

# Chapter 1

**Foreign Investment  
Review Board**



# 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 Treasurer 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 Treasurer on those proposals;
- to advise the Treasurer 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.

The Executive member of the Board is also the Australian National Contact Point (ANCP) for the *OECD Guidelines for Multinational Enterprises* (the *Guidelines*) (a copy is at **Appendix G**). The ANCP is responsible for promoting the *Guidelines*, handling inquiries, discussions with interested stakeholders and reporting its activities to the OECD Committee on International Investment and Multinational Enterprises.

## Membership

There was one change to the composition of the Board during 2002-03. As at 30 June 2003 the Board comprised three part-time members and a full-time Executive Member.

**Mr John Phillips, AM** was first appointed Chairman of the Board on 16 April 1997 and re-appointed for a further term of five years on 24 April 2002. 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, Australia Charities Fund and Chancellor, University of Western Sydney.

**Ms Lynn Wood** has been a Board member since April 1995 and was re-appointed to the Board on 4 April 2000 for a further term of five years. Ms Wood has considerable business experience in financial services. Her present responsibilities include Director,

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Macquarie Goodman Funds Management Limited; Director, MS Society of NSW; Chairman of Hands Pty Limited; and Compliance Committee Member of Barclays Global Investors Australia Limited and Mellon Global Investment Australia Limited. Ms Wood was formerly a Director of Schroders Australia Limited; Sedgwick (Holdings) Pty Limited and the Investment Funds Association of Australia (now IFSA).

**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 Strategic Development, Pacific Hills Education Ltd.

**Dr Jim Hagan** was the ex officio Executive Member of the Board from mid January 2001 to October 2002. He joined the Commonwealth Treasury in 1998 after working in the New Zealand Treasury for five years, and prior to that in the Productivity Commission. In October 2002, he left the Board to take up a position in the Domestic Economy Division of the Treasury.

**Mr Chris Legg** has been the ex officio Executive Member of the Board since October 2002. He joined the Commonwealth Treasury in 1980, and has had secondments to the International Monetary Fund, the World Bank and the Office of National Assessments. He has also worked at the Bureau of Industry Economics. Before taking up his current position, Chris was the General Manager of the International Economy Division of the Treasury. His Treasury experience includes a period as an adviser in the Treasurer's office, and work on resource allocation and transport, balance of payments, State finances, market operations, overseas borrowing and international finance.

### Relationship of the Division to the Board

Executive assistance to the Board is provided by the Foreign Investment Policy Division of the Treasury. The Division is headed by Mr Legg as General Manager. The Division 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 Division also advises the Government on foreign investment policy matters. This includes providing advice on relevant policy issues which emerge in the context of multilateral forums, such as the Organisation for Economic Cooperation and Development (OECD), the World Trade Organization (WTO) and the Asia-Pacific Economic Cooperation (APEC), and bilaterally through free trade and investment protection and promotion agreements. Chapter 4 covers these issues in more detail and also examines Australia's international investment position.

## Administration of Foreign Investment Policy

In 2002-03 5,112 cases were received, up from 4,922 in 2001-02. Of these, 4,747 were decided and 365 were withdrawn. Additionally, the Division handled over 25,000 incoming telephone calls, answered 173 letters (208 in 2001-02) and 1,712 electronic mail messages (1,120 in 2001-02) in relation to specific potential proposals and the operation of foreign investment policy more generally.

The Division welcomes direct contact from persons seeking advice on foreign investment policy through its telephone inquiry line +61 2 6263 3795, electronic-mail address, <firb@treasury.gov.au>, or alternatively from its website at <<http://www.firb.gov.au>>.

Under the *Foreign Acquisitions and Takeovers Act 1975* (the Act) (a copy is at **Appendix E**) 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 2002-03, 71 interim orders, 68 final orders<sup>1</sup> and 14 divestiture orders were published. 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 period 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 judged 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 Division 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 the development of recommendations to the Treasurer or the Parliamentary Secretary to the 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 2002-03 were \$117,897 (\$95,375 in 2001-02). Remuneration of Board members was around 89 per cent of total Board expenses, the remainder was for local travel, car hire 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 Division were \$2.35 million in 2002-03 compared with \$2.16 million in 2001-02. These expenses were mainly for employees (including

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<sup>1</sup> Final and interim orders are only issued on proposals when a valid statutory notice has been received by the FIRB. Some proposals do not require a statutory notice (for example, retrospective and advanced 'off the plan' proposals). When rejected, such proposals are not issued with final orders.

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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.

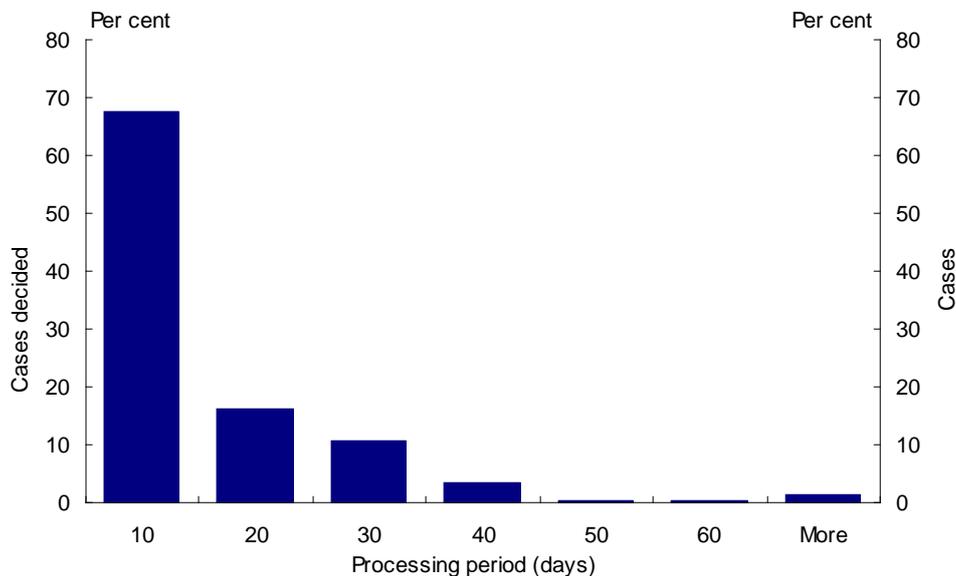
At 30 June 2003, there were 26 staff members in the Division. This compares with 24 officers at the end of June 2002.

