

**Foreign Investment
Review Board**

**Annual Report
2004-05**

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13 December 2005

The Hon Peter Costello MP
Treasurer
Parliament House
CANBERRA ACT 2600

Dear Treasurer

In accordance with the Foreign Investment Review Board's responsibility to advise the Government on foreign investment matters, I submit the Board's Annual Report for the financial year 2004-05.

The Report outlines the activities of the Board, provides a summary of the year's foreign investment proposals, and reviews trends in foreign investment in Australia and Australian investment abroad. The Report also has a number of Appendices that provide supporting material on foreign investment policy, including a copy of the relevant legislation.

Yours sincerely

A handwritten signature in black ink that reads 'M J Phillips'.

M J Phillips AO
Chairman

CONTENTS

MAIN POINTS	VII
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CHAPTER 1: FOREIGN INVESTMENT REVIEW BOARD

Functions of the Board	3
Board membership	3
Relationship of the Division to the Board	4
Administration of foreign investment policy	5
2004-05 outcomes	7
Cost of the Board's operations	7
Processing of proposals	7
Consultation arrangements	7
National interest	8
Handling of commercial-in-confidence and personal information	8
Monitoring and compliance activity	9

CHAPTER 2: FOREIGN INVESTMENT PROPOSALS

Features of these statistics	15
Applications decided in 2004-05	16
Approvals by sector	19
General summary	19
Agriculture, forestry and fishing	20
Finance and insurance	20
Manufacturing	20
Mineral exploration and development	21
Services (excluding tourism)	22
Tourism	22
Real estate	22
Residential real estate	23
Commercial real estate	26
Real estate by State	26
Approvals by country of investor	27

CHAPTER 3: OVERVIEW OF THE FOREIGN ACQUISITIONS AND TAKEOVERS ACT 1975

Introduction	33
Notification	34
Examination	35
Enforcement provisions	37
Other aspects of foreign investment policy	37

**CHAPTER 4: INTERNATIONAL INVESTMENT ISSUES AND AUSTRALIA'S
INTERNATIONAL INVESTMENT POSITION**

Introduction.....	41
Multilateral investment issues	42
Organisation for Economic Co-operation and Development (OECD).....	42
OECD Investment Committee	43
OECD Guidelines for Multinational Enterprises	45
World Trade Organization (WTO).....	47
Asia-Pacific Economic Cooperation (APEC).....	47
Bilateral investment issues	48
Investment Promotion and Protection Agreements	49
Other agreements involving investment	50
International investment position	54
Useful references on international investment issues	64

APPENDICES

Appendix A: Summary of Australia's foreign investment policy	67
Appendix B: Legislation, media releases and policy statements and publications	85
Appendix C: Chronology of policy measures	93
Appendix D: Foreign Acquisitions and Takeovers Act 1975.....	103
Appendix E: Foreign Acquisitions and Takeovers Regulations.....	161
Appendix F: OECD Guidelines for Multinational Enterprises.....	183
Appendix G: Contact details	203

Main points

- In 2004-05, 4,360 proposals received foreign investment approval under Australia's foreign investment policy and the *Foreign Acquisitions and Takeovers Act 1975*. This compares with 4,447 the previous year, representing a decrease of 2 per cent. Of these, 3,949 approvals were in the real estate sector compared with 4,059 in 2003-04, a decrease of 3 per cent. There were 411 proposals approved in other sectors in 2004-05 compared with 388 in 2003-04, an increase of 6 per cent.¹
- In 2004-05, 55 proposals were rejected by the way of a final order, a 14 per cent decrease from the 64 final orders made in 2003-04. Six divestiture orders, all in the real estate sector, required foreign persons to dispose of their interests. There were 65 interim orders (70 in 2003-04), extending the 30-day statutory decision-making period by up to a further 90 days.
- The mineral exploration and development sector was the largest industry sector by value, with investment approvals in 2004-05 of \$33.5 billion (compared with \$10.4 billion in 2003-04). The other major sectors were: services (excluding tourism), with investment approvals of \$30.5 billion (\$34.8 billion in 2003-04); manufacturing, with approvals of \$22.1 billion (\$23.1 billion in 2003-04); real estate, with approved investment proposals valued at \$20.9 billion (\$25.7 billion in 2003-04); and finance and insurance, with approvals of \$11.2 billion (\$2.7 billion in 2003-04).
- The United States of America was again the largest source country for foreign investment in 2004-05, involving proposed investment of \$36.0 billion representing 30 per cent of total approved proposals. Switzerland, the United Kingdom and Germany were the other major sources of proposed investment approved during 2004-05, accounting for 17 per cent, 15 per cent and 6 per cent, respectively.
- In 2004-05, Australia made progress on the international liberalisation of trade and investment through its engagement in bilateral, regional and multilateral forums. On 1 January 2005, Free Trade Agreements (FTAs) between Australia and the United States and between Australia and Thailand entered into force. FTA negotiations with the United Arab Emirates, Malaysia, China and ASEAN were commenced and a joint feasibility study into an FTA with Japan was commenced.
- Worldwide Foreign Direct Investment (FDI) flows recovered moderately in 2004. Despite a contraction of FDI flows in the early 2000s, FDI during 2004-05 was not low by historic standards, with inflows comparing favourably with early and mid-1990s levels. While Australia continues to be a net importer of FDI, compared

