The Treasury  Langton Crescent  PARKES ACT 2600  **By online application** | James Wood  Partner  james.wood@hoganlovells.com  D +61 2 90933529  Our ref 126043 |

Project Moore | Acquisition of interests in Hanwha US AUS PPP Private Fund 1

# Introduction

* 1. We act for KDB Life Insurance Co., Ltd. a life insurance company incorporated in the Republic of Korea and indirectly owned by, among other shareholders, the Korea Development Bank (a government entity of the Republic of Korea) (63.24%) and the National Pension Service (also a government entity of the Republic of Korea) (27.20%) (the **Purchaser**).
  2. This is a notification pursuant to sections 81 and 82 of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) as amended by the *Foreign Investment Reform (Protecting Australia’s National Security) Act 2020* (Cth) (**FATA**) and the *Foreign Acquisitions and Takeovers Regulation 2015* (Cth) as amended by the *Foreign Investment Reform (Protecting Australia’s National Security) Regulations 2020* (Cth) (**FATR**), setting out the details of the Purchaser's proposed indirect acquisition of:
     1. a 17.3% interest in Celsus Holding Pty Ltd ACN 147 871 369 (**Celsus Australia**), the project company for the new Royal Adelaide Hospital;
     2. a 25% interest in NGR Holding Company Pty Ltd ACN 166 705 326 (**NGR Australia**), the project company for the Queensland New Generation Rollingstock; and
     3. a 49.9% interest in Helena Water Holdings Pty Ltd ACN 151 325 898 (**Helena Australia**), the project company for the Mundaring Water Treatment Plant,

(Helena Australia, Celsus Australia and NGR Australia together being the **Australian Companies**).

* 1. For the reasons set out below:
     1. the Proposed Selldown Transaction (as defined below) will be a 'notifiable action' under Australia's foreign investment regime;
     2. the Proposed Selldown Transaction will not be a 'significant action' under Australia's foreign investment regime; and
     3. the Proposed Selldown Transaction will not be a 'notifiable national security action' under Australia's foreign investment regime.

# Background

* 1. On 17 December 2020, the following entities (together, the **Initial Purchasers**)entered into a sale agreement (**Initial Sale Agreement**) to acquire all of the limited partnership interests of Aberdeen Global Infrastructure Partners LP, a registered limited partnership in Guernsey (registration number 1864) (**Aberdeen Fund**):
     1. NongHyup Bank acting as trustee of Shinhan AIM Infrastructure Fund 9, a collective investment scheme organized under the laws of the Republic of Korea (**Shinhan**);
     2. NongHyup Bank acting as trustee of Hanwha US AUS PPP Private Fund 1, a collective investment scheme organized under the laws of the Republic of Korea (**Hanwha**); and
     3. KEB Hana Bank acting as trustee of Hanwha Global Infrastructure Strategy Private Fund 3, a collective investment scheme organized under the laws of the Republic of Korea (**Hanwha Blind Fund**),

(the **Initial Transaction**).

