

Chapter 1

**Foreign Investment
Review Board**

Foreign Investment Review Board

The Foreign Investment Review Board (the Board or FIRB) is a non-statutory body established in 1976 to advise the Treasurer and the Government on foreign investment policy and administration. Its annual reports, which are not statutorily mandated, provide information on the operation of Australia's foreign investment review arrangements. This chapter covers the role of the FIRB and administration of these arrangements.

Functions of the Board

The Board's functions are advisory only. Responsibility for making decisions on foreign investment policy and proposals rests with the Treasurer. The Treasury's Foreign Investment and Trade Policy Division (the Division) provides secretariat services to the Board and is responsible for the day-to-day administration of the arrangements. The Division also provides advice to the Treasury ministers on foreign investment matters.

The role of the Board, including through its secretariat, is to:

- examine proposed investments in Australia that are subject to the policy and supporting legislation, and to make recommendations to the Treasurer on these proposals;
- advise the Treasurer and other Treasury portfolio ministers on the operation of the policy and the *Foreign Acquisitions and Takeovers Act 1975* (the FATA), and on proposed investments that are subject to each;
- foster an awareness and understanding, both in Australia and abroad, of the policy and the FATA;
- provide guidance to foreign persons and their representatives/agents on the policy and the FATA;
- monitor and ensure compliance with the policy and the FATA; and
- provide advice to the Treasurer on foreign investment policy and related matters.

Information on the operation of the FATA is provided in Chapter 3.

Board membership

The Board comprises four part-time Members and a full-time Executive Member.



Mr John Phillips AO was first appointed Chairman of the Board on 16 April 1997 and was reappointed for a further term of five years on 18 April 2007. He has extensive high-level experience in the public, finance and business sectors, including as Deputy Governor of the Reserve Bank of Australia. He has also been a director of a number of leading Australian companies.



Mr Hamish Douglass was appointed to the Board on 10 December 2009. He has extensive experience in global foreign investment and in the origination and execution of corporate finance transactions and, in particular, public company mergers and acquisitions. He has had extensive experience in corporate finance transactions in the mining industry. He is the Chief Executive Officer of Magellan Financial Group, a specialist global fund management group which is listed on the ASX.

He was previously Co-Head of Global Banking for Deutsche Bank AG in Australia and New Zealand and prior to that he was Head of Mergers and Acquisitions. He is a member of the Australian Government's Takeovers Panel, a member of the Young Global Leaders, a forum of the World Economic Forum and a member of the Financial Literacy Board.



Mr Brian Wilson was appointed to the Board on 10 December 2009. In his 33-year career as an investment banker specialising in corporate financial advice he advised more than 40 of Australia's top 100 companies and numerous international groups. Mr Wilson retired in 2009 as a Managing Director of the global investment bank Lazard, after co-founding the firm in Australia in 2004 and was previously a Vice-Chairman of Citigroup Australia and its predecessor companies.

He is currently Pro Chancellor of University of Technology, Sydney, a non-executive director of Bell Financial Group and a member of the Payments System Board of the Reserve Bank of Australia. He was also a member of the Australian Government Review of Australia's Superannuation System.



Ms Anna Buduls was appointed to the Board on 15 July 2010. Through her corporate advisory work and 15 years of non-executive company directorships, Ms Buduls has gained wide commercial experience across a broad range of companies and industries. She is currently owner and Chairman of a travel software group, and has been a non-executive director of listed companies SAI Global Ltd since October 2003 and Centro Properties Group since October 2009.



Mr Patrick Colmer became the General Manager of Treasury's Foreign Investment and Trade Policy Division (the Division) and commenced as the Executive Member of the Board on 20 November 2006. Mr Colmer has an extensive background as a public policy adviser in a

variety of government agencies. He was the General Manager of Treasury's Indirect Tax Division from 2002 to 2006 and was an Assistant Commissioner in the Australian Taxation Office from 1999 to 2002.

Relationship of the Division to the Board

As the Executive Member of the Board and the General Manager of the Division, Mr Colmer provides the link between the Board and the Treasury. As the secretariat to the Board, the Division is responsible for the initial examination of proposals received, and for preparing recommendations to the Treasury ministers or the Divisional officers the Treasurer has authorised to make decisions under the FATA and the policy. It also provides a contact point for foreign investors and their representatives/agents.

