

Chapter 1: Foreign Investment Review Board

Foreign Investment Review Board

The Foreign Investment Review Board (the Board) is a non-statutory body established in 1976 to advise the Treasurer and the Government on Australia's Foreign Investment Policy (the Policy) and its administration. The Foreign Investment Review Board 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 Board and administration of these arrangements.

The Board's functions are advisory only. Responsibility for making decisions on the 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 portfolio 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 Act), and on proposed investments that are subject to each;
- foster an awareness and understanding, both in Australia and abroad, of the Policy and the Act;
- provide guidance to foreign persons and their representatives or agents on the Policy and the Act;
- monitor and ensure compliance with the Policy and the Act; and
- provide advice to the Treasurer on the Policy and related matters.

A copy of the Policy and information on the operation of the Act are provided in Appendices A and B.

Board membership

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



Mr Brian Wilson was appointed to the Board on 10 December 2009 and appointed Chairman from 16 April 2012. In his 33-year career as an investment banker specialising in corporate financial advice, Mr Wilson 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 Deputy 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 and is currently a member of the Australian Taxation Office Superannuation Reform Steering Committee.



Mr John Phillips AO was Chairman of the Board from 16 April 1997 until his retirement on 15 April 2012. He had extensive high-level experience in the public, finance and business sectors, including as Deputy Governor of the Reserve Bank of Australia. He was also 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 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 that is listed on the Australian Securities Exchange. 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.



Ms Anna Buduls was appointed to the Board on 15 July 2010. Through her corporate advisory work and 19 years of non-executive company directorships, Ms Buduls has gained wide commercial experience across a broad range of companies and industries, including the agriculture sector. She is currently owner and Chairman of a travel software group, and is a non-executive director of the listed company SAI Global Ltd (since October 2003). Ms Buduls is also a member of the Australian Social Inclusion Board and one of the three Australian members on the APEC Business Advisory Council.

Ms Deidre Gerathy, Mr Frank Di Giorgio and Ms Sam Reinhardt each served as Executive Member of the Board during 2011-12. The position of Executive Member is held by the General Manager of Treasury's Foreign Investment and Trade Policy Division. The Executive Member provides the link between the Board and the

Division, which provides secretariat support to the Board. Ms Reinhardt is the current Executive Member of the Board.

The role of Treasury's Foreign Investment and Trade Policy Division

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 Policy and the Act. The Division also provides a contact point for foreign investors and their representatives or agents.

The Board provides advice on the application of the Policy and the Act 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 discussions with the Executive Member and divisional officers. 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.

Administration of the 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 or agents and Australian businesses to provide information on the operation of the Policy and the Act 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 Act; and
- a compliance hotline, 1800 050 377, and an email address, FIRBCompliance@treasury.gov.au, for people wanting to raise potential compliance issues.

Consideration timeframe

The Act provides a 30-day statutory period for a decision to be made on proposals lodged under the Act, with up to a further 10 days after the day of the decision to advise the applicant of the decision. The statutory period commences from the day

after the receipt of a completed notice under section 25, section 26 or section 26A. The Act 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 Act are decided (where possible) within a 30-day period.

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. Just over 92 per cent of proposals were decided under this authorisation.

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 any required 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 Act, 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 Act 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 or 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.

National interest

The Act 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 Act. Instead, the Act 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 the Policy and the national interest (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).

The Government has decided that some types of investment in real estate are contrary to the national interest. The Policy outlines this as well as the types of real estate that foreign persons may buy and whether they need Government approval to do so. All residential real estate applications are considered in light of the overarching principle that foreign investment in residential real estate should increase Australia's housing stock.

For business acquisitions, assessing the national interest allows the Government to balance potential sensitivities against the benefits of foreign investment. The Government typically considers the following factors when assessing foreign investment proposals in any sector:

- national security;
- competition;
- impact on other Government policies (including taxation);
- impact on the economy and the community; and
- the character of the investor.

The Policy provides guidance on the above factors, as well as guidance on consideration of proposals involving direct investment by foreign governments and their related entities.

