CHAPTER 1

Foreign Investment Review Board

Functions of the Board

The Foreign Investment Review Board (FIRB) is a non-statutory body established in April 1976 to advise the 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 no changes to the composition of the Board during 1999-2000. As at 30 June 2000 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 is currently a Director of the New South Wales Lotteries Corporation, Syscorp Pty Limited 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 the ex officio Executive Member of the Board 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 Treasury Minister – Counsellor Economic, on 1 September 2000.

Relationship of the Executive to the Board

Executive assistance to the Board is provided by the Foreign Investment Policy Division of the Treasury. During 1999-2000 the Executive was headed by Ms Murphy as General Manager of the Division. 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 Executive 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

The number of cases received in 1999-2000 was 4,411 (5,091 in 1998-99). Of these 4,003 (4,754) were decided. Additionally, in 1999-2000 the Executive handled over 40,000 incoming telephone calls, answered 314 (667) letters and 419 (13) electronic mail messages during the year with regard to specific potential proposals and the operation of foreign investment policy more generally.

The Executive welcomes direct contact from the general public seeking advice on foreign investment policy questions and encourages contact either via its telephone inquiry line, its electronic-mail address, firb@treasury.gov.au or alternatively from http://www.firb.gov.au on the internet. During 1999-2000, for the first time, more persons contacted the Executive by electronic message than by normal mail.

Under the *Foreign Acquisitions and Takeovers Act 1975*, 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 1999-2000 there were 133 interim orders and 87 final orders 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 give the opportunity to the parties to address issues arising from the proposal. Final orders are issued where a proposal is inconsistent with Australia's foreign investment policy and 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. The Board and the Executive are ready to comment on proposals in draft form.

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 1999-2000 were $95,500 ($97,000 in 1998-99). Remuneration of Board members was around 88 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.

Total expenses of the Executive were $2.0 million in 1999-2000 compared with $2.2 million in 1998-99. These expenses were mainly for employees, including expenses for 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 for other Government authorities and agencies, at both the Commonwealth and State levels, that are consulted on proposals.

At 30 June 2000, there were 23 staff members in the Foreign Investment Policy Division of Treasury. This compares with 27 officers at the end of June 1999. The lower number of staff members and resulting lower expenses of the Executive can be mainly attributed to changes in foreign investment regulations leading to a decline in the number of applications received during 1999-2000 (see Appendix D for policy changes).

1999-2000 outcomes

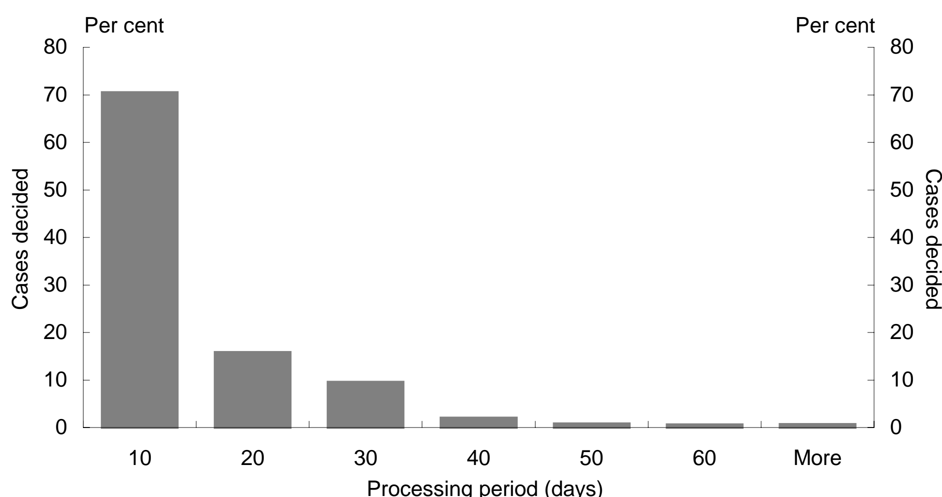
Minimising the impact on commercial decision making processes and ensuring proper consideration of cases against policy requirements continue to be important objectives of the administration of foreign investment policy. The Board continues to ensure that proposals are dealt with quickly and efficiently

and every effort is made to avoid unnecessary interference in business decision making.

The information requirements for processing proposals have been designed to keep to a minimum the time taken (and hence the cost involved) in obtaining foreign investment approval. In 1999-2000, 71 per cent of applications (2,821) were decided within 10 days of receipt of a completed application (refer Chart 1.1) and 96 per cent of cases were 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.

Delays may occur where applications lack necessary information. For example, last year it was reported that 40 per cent of applications were decided within 10 days and 86 per cent within 30 days of receipt of a completed application. However, these figures were based on the time taken from original receipt of the application to decision. If the time is measured from receipt of all the necessary information, 65 per cent of applications were decided within 10 days and 95 per cent within 30 days in 1998-99. This basis of measurement has been adopted this year since it is more realistic and is consistent with normal practice.