The Board provides advice on the application of the policy and the FATA across the range of proposals received by the Division and on foreign investment policy issues. It provides specific advice on the more significant applications received and also reviews the general handling of other applications. The Board performs this role with the benefit of weekly reports prepared by the Division on proposals received and through regular meetings and telephone discussions with the Executive Member. Formal Board meetings are generally held monthly, with telephone discussions taking place in the intervening weeks. The Board members draw on their considerable collective and individual professional and commercial experience in discharging their advisory role.

The Executive Member of the Board is also the Australian National Contact Point (the ANCP) for the *OECD Guidelines for Multinational Enterprises*. The ANCP is responsible for implementing the OECD Guidelines, handling inquiries, conducting formal reviews when the adherence of a multinational enterprise to the OECD Guidelines is questioned, facilitating discussions with interested stakeholders, and reporting on its activities to the OECD Investment Committee.

Administration of foreign investment policy

Information, advice and education

In keeping with the Board's role of fostering awareness and understanding of Australia's foreign investment review arrangements and the policy, the Division regularly engages with potential foreign investors, their representatives/agents and Australian businesses to provide information on the operation of the policy and the FATA and their application, including to specific proposals.

The Division also provides a telephone inquiry line, +61 2 6263 3795, an email address, firbenquiries@treasury.gov.au, and a website, www.firb.gov.au, for people seeking information or advice on the policy and the FATA.

Consideration timeframe

The FATA provides a 30-day statutory period for a decision to be made on proposals lodged under the FATA, with up to a further 10 days to advise the applicant parties of the decision. The statutory period commences upon receipt of a completed notice under section 25, section 26 or section 26A. The FATA also provides for the issue of an Interim Order, which extends the available examination period and prohibits the proposal for up to 90 days. Interim Orders are usually issued to allow the applicant additional time to provide adequate information for assessing the proposal. Proposals subject to the policy but not the FATA are decided (where possible) within the 30-day statutory deadline set by the FATA.

The Treasurer has provided an authorisation (effectively a delegation) to the Executive Member and other senior Division staff to make decisions on foreign investment proposals that are consistent with the policy or do not involve issues of special sensitivity. Around 88 per cent of proposals are decided under this authorisation. The Board maintains oversight of decisions made under this arrangement.

These arrangements, along with the use of notification forms for residential and non-residential real estate purchases, streamline the application and approval process. The forms, once completed, signed and submitted together with additional supporting information, facilitate a timely decision on applications.

Examination and approval process

Proposals are initially examined by the Division, in its role as Board secretariat, with the Board's direct and early involvement in significant applications. The Division also undertakes associated compliance work. Proposals are examined as to whether they conform with the requirements of the policy and the FATA, including the proponent's fulfilment of any conditions attached to past approvals. While the overwhelming majority of proposals proceed without objection, the Treasurer has powers under the FATA to prohibit proposals that are contrary to the national interest or to raise no objections to them subject to conditions that are considered necessary to ameliorate national interest concerns. Decisions are advised in writing to the applicants or their representatives/agents. Where the Treasurer makes a decision on a significant proposal, he may also issue a media release.

Consultation arrangements

In examining significant proposals, consultations are undertaken by the Board's secretariat with Australian, state and territory government departments and authorities with responsibilities relevant to the proposals. Advice and comments provided by such agencies are important in assessing the implications of proposals and, in particular, in determining whether they raise any national interest issues. Such consultation is undertaken on a strictly confidential basis to protect the information provided by the applicants. The Board regards this liaison with key stakeholders as an integral part of the administration of the policy.

Where major proposals are in the public domain, the Board may also receive submissions from third parties. Consideration of such submissions can be an important part of the examination process and the development of advice on the proposals to the Treasurer.

National interest

The FATA empowers the Treasurer to prohibit an acquisition if he is satisfied it would be contrary to the national interest. However, the general presumption is that foreign investment proposals will serve the national interest. This reflects the positive stance of successive Australian governments towards foreign investment, given the important role it plays in our economy and Australia's national development.

The national interest, and hence what would be contrary to it, is not defined in the FATA. Instead, the FATA confers upon the Treasurer the power to decide in each case whether a particular investment would be contrary to the national interest.

In preparing the Board's advice, consideration is also given to whether an investment is consistent with Australia's Foreign Investment Policy (see the Board's website at www.firb.gov.au. This website also contains information on Australia's foreign investment screening arrangements and on national interest matters, especially relating to real estate and other sectors with specific requirements).