On 18 January 2012, the Government released a Policy Statement on Foreign Investment in Agriculture (now Annex 2 of the Policy). This provides guidance on factors that the Government typically considers in assessing foreign investment applications involving the agricultural sector. These are:

- the quality and availability of Australia's agricultural resources, including water;

- land access and use;
- agricultural production and productivity;
- Australia's capacity to remain a reliable supplier of agricultural production, both to the Australian community and our trading partners;
- biodiversity; and
- employment and prosperity in Australia's local and regional communities.

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 related 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 whether 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 commercially sensitive 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* and the *Freedom of Information Act 1982*. However, in accordance with the *Privacy Act 1988*, to provide whole-of-government advice to the Treasurer on applications or where the applicant may have breached the Act 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 and the Australian Taxation Office.

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 *Freedom of Information Act 1982*.

In 2011-12, the Division received 17 freedom of information applications (23 in 2010-11) concerning foreign investment matters. The *Freedom of Information Act 1982* 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 *Freedom of Information Act 1982*, the Division may consult with the parties to a proposal about documents they provided which are the subject of a freedom of information request, to seek their views on their possible release to a freedom of information applicant.

2011-12 Outcomes

Cost of the Board's operations

Total Board expenses in 2011-12 were \$176,745 (\$169,662 in 2010-11). 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 2011-12 were \$3.9 million (\$4.1 million in 2010-11). These expenses mainly comprised employee salary (including superannuation and accruing leave entitlements) and administrative costs. Over the course of 2011-12, the Division employed an average of 33 staff.

Consideration of proposals and enquiries

In 2011-12, a total of 11,420 applications for foreign investment approval were considered, with 10,703 approved, 13 rejected, 534 withdrawn and 170 exempt as not subject to the Policy or the Act. Of the 10,716 applications decided in 2011-12 (that is, those approved or rejected but not those withdrawn or exempt), 9,937 were decided within the Division under the Treasurer's authorisation and 779 were decided by a Treasury minister.

Additionally, in 2011-12 the Division handled approximately 9,700 telephone enquiries and 3,800 items of correspondence in relation to potential proposals, compliance with conditional approvals, the Policy and the Act.¹

In 2011-12, four non-real estate related and three real estate related Interim Orders were published in the Commonwealth of Australia *Gazette*.² There were no non-real estate related and 13 real estate related Final Orders published. Final Orders are issued where a proposal, assessed in terms of the Policy, is considered to be contrary to the national interest. No Divestiture Orders were made. 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.

Of the 10,716 applications decided in 2011-12 (that is, those approved or rejected but not those withdrawn or exempt), over 95 per cent of proposals were decided within 30 days. Proposals that take more than 30 days to decide are generally delayed by a lack of sufficient information from the parties, or because the application involved significant complexity or sensitivity.

Monitoring and compliance activity

The Act 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 contrary to the national interest;
- 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

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

2 The Act 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. The Act also provides the Treasurer with the power to revoke an Order that has been made.

- prosecute a foreign person that failed to comply with conditions attached to any approval granted under the Act.

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 Act.

In examining proposals, the applicant's compliance with any conditions relating to past proposals is taken into account. Instances of failure to comply with conditions may result in future proposals being rejected. It is general policy to report potential breaches of the Act to the Department of Immigration and Citizenship, the Australian Taxation Office, the Australian Federal Police and other government agencies as appropriate.

Compliance and monitoring work includes the following activities:

- educating and providing information to individuals and organisations affected directly and indirectly by the Policy. Activities include presenting at industry forums and seminars, providing information such as the Guidance Notes and the Investor Obligations Fact Sheets (which are available on the Board's website); responding to written enquiries and providing information through the general enquiries helpline and the compliance hotline;
- monitoring to ensure that 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 occasions, the general public;
- interagency co-operation and liaison with a range of government agencies including the Department of Immigration and Citizenship, the Australian Taxation Office, the Australian Securities and Investments Commission and the Australian Federal Police; and
- case investigations triggered by information received from members of the public.