

Foreign Investment Review Board

Functions of the Board

The Foreign Investment Review Board (FIRB or the Board) is a non-statutory body established in April 1976 to advise the Commonwealth Government on foreign investment policy and its administration.

The main functions of the Board are:

- ❖ to examine proposals by foreign interests for acquisitions and new investment projects in Australia and, against the background of the Government's foreign investment policy, to make recommendations to the Government on those proposals;
- ❖ to advise the Government on foreign investment matters generally;
- ❖ to foster an awareness and understanding, both in Australia and abroad, of the Government's foreign investment policy;
- ❖ to provide guidance, where necessary, to foreign investors so that their proposals conform with the policy; and
- ❖ to monitor and ensure compliance with foreign investment policy.

The Board's functions are advisory only. Responsibility for the Government's foreign investment policy and for making decisions on proposals rests with the Treasurer.

Membership

There were three changes to the composition of the Board during 2000-01. As at 30 June 2001 the Board comprised three part-time members and a full-time Executive Member.

Mr John Phillips, AM was appointed Chairman of the Board on 16 April 1997 for a term of five years. He has extensive high level experience in the public,

finance and business sectors including the position of Deputy Governor of the Reserve Bank of Australia. His present responsibilities include Chairman, the Australian Gas Light Company; Chairman, IBJ Australia Bank Limited; and Deputy Chairman, QBE Insurance Group Limited.

Ms Lynn Wood has been a Board member since April 1995 and was re-appointed to the Board on 4 April 2000 for a term of five years. Ms Wood has considerable business experience in financial services, including having been a Director of Schroders Australia Ltd and Sedgwick (Holdings) Pty Ltd. She has also served as a Director of the Investment Funds Association of Australia and as a Member of the Economic Development Council of New South Wales. Ms Wood's other memberships include: a Director of the New South Wales Lotteries Corporation and the Multiple Sclerosis Society of New South Wales.

The Hon. Chris Miles was appointed to the Board on 8 June 1999 for a five year term. Between 1984 and 1998 Mr Miles represented the seat of Braddon, Tasmania, in the House of Representatives where from 1996 to 1998 he was the Parliamentary Secretary (Cabinet) to the Prime Minister. In that capacity he had special responsibility for tax legislation in the House of Representatives. Prior to his distinguished parliamentary career, Mr Miles taught in the education systems of Tasmania, the ACT and NSW. Mr Miles is currently Director of Corporate Development, Pacific Hills Education Ltd.

Ms Janine Murphy was the ex officio Executive Member of the Board until August 2000. She has been with the Commonwealth Treasury since 1976 and has experience across Treasury's various divisions, with a focus mainly on microeconomic reform, in particular the deregulation of the financial system and taxation policy. Ms Murphy began a three year posting to the Australian Embassy in Washington as Minister — Counsellor (Economic), on 1 September 2000.

Mr Peter Biggs was the ex officio Executive Member of the Board from August 2000 to 12 January 2001. He joined the Commonwealth Treasury in 1985 and his experience in Treasury has been mainly on microeconomic reform, environment economics and development finance. Immediately prior to joining the Executive of the Board in 1997 he was Minister — Counsellor (Financial) in the Australian Embassy in Bonn, Germany.

Dr Jim Hagan has been the ex officio Executive Member of the Board since 15 January 2001. He has been with the Commonwealth Treasury since 1998 after working in the New Zealand Treasury for five years, and prior to that in the Productivity Commission. He has experience across a range of portfolio issues including: taxation, labour markets, industry policy, agriculture, competition policy, education and the environment.

Relationship of the Executive to the Board

Executive assistance to the Board is provided by the Foreign Investment Policy Division of the Treasury. The Executive was headed by Ms Murphy as General Manager of the Division until August 2000, Mr Biggs as Acting General Manager from August 2000 to January 2001 and Dr Hagan (the current Executive Member) as General Manager from January 2001. The Executive provides secretariat services for the Board, prepares draft and final reports on proposals and is usually the first point of contact for foreign investment applicants.

In addition to its function as a secretariat for the Board, the Foreign Investment Policy Division also advises the Government on general foreign investment policy matters, including Australia's participation in multilateral and bilateral international agreements on investment.

Administration of Foreign Investment Policy

There were 3,665 cases received in 2000-01, down from 4,411 in 1999-2000. Of these, 3,347 were decided and 318 were withdrawn. Additionally, the Executive handled over 40,000 incoming telephone calls, answered 272 letters (314 in 1999-2000) and 722 electronic mail messages (419 in 1999-2000) in relation to specific potential proposals and the operation of foreign investment policy more generally.