* 1. The general partner of the Aberdeen Fund is Aberdeen Global Infrastructure Partners GP Limited (**Aberdeen GP**), a company registered in Guernsey (registration number 56568).
  2. The Aberdeen Fund holds:
     1. 100% of the issued securities in Aberdeen Infrastructure Investments (Mundaring) Limited, a company registered in Guernsey (registration number 53673), which holds 49.9% of the issued securities in Helena Australia;
     2. 100% of the issued securities in Aberdeen Infrastructure Investments (NRAH) Limited, a company registered in Guernsey (registration number 53063), which holds 17.3% of the issued securities in Celsus Australia; and
     3. 100% of the issued securities in Aberdeen Infrastructure Investments (NGR) Limited, a company registered in Guernsey (registration number 57603), which holds 25% of the issued securities NGR Australia.
  3. Completion of the Initial Transaction was subject to the Initial Purchasers receiving a written notice from the Treasurer of the Commonwealth of Australia (or his or her delegate) (**Treasurer**) stating that, or to the effect that, the Commonwealth Government of Australia does not object to the transaction either with or without conditions that the Initial Purchasers must satisfy (or the Treasurer failing to make a determination within the required timeframe) (**Initial FIRB Approval**).
  4. The Initial Purchasers notified the Treasurer of the Initial Sale Agreement and sought the Initial FIRB Approval on 3 February 2021 (the **Initial FIRB Application**). The relevant FIRB file number is FI2021/00133. The Initial FIRB Approval was received by way of a no objection letter on 13 May 2021 and the Initial Transaction was subsequently completed. *A copy of the initial FIRB Application (without its annexures) is attached as Annexure [\*\*\*]. A copy of the initial FIRB Approval is attached as Annexure [\*\*\*].*
  5. Details of the Australian Companies, including their structure, projects and activities, are set out in section 5 of the Initial FIRB Application.
  6. Following completion of the Initial Transaction, the limited partnership interests of the Aberdeen Fund are:
     1. Shinhan – 30.199259%;
     2. Hanwha – 30.199259%; and
     3. Hanwha Blind Fund – 39.601482%.

Each of the Initial Purchasers' indirect interests in the Australian Companies are therefore currently as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Helena Australia | Celsus Australia | NGR Australia |
| Shinhan | 15.069% | 5.224% | 7.550% |
| Hanwha | 15.069% | 5.224% | 7.550% |
| Hanwha Blind Fund | 19.761% | 6.851% | 9.900% |
|  |  |  | *Figure 1* |

* 1. *A chart setting out the current ownership structure of the Australian companies is attached as Annexure [\*\*\*].*

# The Purchaser

* 1. The Purchaser, KDB Life Insurance Co., Ltd. is a life insurance company offering a wide range of life insurance products and related services to both individuals and groups throughout the Republic of Korea. The Purchaser is incorporated in the Republic of Korea.
  2. It is indirectly owned by, among other shareholders, the Korea Development Bank (a government entity of the Republic of Korea) (63.24%), the National Pension Service (also a government entity of the Republic of Korea) (27.20%), and asset manager Consus Asset Management (2.29%). *A chart setting out the ownership structure of the Purchaser is attached as Annexure [\*\*\*].*
  3. Accordingly, the Purchaser will be a 'foreign person' under s 4 of the FATA, because it is a corporation in which a foreign corporation holds a 'substantial interest' (being an interest of 20% or more).
  4. The Purchaser is also a 'foreign government investor' (**FGI**) for the purposes of the FATA and the FATR because it is a corporation in which a foreign government or separate government entity holds a substantial interest (because the government of the Republic of Korea indirectly holds a 90.44% interest in it) (FATR r 17(1)(b)(i)).

# The Proposed Transaction

* 1. It is now proposed that following the Initial Transaction, the beneficial interests in Shinhan and Hanwha be sold down to new end investors in a series of transactions. One of the proposed transactions is the Purchaser's proposed acquisition of 13,700,000,000‬ out of the total 35,400,000,000 units (being 38.70%) of Hanwha (the **Proposed Selldown Transaction**).
  2. *A chart setting out the ownership structure of the Australian companies as it will appear following the Proposed Selldown Transaction is attached as Annexure [\*\*\*].*
  3. In connection with the Proposed Selldown Transaction, the Purchaser entered into a Korean-language sale and purchase agreement on 20 October 2021 (the **SPA**). *A copy of the original Korean-language SPA is attached as Annexure [\*\*\*]. An English translation of the SPA is attached as Annexure [\*\*\*].*
  4. Article 17 of the SPA sets out that the sale and purchase clauses of the SPA do not become binding until the Purchaser obtains "the approval of the Australian Foreign Investment Review Board". Article 9(6) sets out that the SPA shall be terminated if such approval is not obtained. The parties understand that "approval of the Australian Foreign Investment Review Board" refers to the receipt of written notice from the Treasurer that, or to the effect that, the Commonwealth Government of Australia does not object to the Proposed Selldown Transaction either with or without conditions that the Purchaser must satisfy (or the Treasurer failing to make a determination within the required timeframe) (**FIRB Approval**).