### 2002-03 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 2002-03, 68 per cent of applications were decided within 10 days of receipt of a 'completed' application (refer Chart 1.1), with 95 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. Of the total number of cases, 89 per cent of cases were completed within 30 days of receipt of the initial application. 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 Division. 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 property being acquired. A third unit, the International and Compliance Unit, manages compliance issues associated with foreign investment proposals.

The Board considers reports prepared by the Division on a weekly basis concerning non-real estate sector proposals and commercial real estate proposals valued at \$100 million or more, and the more complex residential real estate proposals. 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 the reports, the Board's views and recommendations are submitted by the Executive Member to the Treasurer or the Parliamentary Secretary to the Treasurer. Should a proposal raise important considerations and/or impinge on other ministerial responsibilities, the Treasurer or the Parliamentary Secretary to the Treasurer may consult his colleagues or seek Cabinet's view.

The nature of the Board's advice 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 (in terms of their size, complexity or the policy issues raised), a full background brief is usually prepared by the Division for consideration at a formal Board meeting prior to seeking the decision of the Treasurer or Parliamentary Secretary to the Treasurer. Where time constraints make a formal meeting impracticable, the Board's involvement will be by telephone.

Arrangements are in place under which authority for decision making of certain types of proposals that do not involve issues of high sensitivity are delegated to senior staff of the Division. The majority of proposals (95 per cent in 2002-03) are decided under delegation. The types of proposals that are decided under delegation include acquisitions of urban land valued below \$50 million (\$100 million for commercial real estate and 'off the plan' proposals), acquisitions of existing businesses or the establishment of new businesses valued at less than \$100 million, and offshore takeovers where the Australian assets represent less than 50 per cent of the total assets of the business being acquired. These delegations have been in place since September 1999.

These arrangements, along with the release of the residential real estate application form in 2001 (the revised version, R2 Form, was released in 2002) and the advanced 'off the plan' application form (D1 Form) in 2002, have contributed to the considerable streamlining of the application process over recent years. This is evidenced through the increased number of 'complete' applications received by the Division. In 2002-03, 4,531 cases were decided under delegation and 216 cases were decided by Ministers. Of these, 1,182 were seen by the Board in the weekly board reports.

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 prohibited using foreign investment powers where the proposals are inconsistent with policy and involve national interest concerns. Reasons for rejecting substantial commercial proposals are usually published in the Treasurer's press release.

## **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 2002-03 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.

Additionally, to increase familiarity with the Government's foreign investment policy and its requirements generally, the Division, commencing in 2001, has more actively taken opportunities to make presentations to interest groups on Australia's foreign investment policy. Presentations have been directed to the real estate and conveyancing institutes. Additionally, contacts have been made with other relevant parties, including Government and State authorities as well as private agencies, such as the law societies, to ensure foreign investment policy is both widely available and understood.

## **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 Act, 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 and Indigenous 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, such information 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 2002-03, the Division directly dealt with five applications under the *Freedom of Information Act 1982* (FOI Act) seeking information concerning foreign investment matters.

The FOI Act provides for the denial of access to commercially confidential/personal documents. This has relevance to documents provided to the Board (or prepared by the Board or the Division) in its examination of proposals. It is the practice of the Division 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 Act (at **Appendix E**) 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 (at **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.

Furthermore, provisions of the *Crimes Act 1914* 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.

It is general policy to report breaches of the Act to the Department of Immigration and Multicultural and Indigenous Affairs and other Government agencies as appropriate.

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 systematically monitors whether foreign persons are complying with the conditions of their approvals. This involves the active co-operation of many in the business community, local government authorities, the

legal fraternity and on occasion the wider general public. During 2002-03, the International and Compliance Unit examined around 2,300 past proposals to determine compliance with the conditions attached to foreign investment decisions. In addition, compliance activities focused on:

- settling outstanding matters;
- separate investigations of instances of possible non-compliance brought to the Board's attention by the members of the public; and
- improving awareness of the Government's foreign investment policy in the local government arena and appropriate State and Commonwealth agencies.

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 Act and/or the approval conditions were also reviewed including how and when breaches are to be reported to the Department of Immigration and Multicultural and Indigenous Affairs and other Government agencies as appropriate. Some of these reports have resulted in delays by Immigration in issuing new visas to offenders or in the refusal to issue a new visa.

Links with the Australian Federal Police and other law enforcement agencies were strengthened with the exchange of information and advice within the limits allowed by the *Privacy Act 1984*. Two joint agency agreements were entered into with the Australian Federal Police to investigate, inter alia, possible breaches of the Act. At the time of publication one of these matters was before the Courts and the other matter resulted in the agreed sale of numerous properties acquired without approval and without regard to the Government's foreign investment policy.

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

## **National interest**

Under the Act, 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 towards foreign investment.

The Board provides advice to the Treasurer on large and sensitive proposals. However, it is the Treasurer, as the authority under the Act, who decides 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 may seek to formulate conditions that address these concerns.