The Executive welcomes direct contact from persons seeking advice on foreign investment policy questions through its telephone inquiry line (02) 6263 3795; electronic-mail address, firb@treasury.gov.au; or alternatively from its website at www.firb.gov.au. During 2000-01, the Executive received more than twice as many electronic inquiries as postal inquiries.

Under the *Foreign Acquisitions and Takeovers Act 1975* (FATA), the statutory time limit for reaching a decision is 30 days, with up to a further ten days to notify the parties. There is scope for an interim order extending the period of examination for up to a further 90 days. In 2000-01, 102 interim orders and 42 final orders¹ were issued. Interim orders are usually sought where the applicant has failed to provide adequate information to assess the proposal against the national interest test within the 30 day statutory deadline or to provide parties with the opportunity to address issues arising from the proposal. Final orders are issued where a proposal is inconsistent with Australia's foreign investment policy and therefore not in the national interest.

In keeping with the Board's responsibility to foster an awareness and understanding of the Government's policy and to provide guidance to investors, the Board's Executive is available to meet with both potential foreign investors and Australian businesses to explain foreign investment policy and its application to particular proposals.

Major proposals will often be in the public domain and the Board welcomes submissions on them from third parties. Consideration of such submissions can be an important part of the Board's examination process and its making of recommendations to the Treasurer or Assistant Treasurer.

Cost of the Board's operations

Consistent with the proper discharge of its functions, the Board is concerned to ensure that its operating costs are minimised. Total Board expenses in 2000-01 were \$99,560 (\$95,500 in 1999-2000). Remuneration of Board members was around 85 per cent of total Board expenses, the remainder was for local travel, car hire, legal advice and incidentals. Board members' fees are determined by the Remuneration Tribunal. Under the *Remuneration Tribunal Act 1973*, the Tribunal is required to make reports or determinations in respect of the remuneration and allowances of officers at intervals of not more than one year.

1 Final orders are only issued on proposals when a valid statutory notice has been received by the FIRB. Proposals that do not fall under the FATA (for example, retrospective and advanced 'off the plan' proposals) do not require a statutory notice. When rejected, such proposals are not issued with final orders.

Total expenses of the Executive were \$1.95 million in 2000-01 compared with \$2.0 million in 1999-2000. These expenses were mainly for employees (including superannuation and accruing leave entitlements), with other expenses being incurred for travel, printing and advertising. The total cost of foreign investment screening would also include the expenses of other Government authorities and agencies, at the Commonwealth and State levels, that are consulted on proposals.

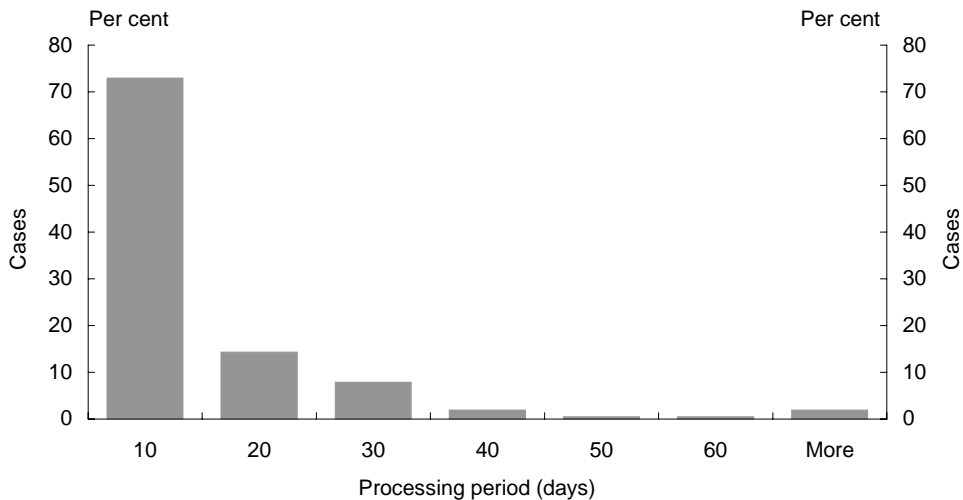
At 30 June 2001, there were 26 staff members in the Executive. This compares with 23 officers at the end of June 2000. The increase in staff numbers but decrease in total expenses can be attributed to the Executive having two full time contractors. Their wages are not included in the total expenses.