¹ The Foreign Investment Review Board recommends caution in the use of the statistics contained in this Report. For a full discussion on the limitations of this data see Chapter 2.

with the OECD as a whole which is a net exporter, over the past 15 years Australian outward FDI stocks have grown more strongly than inward FDI stocks.

- The main activities of the Australian National Contact Point for the *OECD Guidelines for Multinational Enterprises* have focused on promoting the Guidelines and developing a more targeted approach to the consultation process with government agencies, non-government organisations (NGOs), the business community, and other social partners.

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 1976 to advise the Treasurer on foreign investment policy and its administration. As such, the Board's functions are advisory only. Responsibility for the Government's foreign investment policy and for making decisions on foreign investment proposals rests with the Treasurer. The Treasury's Foreign Investment and Trade Policy Division (the Division) provides secretariat services to the Board.

The role of the Board is to:

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

Information on the operation of the *Foreign Acquisitions and Takeovers Act 1975* (FATA or the Act) and a copy of the summary of the Government's foreign investment policy is provided in Chapter 3 and **Appendix A** to this report. A copy of the FATA is provided at **Appendix D**.

Board membership

As at 30 June 2005, the Board comprised three part-time members and a full-time Executive Member. During 2004-05, Mr Gerry Antioch replaced Mr Chris Legg as the ex officio Executive Member.

Mr John Phillips AO was first appointed Chairman of the Board in 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 holding the position of Deputy Governor of the Reserve Bank of Australia. His present roles include Chancellor of the University of Western Sydney and Chairman of The Australian Charities Fund.

Ms Lynn Wood has been a Board member since April 1995 and was re-appointed on 3 April 2005 for a further term of five years. She is a director of HSBC Bank Australia Limited, a compliance committee member of Barclays Global Investors Australia Limited and Mellon Global Investments Australia Limited, a director and vice-president of the MS Society of NSW and an executive coach. Her previous board memberships include Macquarie Goodman Group, Schroders Australia Limited, Sedgwick (Holdings) Pty Ltd, NSW Lotteries Corporation and the Investment Funds Association of Australia (now IFSA). She was awarded the Centenary Medal in 2003.

The Hon Chris Miles has been a Board member since June 1999 and was re-appointed on 8 June 2004 for a further term of five years. Between 1984 and 1998, Mr Miles represented the seat of Braddon, Tasmania, in the House of Representatives, and 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 Australian Capital Territory and New South Wales. Mr Miles is currently director of two private companies.

Mr Chris Legg was the Executive Member of the Board between October 2002 and February 2005. He joined the Treasury in 1980, and had secondments to the International Monetary Fund, the World Bank and the Office of National Assessments. His Treasury experience includes a period as an adviser in the Treasurer's office, and in the areas of resource allocation and transport, balance of payments, State finances, domestic and overseas borrowing, and international financial and economic issues.