A proposal that does not meet the requirements set out in the policy would ordinarily be regarded as being contrary to the national interest. Additional guidance on aspects of the national interest is provided in the Australian Government's Foreign Investment Policy (see www.firb.gov.au) and includes:

- existing government policy and legislation (for example, applying to telecommunications, broadcasting, the media, aviation, environmental regulation and competition policy);
- national security interests;
- competition;
- impact on the economy and the community; or
- the character of the investor.

The policy released by the Treasurer in June 2010 also provides guidance on consideration of proposals involving direct investment by foreign governments and their related entities.

Where a proposal involves a foreign government or a related entity, the Australian Government also considers if the investment is commercial in nature or if the investor may be pursuing broader political or strategic objectives that may be contrary to

Australia's national interest. This includes assessing whether the prospective investor's governance arrangements could facilitate actual or potential control by a foreign government (including through the investor's funding arrangements). Proposals from foreign government entities operating on a fully arms length and commercial basis are less likely to raise national interest concerns than proposals from those that do not.

Where the potential investor has been partly privatised, the Government considers the size, nature and composition of any non-government interests, including any restrictions on the exercise of their rights as interest holders.

The Government looks carefully at proposals from foreign government entities that are not operating on a fully arms length and commercial basis. The Government does not have a policy of prohibiting such investments but it looks at the overall proposal carefully to determine whether such investments may be contrary to the national interest.

Mitigating factors that assist in determining that such proposals are not contrary to the national interest may include: the existence of external partners or shareholders in the investment; the level of non-associated ownership interests; the governance arrangements for the investment; ongoing arrangements to protect Australian interests from non-commercial dealings; and whether the target will be, or remain, listed on the Australian Securities Exchange or another recognised exchange. The Government will also consider the size, importance and potential impact of such investments in considering whether or not the proposal is contrary to the national interest.

Handling of commercial-in-confidence and personal information

The Board recognises that much of the information required to assess a proposal will be commercially sensitive or be private to the applicant. Consequently, appropriate procedures are in place to ensure that confidentiality is protected.

Moreover, the Government is required to respect the privacy and sensitivity of personal and commercial information that is provided by applicants to the Board, in accordance with the requirements of the relevant legislation, including the *Privacy Act 1988* (Privacy Act) and the *Freedom of Information Act 1982* (FOI Act). However, in accordance with the Privacy Act, to provide whole-of-government advice to the Treasurer on applications or where the applicant may have breached the FATA or the policy, other government agencies may be consulted and relevant information may be provided to those agencies. Those agencies include the Department of Immigration and Citizenship (DIAC) and the Australian Taxation Office (ATO).

In the event that third parties outside government seek access to confidential information, it would not be made available without the permission of the person(s) who provided it, except upon order by a court of a competent jurisdiction or, in some circumstances, through the operation of the FOI Act.

In 2009-10, the Division received eight applications under the FOI Act (one in 2008-09) seeking information concerning foreign investment matters. The FOI Act provides criteria to determine whether particular documents or parts of documents are available or exempt from release. These include, for example, that the document contains commercially sensitive information where its release would cause harm to its provider. In line with the provisions of the FOI Act, the Division may consult with the parties to a proposal about documents they provided which are the subject of an FOI request, to seek their views on their possible release to an FOI applicant.

2009-10 outcomes

Cost of the Board's operations

Total Board expenses in 2009-10 were \$130,436 (\$128,552 in 2008-09). Remuneration of Board members was around 90 per cent of total Board expenses, with the remainder expended on local travel, car hire and incidentals. Board members' fees are determined by the Remuneration Tribunal.

Total expenses of the Division for 2009-10 were \$3.2 million (\$3.5 million in 2008-09). These expenses mainly comprised employee salary (including superannuation and accruing leave entitlements) and administrative costs. Over the course of 2009-10, the Division employed an average of 26 staff, two fewer than the average number of staff employed in 2008-09. However, following the introduction of new real estate screening and compliance policy in April 2010, additional staff has been engaged.

Consideration of proposals and enquiries

In 2009-10, a total of 4,703 applications for foreign investment approval were considered, with 4,401 approved, three rejected, 167 withdrawn and 132 exempt as not subject to the policy or the FATA. Of the 4,404 applications decided in 2009-10 (that is, those approved or rejected but not those withdrawn or exempt), 3,895 were decided within the Division under the Treasurer's authorisation and 509 were decided by a Treasury minister.

Additionally, in 2009-10 the Division handled approximately 15,000 telephone enquiries and 5,000 items of correspondence¹ in relation to potential proposals, compliance with conditional approvals, the policy and the FATA.