2000-01 outcomes

Minimising the impact on commercial decision making processes and ensuring proper consideration of cases against policy requirements continue to be important objectives of the administration of foreign investment policy. The Board continues to ensure that proposals are dealt with quickly and efficiently and every effort is made to avoid unnecessary interference in business decision making.

The information requirements for processing proposals have been designed to minimise the time taken (and hence the cost involved) in obtaining foreign investment approval. In 2000-01, 72 per cent of applications (71 per cent in 1999-2000) were decided within 10 days of receipt of a 'completed' application (refer Chart 1.1), with 96 per cent of these cases decided within 30 days. A 'completed' application is one incorporating all the information needed for a decision to be taken. Cases taking more than 30 days to process usually involve significant complexity or sensitivity.

Chart 1.1: Processing time for cases decided



Processing of proposals

After proposals have been submitted, the initial work is handled within the Executive. Business proposals are allocated to one of two specialist units depending on the industry sector involved, that is, the Primary and Secondary Industries Unit or the Tertiary Industries Unit. In the case of commercial and residential real estate, allocation is generally on the basis of the geographic location of the assets being acquired. A third unit, the International and Compliance Unit, takes on some of these commercial and residential cases.

The Board considers reports prepared by the Executive on major proposals on a weekly basis. Formal meetings are held approximately every four weeks, with a telephone discussion between the Executive Member and the other Board members in each of the intervening weeks. Following examination of a report, the Board's views and recommendations are submitted by the Executive Member to the Treasurer or Assistant Treasurer. The Board's views need not be unanimous. For the more significant cases, the Executive usually meets with the Treasurer or the Assistant Treasurer to discuss the case. Should a proposal raise important considerations and/or impinge on other ministerial responsibilities, the Treasurer or Assistant Treasurer may consult his colleagues or seek Cabinet's view.

The nature of a report and the level to which it is submitted for decision are normally determined by the features of the foreign investment proposal. In the case of significant proposals (their size, complexity or the policy issues raised), a full report is usually considered at a formal Board meeting prior to seeking the decision of the Treasurer or Assistant Treasurer. Where time constraints make a formal meeting impracticable, the Board's involvement will be by telephone.

Arrangements also exist under which, authority for decision making of certain types of proposals that do not involve issues of significance, are delegated to senior staff of the Executive.

Proposals are examined to determine whether they conform to the general and particular requirements of foreign investment policy, including the proponent's fulfilment of conditions attached to past approvals. Proposals are blocked using foreign investment powers where the proposals are inconsistent with policy and in circumstances involving national interest concerns. Reasons for rejecting substantial commercial proposals are usually published in the Treasurer's press releases.

Consultation arrangements

In examining large or otherwise significant proposals, State and Commonwealth Government departments and authorities with responsibilities relevant to the proposed activity, may be consulted. Consultation is undertaken on a strictly confidential basis to protect the information provided by the investor and usually takes about two weeks.

The Board acknowledges the assistance received during 2000-01 from the Commonwealth and State departments and authorities whose advice and comments are important in assessing the implications of proposals. The Board regards its liaison with key stakeholders as an integral part of the administration of Australia's foreign investment policy.

In the past, foreign investment proposals that were considered environmentally significant required environmental impact assessment under the *Environment Protection (Impact of Proposals) Act 1974*. It was the Board's practice not to provide advice on proposals with significant environmental aspects until the Minister for the Environment provided advice and

recommendations based on the environmental impact assessment. This approach was consistent with meeting the objectives of this legislation.

The *Environment Protection and Biodiversity Conservation Act 1999*, which came into effect on 16 July 2000, has altered these arrangements. The Treasurer's foreign investment decisions on cases received after 16 July 2000 no longer trigger environmental impact assessment under Commonwealth legislation. The *Environment Protection and Biodiversity Conservation Act 1999* allows the Minister for the Environment and Heritage to act independently of the foreign investment process when examining proposals for Commonwealth environmental approval. The FATA provides for the Board, as a Commonwealth agency aware of a proposal by a person to take an action, to refer the action to the Minister for the Environment and Heritage.

Handling of Commercial-in-Confidence and personal information

The Board fully recognises that much of the information required to assess a proposal will be sensitive commercial-in-confidence information. The Government respects this confidential status and has appropriate security procedures in place to ensure that this status is fully protected.