Chart 1.1: Processing time for cases decided



Processing of proposals

After proposals have been submitted to the Board or its Executive, the initial work is handled within the Foreign Investment Policy Division of the Treasury. Within the Division, business proposals are allocated to one of two specialist units depending on the industry sector involved, that is, the Primary & 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 Member usually meets with the Treasurer and the Executive also discusses cases with the Assistant Treasurer. Should a proposal raise important considerations and/or impinge on other ministerial responsibilities, the 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 (because of 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.

There are also arrangements under which authority, for approval of certain types of proposals that do not involve issues of significance, is delegated to senior staff of the Executive.

Conclusions are reached only after examination of the proposal as submitted and necessary consultations to determine whether it conforms to the general and particular requirements of foreign investment policy including the proponent's fulfillment of conditions attached to past approvals. Proposals are

blocked using foreign investment powers only in circumstances involving major national interest concerns. Reasons for rejecting substantial commercial proposals are published in the Treasurer's press releases.

Consultation arrangements

In the examination of large or otherwise significant proposals, State and Commonwealth Government departments and authorities with responsibilities relevant to the proposed activity of the foreign investor 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 1999-2000 from the relevant 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.

During 1999-2000 foreign investment proposals that were considered environmentally significant required environmental impact assessment under the *Environment Protection (Impact of Proposals) Act 1974*. During 1999-2000, the practice continued that the Board would not provide any decision on proposals with significant environmental aspects until the Minister for the Environment and Heritage provided advice and recommendations based on environmental impact assessment. This approach was consistent with meeting the object of the *Environment Protection (Impact of Proposals) Act 1974*.

The *Environment Protection and Biodiversity Conservation Act 1999*, which came into effect on 16 July 2000 has altered these arrangements. The Board's decision on foreign investment approval of proposals no longer triggers environmental impact assessment under Commonwealth legislation. The *Environment Protection and Biodiversity Conservation Act 1999* will allow the Minister for the Environment and Heritage to act independently of the foreign investment process when examining proposals for Commonwealth environmental approval. Under the Act provision exists 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 for a decision on whether or not the action is a controlled action.

Handling of Commercial-in-Confidence 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 Foreign Investment Review 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 *Foreign Acquisitions and Takeovers Act 1975* 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 government agencies. Most commonly these agencies will be the Department of Immigration and Multicultural Affairs, the Australian Taxation Office 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 1999-2000, the Board's Executive dealt with eight applications under the *Freedom of Information Act 1982* (FOI Act). All applications sought information concerning foreign investment matters. Of the eight applications, seven were received during 1999-2000 while one was an application being processed as at 30 June 1999. Of these, two were still being processed as at 30 June 2000, two applications were withdrawn or lapsed, two were denied access, one was granted partial access and one was granted full access.

There are provisions in the FOI Act authorising denial of access to commercially confidential documents. This has relevance to documents provided to the Board (or prepared by the Board or Executive) in examination of proposals. It is the practice of the Executive to consult with the parties to a proposal about the documents that are the subject of a FOI request to establish whether the parties are prepared to have the documents released to an applicant or whether there are justifiable grounds to withhold documents.

Monitoring and compliance activity

The *Foreign Acquisitions and Takeovers Act 1975* 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 Act.

Monitoring of compliance with foreign investment policy continues to be a significant activity, particularly in respect of the real estate sector. Close attention is given to the application of policy and/or the fulfillment of conditions attached to approval.

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 not being approved.

During 1999-2000, the International and Compliance Unit examined around 1,000 past proposals to ensure compliance with the conditions attached to foreign investment approval. In addition, several hundred proposals generated further correspondence in settling outstanding matters.

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

Foreign Investment Policy during 1999-2000

Significant changes were made to the administration of foreign investment policy during 1999-2000. Generally the changes represent a significant easing of compliance and administrative costs associated with Australia's foreign investment regime.

These changes followed several developments.

First, the Treasurer announced on 28 June 1996 a comprehensive schedule of legislative reviews, including a review of foreign investment policy. The review was proposed to examine costs imposed upon business in complying with foreign investment policy.

Secondly, in its Individual Action Plans from 1996 to 1998, Australia committed to other Asia Pacific Economic Cooperation (APEC) countries that it would rationalise restrictions on foreign investment in real estate, and review the screening system in relation to foreign investment in 'non-sensitive' sectors.

Lastly, in February 1999, the Prime Ministers of Australia and New Zealand established a Joint Prime Ministerial Task Force on Australia and New Zealand Bilateral Economic Relations.

Flowing from the work of the Task Force, on 4 August 1999, the Prime Minister announced a number of changes to Australia's foreign investment regime that would facilitate investment between Australia and New Zealand. On 3 September 1999, following work pertaining to the review of foreign investment and in accord with APEC commitments, the Treasurer announced a further set of measures.