# The Proposed Selldown Transaction is a Notifiable Action

* 1. The criteria for determining whether an action is a 'notifiable action' are set out in s 47(2) of the FATA. The first condition which must be met is that the action must be:
     1. to acquire a direct interest in an Australian entity or Australian business that is an agribusiness;
     2. to acquire a substantial interest in an Australian entity; or
     3. to acquire an interest in Australian land.
  2. The Proposed Selldown Transaction involves the Purchaser indirectly acquiring an interest in each of the Australian Companies. The Australian Companies are not agribusinesses, and the Proposed Selldown Transaction does not involve the acquisition of interests in Australian land. The Proposed Selldown Transaction will therefore only be a 'notifiable action' if any of the interests to be acquired is a 'substantial interest' for the purposes of s 47(2)(b) of the FATA.

Under s 4 of the FATA, a person holds a 'substantial interest' in an entity, trust or unincorporated limited partnership if:

* + 1. for an entity or unincorporated limited partnership – the person holds an interest of at least 20% in the entity or partnership; or
    2. for a trust (including a unit trust) – the person, together with any one or more associates, holds a beneficial interest in at least 20% of the income or property of the trust.
  1. The Proposed Selldown Transaction will involves the indirect acquisition of the following interests in the Australian Companies (prior to the application of tracing rules for Foreign Government Investors under s 19 of the FATA):

|  |  |  |  |
| --- | --- | --- | --- |
|  | Helena Australia | Celsus Australia | NGR Australia |
| KDB Life Insurance Co., Ltd. | 5.832% | 2.022% | 2.922% |
|  |  |  | *Figure 2* |

* 1. However, as set out in paragraph 3.4 above, the Purchaser is an FGI for the purposes of the FATA and the FATR. For this reason, the tracing rules set out in s 19 of the FATA apply. Namely:

If a person:

* + 1. holds a substantial interest in an unincorporated limited partnership (a general partner of which is a *higher party*); and
    2. the *higher party* holds an interest in a trust or unincorporated limited partnership (the *lower party*),

the person is taken to hold the interest in the lower party that the higher party holds.

* 1. Applying these FGI tracing rules, the relevant interest percentages being acquired by the Purchaser for the purposes of s 47(2) of the FATA are therefore as set out in the table below:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Helena Australia | Celsus Australia | NGR Australia |
| KDB Life Insurance Co., Ltd. | 49% | 17.3% | 25% |
|  |  |  | *Figure 3* |

* 1. Accordingly, for the purposes of s 47(2) of the FATA, the interests to be acquired by the Purchaser in Helena Australia and NGR Australia will be 'substantial interests' (above 20%) for the purposes of s 47(2)(b) of the FATA. Each of these proposed investments therefore meets the first condition for a 'notifiable action'.
  2. The second condition for a 'notifiable action' is that the 'threshold test' is met in relation to the entity, business or land under the FATA Subdivision B of Division 4. Because the Purchaser is an FGI, the relevant threshold amount is $0, and the 'threshold test' (and second condition) is therefore met.
  3. Where the first condition in s 47(2)(b) has been met, the third condition is that the relevant entity is:
     1. an Australian corporation that carries on an Australian business, whether alone or together with one or more other persons;
     2. an Australian unit trust; or
     3. Australian entity that is the holding entity of an entity mentioned in paragraph (a) or (b).
  4. Both of Helena Australia and NGR Australia are Australian corporations that carry on an Australian business. The Purchaser's acquisition of interests in these entities will therefore meet the third condition for a 'notifiable action'.
  5. The final condition for a 'notifiable action' is that the action is or is to be taken by a 'foreign person'. As set out above, the Purchaser is a 'foreign person' and the final condition is therefore met in relation to its proposed investment.
  6. The Purchaser's proposed acquisition of a 38.70% interest in Hanwha (resulting in the indirect acquisition of 'substantial interests' in Helena Australia and NGR Australia pursuant to the FGI tracing rules) under the Proposed Selldown Transaction is therefore a 'notifiable action' for the purposes of s 47(2) of the FATA.