In 2009-10, two Interim Orders were made and published in the Commonwealth of Australia *Gazette*.² No Divestiture Orders or Final Orders were made. Final Orders are

1 This figure excludes all correspondence in relation to proposals that were yet to be finalised when the correspondence was received.

2 The FATA provides the Treasurer with the power to make orders prohibiting an acquisition (an Interim Order or a Final Order) or having the effect of requiring an interest to be disposed (a Divestiture Order). While the prohibition under a Final Order is not subject to any time limitations, an Interim Order prohibits the acquisition proceeding during the period from gazettal until the earlier of an additional 90 days, or until a decision has been made.

issued where a proposal, assessed in terms of the policy, is considered to be contrary to the national interest. Divestiture Orders are issued where an acquisition has already occurred and is subsequently assessed, in terms of the policy, as being contrary to the national interest.

The Board and the Division endeavour to ensure that all foreign investment proposals are dealt with in a timely and efficient manner and every effort is made to avoid any unnecessary delays to business decision-making.

In 2009-10, 94 per cent of proposals were decided within 30 days, compared with 97 per cent of proposals in 2008-09. Proposals that took more than 30 days to decide were generally delayed by a lack of sufficient information from the parties or because the application involved significant complexity or sensitivity. Of the real estate cases decided in 2009-10 (which represent the majority of proposals received), 62 per cent were finalised within two weeks, compared with 90 per cent in 2008-09.

Changes to foreign investment screening thresholds

On 4 August 2009, the Treasurer announced that the Government would make several changes to the foreign investment screening thresholds, including:

- replacing the four lowest thresholds for private business investment with a single threshold of \$219 million;
- indexing the new unified threshold on 1 January every year to keep pace with inflation; and
- abolishing the requirement that private investors notify the Government when establishing a new business in Australia valued above \$10 million.

The threshold changes took effect from 22 September 2009. From 1 January 2011, the monetary threshold is \$231 million for all investors excluding US investors, whose threshold is \$1005 million for investments in sectors that are not prescribed as sensitive sectors.

Changes to foreign investment policy — residential real estate

On 24 April 2010, the former Assistant Treasurer, Senator Nick Sherry, announced a tightening of the foreign investment rules as they relate to residential real estate and a package of new civil penalty, compliance, monitoring and enforcement measures. The announcement includes amendments to each of the FATA, the Regulations and the Policy to ensure that foreign non-residents can only invest in Australian real estate if that investment adds to the housing stock, and that investments by temporary residents in established properties are only for their use whilst they live in Australia.

The Government will continue to monitor the changes. Further details are provided in the section on real estate on page 28.

Monitoring and compliance activity

The FATA provides wide-ranging powers to enforce the decisions made, including the ability to:

- order the unwinding or divestment (by requiring the parties to sell shares, assets or property) of transactions that have gone ahead, without prior foreign investment approval having been obtained, where that purchase was inconsistent with policy;
- prosecute a foreign person (including a natural person or a company) that failed to obtain prior approval;
- prosecute a foreign person that failed to comply with an order to sell shares, assets or property; and
- prosecute a foreign person that failed to comply with conditions attached to any approval granted under the FATA.

Provisions of the *Crimes Act 1914* and the *Criminal Code Act 1995* 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.

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. It is general policy to report potential breaches of the FATA to DIAC, the ATO, the AFP and other government agencies as appropriate.

In order to ensure compliance with foreign investment policy, the Division systematically monitors whether foreign persons are complying with the conditions of their approvals. This involves cooperation with relevant members of the business community, local government authorities, the legal profession, and on occasion, the general public.

In addition, existing compliance capabilities were increased following the real estate changes announced on 24 April 2010. The Division has recruited a senior compliance officer who has built upon existing compliance capacity to create a dedicated compliance team. The compliance team is moving toward a systemic and structured regime which includes the following measures:

- a robust program of Quality Assurance to ensure internal process is adhered to in a consistent manner;
- a proactive systemic series of targeted investigations of non-compliance by foreign investors using a broad based data-matching program;

- interagency co-operation and liaison within the Fraud Control Policy of the Commonwealth;
- formalising FIRB interaction with the Commonwealth Director of Public Prosecutions;
- structured case investigation triggered by information received from members of the public (public denunciations);
- voluntary compliance; and
- a regime of education and information distribution to individuals and organisations affected directly and indirectly by foreign investment Government policy.

The Division's compliance and monitoring procedures and documentation processes will continue to be subject to ongoing review.