The Government is also obligated to respect the privacy of personal information that is provided by applicants to the Board, in accordance with the requirements of the *Privacy Act 1988*. In accordance with that Act, in situations where the applicant has breached, or is strongly suspected of having breached the FATA, the Board may seek the assistance of other government agencies in its efforts to ensure compliance. In seeking such assistance, the Board may pass relevant personal information to those agencies. Most commonly these agencies will be the Department of Immigration and Multicultural Affairs, the Australian Taxation Office and/or the Australian Federal Police.

In the event that action is taken by third parties to obtain access to confidential information held by the Board, it will not be made available without the permission of the person(s) who provided the information to the Board, except upon order of a Court of a competent jurisdiction.

In 2000-01, the Board's Executive directly dealt with six applications under the *Freedom of Information Act 1982* (FOI Act) seeking information concerning

foreign investment matters. Of these applications, four were received during the course of 2000-01 while two applications were being processed as at 30 June 2000.

The FOI Act provides for the denial of access to commercially confidential documents. This has relevance to documents provided to the Board (or prepared by the Board or Executive) in its examination of the proposals. It is the practice of the Executive to consult with the parties to a proposal about documents that are the subject of a FOI request to establish whether the parties are prepared to allow their release to an applicant or whether there are justifiable grounds to withhold documents.

Monitoring and compliance activity

The FATA contains wide-ranging powers under which the Treasurer may take legal action to protect and enforce the intent of the Government's foreign investment policy (see Appendix A). The powers include the ability to:

- ❖ unwind (by requiring the parties to sell shares, assets or property) transactions that have gone ahead, without prior foreign investment approval having been obtained, where that purchase is inconsistent with policy;
- ❖ prosecute persons and companies who fail to obtain prior approval;
- ❖ prosecute persons and companies who fail to comply with an order to sell shares, assets or property; and
- ❖ prosecute persons and companies who fail to comply with conditions attached to any approval given under the foreign investment legislation.

There are also general powers that make it an offence to provide false or misleading information, or to enter into any schemes for the purpose of avoiding the provisions of the FATA.

Monitoring of compliance with foreign investment decisions continues to be a significant activity. Close attention is given to the application of policy and/or the fulfilment of conditions attached to decisions.

In examining proposals, the applicant's compliance with any conditions relating to past proposals is taken into account. Instances of lack of compliance with conditions may result in future proposals being rejected.

The International and Compliance Unit has an ongoing annual compliance program involving the systematic checking of whether foreign persons are complying with the conditions of their approvals. During 2000-01, the International and Compliance Unit examined around 1,100 past proposals to determine compliance with the conditions attached to foreign investment decisions. In addition, further correspondence was generated from either:

- ❖ settling outstanding matters; or
- ❖ separate investigations of instances of possible non-compliance brought to the Board's attention by the members of the public.

During the year, the Unit also spent time reviewing existing compliance and monitoring procedures and documentation with a view to ensuring consistent treatment of cases of non-compliance. Processes for handling cases which are in serious breach of FATA and/or the approval conditions were also reviewed including how and when breaches are to be reported to the Department of Immigration and Multicultural Affairs. Some of these reports have resulted in delays in issuing new visas to offenders or in the refusal to issue a new visa.

Further information on real estate compliance is contained in Chapter 2.

National interest

Under the FATA, the Treasurer may reject applications to control an Australian business or acquire an interest in urban land if he considers the matter is 'contrary to the national interest'. The presumption is that foreign investment proposals are generally in the national interest and should go ahead. This reflects the positive stance of successive Australian Governments to foreign investment.

The Board provides advice to the Treasurer on large or sensitive proposals; however, it is the Treasurer, as the authority under the FATA, who defines whether an investment is contrary to the national interest.

In preparing its advice to the Treasurer, the Board considers whether the proposal is inconsistent with:

- ❖ existing government policy and law — taking the view that existing policy and law define important aspects of the national interest (for example, environmental regulation and competition policy);
- ❖ national security interests; and
- ❖ economic development.

The information required to formulate advice is obtained from a range of sources including consultation with the applicant, relevant Commonwealth and State government agencies and the target entity. Affected third parties may also be asked for information, and indeed, the Board welcomes comments from all interested parties.

Where national interest concerns are identified, the Board will seek, where possible, to formulate conditions that address these concerns.

International aspects

Asia Pacific Economic Cooperation (APEC)

Australia continues to participate actively in the work of APEC, including in relation to foreign investment. Australia's main investment interest in APEC is to encourage APEC members to enhance the environment for investment in their economies. This is done through Individual Action Plans (IAPs), peer reviews and collective actions through the work of the Investment Experts Group (IEG).