# The Proposed Selldown Transaction is not a Significant Action

* 1. S 40(6) of the FATA states that an action will be a 'significant action' if "there would be or has been a change in control of the entity as a result of the action". 'Change in control' is defined in s 54 of the FATA as occurring only if:
     1. one or more foreign persons would begin, or have begun, to control the entity or business (whether alone or together with any associates of any of those persons); or
     2. if one or more foreign persons already control or controlled the entity or business:
        1. another foreign person would become, or has become, a person who controls the entity or business; or
        2. a person would cease, or has ceased, to be a person who controls the entity or business.
  2. Under s 54(4) of the FATA, a person 'controls' an entity or business if:
     1. the person (whether alone or together with one or more associates) is in a position to determine the policy of the entity or business in relation to any matter; or
     2. without limiting paragraph 54(4)(a), in relation to the acquisition of interests in securities in an entity or an issue of securities in an entity—the person holds a substantial interest in the entity.
  3. However, a person mentioned in paragraph 54(4)(b) does not control the entity if the Treasurer is satisfied that, having regard to all the circumstances, the person together with any one or more associates of that person is not in a position to determine the policy of the entity (FATA s 54(5)).
  4. We are instructed that the Purchaser will not have any ability to affect the management decisions of Hanwha (which in turn has no ability to affect the management decisions of the Aberdeen Fund). For this reason, we submit that the Treasurer should be satisfied that, having regard to all the circumstances, the Purchaser together with any one or more of its associates will not be in a position to determine the policy of Hanwha or the Aberdeen Fund for the purposes of s 54(5) of the FATA.
  5. As such, we submit that the Proposed Selldown Transaction will not result in a 'change in control' for any of the Australian Companies and as such does not satisfy the condition set out in s 40(6) of the FATA. On this basis, the Proposed Selldown Transaction will not be a 'significant action' under the FATA.

# The Proposed Selldown Transaction is not a Notifiable National Security Action

* 1. Section 55B of the FATA sets out when an action is a 'notifiable national security action'. In relation to the Proposed Selldown Transaction, the condition for being a 'notifiable national security action' is met where the action is to acquire a direct interest in an entity that carries on a national security business.
  2. Section 8AA of the FATR provides that a business is a "national security business" if:
     1. it is carried on wholly or partly in Australia whether or not in anticipation of profit or gain; and
     2. it is publicly known, or could be known upon the making of reasonable inquiries, that the business is one of the following kind:
        1. the business is a responsible entity for an asset for the purposes of the *Security of Critical Infrastructure Act 2018* (Cth) (**SCIA**), being a water utility that holds the licence, approval or authorization (however described), under a law of the Commonwealth, a State or a Territory, to provide the service to be delivered by the asset; or
        2. the business is an entity that is a direct interest holder (at least 10%) in a critical infrastructure asset for the purpose of the SCIA 2018.
  3. Section 9 of the SCIA sets out the definition of a "critical infrastructure asset", which includes a "critical water asset".
  4. Section 5 of the SCIA defines a "critical water asset" as one or more water or sewerage systems or networks that:
     1. are managed by a single "water utility", being an entity that holds a licence, approval or authorization (however described), under a law of the Commonwealth, a State or a Territory, to provide water services; and
     2. ultimately deliver services to at least 100,000 water connections or 100,000 sewerage connections.
  5. The proposed acquisition of in indirect interest in Helena Australia, the project company for the Mundaring Water Treatment Plant, will not be a 'notifiable national security action' on the basis that the subject of the acquisition is not a national security business or national security land. We are instructed that Helena Australia:
     1. is not a responsible entity for the purposes of the SCIA;
     2. does not hold a licence, approval or authorization (however described), under a law of the Commonwealth, a State or a Territory, to provide water service. Such licence is held by Water Corporation; and
     3. does not deliver any service to water connections. The delivery of such service is undertaken by Water Corporation.
  6. The proposed acquisition of an indirect interest in Celsus Australia, the project company for the new Royal Adelaide Hospital, will not be a 'notifiable national security action' on the basis that the subject of the acquisition is not a national security business or national security land.
  7. The proposed acquisition of an indirect interest in NGR Australia, the project company for the Queensland New Generation Rollingstock, will not be a 'notifiable national security action' on the basis that the subject of the acquisition is not a national security business or national security land.
  8. As none of the Australian Companies are entities that carry on a national security business, the Proposed Selldown Transaction will not be a 'notifiable national security action'. This analysis is the same as that provided to the Treasurer in the Initial FIRB Application, which was subsequently approved.