These announcements have led to numerous changes to the *Foreign Acquisition and Takeovers Regulations 1989*.

The main changes resulted in increases to the notification threshold for foreign investment purposes for acquisitions of existing businesses from $5 million ($3 million for rural businesses) to $50 million and similarly for developed non-residential commercial real estate from $5 million to $50 million (unless such properties are subject to heritage listing).

Another key amendment to the regulations provided an exemption for Australian citizens and their foreign spouses when purchasing residential real estate as joint tenants.

These and other changes (discussed in Appendix D) commenced on 10 September 1999.

International aspects

Review of the OECD Guidelines for Multinational Enterprises

The *OECD Guidelines for Multinational Enterprises* (the Guidelines) are recommendations jointly addressed by the OECD Governments to multinational enterprises (MNEs) operating in their territories. They form part of the *1976 OECD Declaration on International Investment and Multinational Enterprises*, an instrument imposing responsibilities on both governments and business. The approach in the Declaration represents a commitment by adhering governments to facilitate direct investment among OECD members in recognition that such investment contributes to higher rates of economic growth, employment and standards of living.

The Guidelines provide voluntary principles and standards for responsible business conduct consistent with applicable laws. Their aim is to ensure that the operations of MNEs strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and enhance the contribution to sustainable development made by MNEs.

In June 1998, the OECD Committee on International Investment and Multinational Enterprises (CIME) instigated a review of the Guidelines. The review of the Guidelines was undertaken over a period of two years, and included extensive dialogue with business, labour organisations and non-governmental organisations, to ensure the Guidelines continued to be relevant and effective in the rapidly changing global economy. The revised Guidelines were adopted by the governments of the 29 OECD Member countries and four non-Members, Argentina, Brazil, Chile and the Slovak Republic, at the OECD Ministerial Council Meeting (MCM) in Paris in June 2000. The 2000 MCM was chaired by the Hon Peter Costello, Treasurer of the Commonwealth of Australia.

The revised text of the Guidelines (see Appendix E) contains far-reaching changes that reinforce the economic, social and environmental elements of the OECD's sustainable development agenda. These include the addition of recommendations on the elimination of child labour and forced labour, a recommendation on human rights, and new chapters on combating corruption and consumer protection. The environment chapter now encourages multinational enterprises to raise their environmental performance through improved internal environmental management and better contingency planning for environmental impacts.

The review also resulted in revised implementation procedures. The Guidelines are recommendations addressed to business. However, governments through their National Contact Points (NCPs) are responsible for promoting the Guidelines, handling inquiries and helping to resolve issues that arise in certain instances. While the review of the Guidelines has not changed the role of NCPs to any great extent, the Procedural Guidance does make the functions of the NCP far more explicit and these functions emphasise more 'pro-active' responsibilities for NCPs.

The Board advises the Government on its approach to the revised implementation procedures, including through consultation with business organisations, employee representatives and other non-governmental organisations. Currently, the Australian NCP is the Executive Member of the FIRB. The NCP will put in place measures to raise the awareness of the Guidelines, including the hosting of seminars and using the Internet to disseminate information on the Guidelines as widely as possible. Information on Australia's NCP and a copy of the Guidelines text and other relevant documents are available at http://www.treasury.gov.au/OECD Aus. NCP.

Joint Prime Ministerial Task Force on Australia New Zealand Bilateral Economic Relations

As discussed above, in February 1999, the Prime Ministers of Australia and New Zealand established a Joint Prime Ministerial Task Force on Australia and New Zealand Bilateral Economic Relations.

Following the work of the Task Force, on 4 August 1999 the Prime Minister of Australia announced a number of changes to Australia's foreign investment regime aimed at facilitating investment between Australia and New Zealand. One change resulted in an exemption from the need for foreign investment

approval for a special category of visa holders, which includes most New Zealand citizens, when investing in Australian residential real estate through Australian companies and trusts. These changes are at Appendix D.

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 being done through Individual Action Plans (IAPs), peer reviews and collective actions through the work of the Investment Experts Group (IEG).

Australia's IAP for 1999-2000, and those of the other APEC member countries, was set out in a new streamlined, electronic format. This new format provides for greater transparency and comparability, making the IAPs a more useful tool for business in considering their investment options. This year's IAP included information pertaining to 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/iap/2000 on the Internet.

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, to promote the flow of capital for economic activity and development. 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. A model IPPA text has been established, and was updated in 1999, to provide the basis on which these agreements can be negotiated.

Australia has entered into IPPAs with a number of countries. 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, Ukraine

and Vietnam. Australia is negotiating further agreements with Egypt, Russia, Uruguay, Turkey and the United Arab Emirates.

By promoting confidence in the regulatory environment relating to foreign investment, IPPAs have the potential to enhance investment flows between Australia and other countries.