During 2000-01, the Executive revised and updated the Investment Chapter of the annual IAP. The Chapter describes the investment environment and policies of APEC member economies, and is intended to give a clear view of progress in achieving the announced Bogor goal of free and open trade and investment between APEC member economies. Australia's IAP for 2000-01 included information on liberalisations of Australia's foreign investment policy and investment related measures which have occurred in the past twelve months, as well as those which have been implemented since the base year of 1996. Copies of APEC IAPs are available at www.apecsec.org.sg on the APEC website at.

The Executive sent a representative to the IEG meeting in May 2001.

Bilateral Investment Promotion and Protection Agreements (IPPAs)

Australia's bilateral IPPAs provide a clear set of obligations relating to the promotion and protection of investments with other countries. By promoting confidence in the regulatory environment relating to foreign investment, IPPAs have the potential to enhance investment flows between Australia and other countries.

A model IPPA text has been created, and was recently updated, to provide the basis on which these agreements can be negotiated. The IPPAs provide 'most favoured nation' commitments in regard to treatment of foreign investment, give undertakings about expropriation/nationalisation (including the nature of compensation for such acts) and establish mechanisms for resolving disputes over investment matters.

To date, Australia has signed IPPAs with Argentina, Chile, the Czech Republic, Hong Kong, Hungary, Indonesia, Laos, Lithuania, Pakistan, Papua New Guinea, the People's Republic of China, Peru, the Philippines, Poland, Romania, the United Arab Emirates and Vietnam. Australia is currently negotiating further IPPAs with a number of countries, including South Africa and Turkey.

Free Trade Agreement with Singapore

Australia is involved in ongoing negotiations with Singapore for a Free Trade Agreement (FTA). A key objective of the FTA is the further liberalisation of trade in services and investment between the two countries. The Department of Foreign Affairs and Trade has primary responsibility for pursuing the FTA. The Executive contributes expert advice on international investment issues, and will ensure the FTA provides for the maintenance of Australia's existing foreign investment policy regime.

Review of the OECD Guidelines for Multinational Enterprises

The Guidelines are recommendations addressed by governments to multinational enterprises operating in or from the 30 OECD member countries and non-member adhering countries (Argentina, Chile, and Brazil). They are a voluntary code of 'best practice' standards for responsible business conduct.

The Guidelines were reviewed in June 2000 and the text of the current Guidelines is at **Appendix E**.

The Executive Member of the FIRB is the Guidelines' National Contact Point (NCP) and is responsible for administration of the Guidelines in Australia.

Two main features characterise the beginning of the reporting year:

- ❖ a very low awareness of the Guidelines throughout all areas of government, business labour and civil society; and
- ❖ even where knowledge was greatest in the labour movement and civil society, the perception persisted that their views had not been adequately taken into account in the Guidelines Review process.

The NCP's main activity this year has been to address these issues, through a more pro-active role in regard to the implementation of the revised Guidelines. This has involved:

- ❖ consultations with business, labour and other non-government organisations (NGOs) representing a wide range of interests. Two rounds of workshops on the Guidelines with business, labour and other NGOs. The aim of these workshops was, among other things, to seek these organisations views on the most effective way for the Australian NCP to promote the Guidelines and to involve these organisations as much as possible in that process;
- ❖ A discussion paper on the implementation of the Guidelines, which covered, among other things, the structure of the Australian NCP and a possible service charter for the NCP, which was circulated widely and put onto the Internet;
- ❖ Information and promotional initiatives including the establishment of a dedicated website (www.ausncp.gov.au), which incorporates a comprehensive package of information on the Guidelines and the NCP's role with regard to the Guidelines. Moreover, all decisions on large individual foreign investment proposals provided to foreign investors now include information on the Guidelines; and
- ❖ In accordance with the Guidelines implementation procedures, in June this year the NCP presented the inaugural oral and written report on

Australia's NCP activities in 2000-01 to the OECD. The report was prepared in consultation with business, labour and other NGOs.

We are now satisfied that these promotional and other initiatives are raising awareness.

No specific instances involving Guideline breaches have been raised with the NCP in the past 12 months.

World Trade Organisation (WTO)

Australia also pursues its interests in relation to international investment through involvement in the WTO Working Group on Trade and Investment. The Executive provides expert advice to the Department of Foreign Affairs and Trade on Australia's participation in this forum. The Working Group examines the economic relationship between trade and investment, and the implications of this relationship for development and economic growth, as well as stocktaking and analysis of existing international instruments and activities regarding trade and investment.