# Commercial Rationale and Intentions for the Business

* 1. The Purchaser's investment in Hanwha (and its resultant indirect investment in the Australian Companies) is a part of its long-term strategy for investment in stable, cash-flow generating infrastructure assets.

[***Note to DK: Please provide more detail about why KDB Life Insurance wishes to participate in the selldown. What is its overall investment strategy?***]

* 1. If the Proposed Selldown Transaction is completed, the Purchaser will have no governance or operational input into any of the Australian Companies. Aberdeen will continue as general partner of the Aberdeen Fund with Hanwha holding passive Limited Partner Interests in the Aberdeen Fund (and the Purchaser holding passive Limited Partner interests in Hanwha). Aberdeen’s role, control and discretion in relation to the Australian Companies via the Aberdeen Fund will not change and Aberdeen intends for the existing operations of the Australian Companies to be maintained in a manner consistent with their current operations, and for each Australian Company to continue to grow. There will not be any changes to the board composition, management structure or strategic direction of any of the Australian Companies.

# National Interest

* 1. For the reasons set out below, we submit that the Proposed Transaction would not be contrary to the Australian national interest.

## National Security

* 1. The Proposed Transaction will not have any adverse impact on Australia's national security. It will not affect Australia’s ability to protect its strategic and security interests. The Proposed Transaction is commercial in nature and is not a means of pursuing political or strategic objectives contrary to Australia's national security. Further, as mentioned above at paragraphs 6.4 and 8.2, if the Proposed Selldown Transaction is completed, Aberdeen will continue as general partner of the Aberdeen Fund with Hanwha holding the Limited Partner Interests in the Aberdeen Fund with limited rights, none of which confer control of any of the Australian Companies, and the Purchaser holding equivalent Limited Partner Interests in Hanwha which confer no control of Hanwha. Aberdeen’s role, control and discretion in relation to the Australian Companies via the Aberdeen Fund will not change and Aberdeen intends for the existing operations of the Australian Companies to be maintained in a manner consistent with their current operations.

## Competition

* 1. The Purchaser does not have any interests in any Australian assets which compete directly or indirectly with, or operate upstream or downstream in the supply chain from, the interests of any of the Australian Companies. [The Purchaser has no other investments or assets in Australia.]

[***Note to DK: Please confirm***]

* 1. The Proposed Selldown Transaction will not have the effect, or likely effect, of substantially lessening competition in any relevant market in Australia on the basis that the Purchaser will not gain control over market pricing and production of a good or service in Australia.

## Other Australian Government Policies (Including Tax)

* 1. We are instructed that all appropriately levied taxes relevant to the Proposed Selldown Transaction will be paid promptly in accordance with legal requirements.
  2. The Purchaser does not believe that the Proposed Selldown Transaction will have any material adverse impact on Australian Government revenue or Australian Government policies, and intends to procure that each Australian Company operate in accordance with all relevant Australian laws and Australian Government policies, including native title and Aboriginal heritage laws and environmental and rehabilitation policies.

## Impact on the Economy and the Community

* 1. The Purchaser does not expect the Proposed Selldown Transaction to impact adversely on the operations of any of the Australian Companies or their contribution to the Australian economy and broader community.
  2. As set out at paragraphs paragraphs 6.4 and 8.2, the Purchaser will have no ability to affect the management decisions of Hanwha (which in turn has no ability to affect the management decisions of the Aberdeen Fund). Aberdeen’s role, control and discretion in relation to the Australian Companies via the Aberdeen Fund will not change and Aberdeen intends for the existing operations of the Australian Companies to be maintained in a manner consistent with their current operations, and for each Australian Company to continue to grow. There will not be any changes to the board composition, management structure or strategic direction of any of the Australian Companies.

## Character of the Purchaser

* 1. As mentioned above the Purchaser is a life insurance company offering a wide range of life insurance products and related services to both individuals and groups throughout the Republic of Korea. The Purchaser is incorporated in the Republic of Korea.
  2. While indirectly owned predominantly by the government of the Republic of Korea, the Purchaser operates on a transparent commercial basis and is subject to adequate market regulation and supervision in its place of incorporation. It is subject to rigorous accountability requirements.

[***Note to DK: Please provide some additional details about how KDB Insurance is a well-respected, independent and regulated entity in Korea***]

## Other Information

* 1. The Purchaser has no other information of relevance to the national interest pertaining to:
     1. domestic or international investigations;
     2. rules or ineligibilities or conditions imposed as part of previous foreign investment approvals; or
     3. exclusions,

relating to the Purchaser or any of the Australian Companies.

# Engagement with Australian Regulatory Agencies

* 1. We are instructed that the Purchaser has not engaged with other Australian regulators specifically in relation to the Proposed Selldown Transaction.

[***Note to DK: Please confirm***]

# Request for No Objection

## Request

* 1. We seek a no objection notification under section 75 of the FATA indicating that the Treasurer has no objection to the Proposed Selldown Transaction on the terms described in this application.

## Timing

* 1. The Purchaser is eager to complete the Proposed Selldown Transaction as soon as possible and is prepared to provide any assistance required in order to facilitate the review of the application. Accordingly, we would greatly appreciate the Foreign Investment Review Board considering this application as soon as possible.

As set out in paragraph 4.4, the sale and purchase clauses of the SPA do not become binding until the Purchaser obtains FIRB Approval, and the SPA will terminate if such approval is denied.

# Application Fee

* 1. The consideration to be paid under the Proposer Selldown Transaction is 13,020,000,000 Korean Won (approximately A$14,755,500).
  2. Accordingly, the Purchaser estimates that the fee applicable to this application to be A$6,350.
  3. The Purchaser will arrange for the application fee to be immediately paid to the Foreign Investment Review Board via electronic funds transfer once payment instructions have been received following lodgement of this application.

# Supporting Documentation

# Confidentiality

* 1. The information and documents enclosed with this application are confidential and commercially sensitive. On that basis, we request that the information contained in this application be treated as confidential and protected information pursuant to FATA and not disclosed to any third parties other than those government agencies required to be consulted in the course of processing the pending application, without the prior consent of our clients.
  2. Further, all of the documents submitted and any internal working documents referring to the Aberdeen Fund, the Purchaser or this application are exempt from disclosure by operation of the *Freedom of Information Act 1982* (Cth). The Purchaser submits that it would be contrary to the public interest to release any document in, associated with, or connected to, this application. In any event, we would expect to be consulted and the Aberdeen Fund's or the Purchaser's consent obtained before any determination on the release of such document or part thereof publicly, or to a third party.

# Online Notification

* 1. This application has been submitted through the Foreign Investment Review Board's Foreign Investment Notification System in accordance with the instructions set out at https://firb.gov.au/apply-now. In the event of any inconsistency between the information provided in this application and the online submission form, the information provided in this application should prevail.

If you have any questions or require additional information in relation to this application, or any other matters contained in this application, please contact either myself or my colleague, Adam Aarons (+61 2 9093 3508 or [adam.aarons@hoganlovells.com](mailto:adam.aarons@hoganlovells.com)).

Further, the Applicant has advised that, should you or the Treasurer require, members of the Purchaser's management can make themselves available to discuss the Proposed Selldown Transaction or aspects of this Application at a mutually convenient time.