Mr Gerry Antioch commenced his appointment as Executive Member of the Board on 3 March 2005. Mr Antioch has an extensive background as a public policy adviser. He has been Secretary to the Board of Taxation, a team leader in the Review of Business Taxation's secretariat and a manager in one of Treasury's business taxation divisions. During late 2001 to March 2002, he was seconded as senior taxation adviser to the then Minister for Revenue and Assistant Treasurer, Senator the Hon Helen Coonan.

Relationship of the Division to the Board

As General Manager of Treasury's Foreign Investment and Trade Policy Division, Mr Antioch provides the link between the Board and the Treasury. The Division examines proposals received under the Act and policy, prepares draft and final recommendations and provides a point of contact for foreign investment applicants.

The Division also advises the Treasurer on broader investment and trade-related policy matters. This includes providing advice on relevant policy issues which emerge in the context of international multilateral forums, such as the Organisation for Economic Co-operation and Development (OECD), the World Trade Organization (WTO) and the Asia-Pacific Economic Cooperation (APEC), and bilaterally through the operation and negotiation of free trade and investment protection and promotion agreements. Chapter 4 elaborates on these activities.

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 of which is at **Appendix F**). The ANCP is responsible for implementing the Guidelines, handling inquiries, facilitating discussions with interested stakeholders, and reporting on its activities to the OECD's Investment Committee.

Administration of foreign investment policy

The Foreign Acquisitions and Takeovers Act provides a 30 day statutory period for a decision to be made, with up to a further 10 days to advise the parties. The FATA also provides for the issue of an 'interim order', extending the period of examination by up to a further 90 days. Interim orders are usually issued to allow the applicant additional time to provide adequate information to assess the proposal, or to allow parties the opportunity to address issues arising from the proposal. Proposals that are not subject to the FATA are handled under the Government's foreign investment policy and are not subject to the statutory deadline imposed by the FATA.

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 2004-05, 88 per cent of proposals were decided within 30 days. Most real estate cases, representing the majority of proposals received, were decided within two weeks. For those proposals that took more than 30 days to decide, this generally reflected delays in receiving sufficient information from the parties or because the case involved significant complexity or sensitivity.

Proposals are examined by the Division's Primary and Secondary Industries Unit and the Tertiary Industries Unit. A third unit, the Investment and Compliance Unit, undertakes associated compliance work. Proposals are examined as to whether they conform with the requirements of the FATA and policy, including the proponent's fulfilment of conditions attached to past approvals. While the overwhelming majority of proposals are approved, the Treasurer has powers under the Act to prohibit proposals that are inconsistent with policy or raise other 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 press statement.

The Board provides advice on the application of the policy across the range of proposals managed by the Division. The Board does this with the benefit of weekly reports prepared by the Division on more significant business and more complex real estate proposals. Formal Board meetings are generally held monthly, with a telephone discussion between the Executive Member and the other Board members in each of the intervening weeks.

The involvement of the Board in individual foreign investment proposals is normally determined by the nature and significance of the particular proposal. In the case of significant proposals (in terms of their size, complexity or the policy issues raised), the Board would be provided with briefing material by the Division prior to a decision being made by the Treasurer or the Parliamentary Secretary to the Treasurer.

The Treasurer has provided an authorisation (effectively a delegation) to the Executive Member and other senior Division staff to permit them to make decisions on foreign investment proposals that are consistent with the policy or do not involve issues of special sensitivity. Around 96 per cent of proposals are decided under this authorisation. Of these, the large majority are in the real estate sector.

These arrangements, along with the use of application forms for residential real estate (R3 Form and C1 Form) and the advanced 'off-the-plan' application form (D2 Form) assist in streamlining the application and approval process. When they are completed and submitted together with a statutory notice where required (Section 26A notice) and additional information (such as passport/visa/sale contract details), these forms facilitate a timely decision on proposals.

In keeping with the Board's role of fostering awareness and understanding of the policy, the Division regularly engages with potential foreign investors and Australian businesses to provide information on the operation of the policy and its application, including to specific proposals.

As part of the Board's ongoing efforts to increase familiarity with the policy and its requirements, the Division has continued to liaise with relevant interest groups such as real estate and conveyancing institutes. Additionally, contacts made with other relevant parties, including Commonwealth and State government authorities as well as private agencies, such as law societies, assist in ensuring that the policy is widely disseminated and understood.

The Division also provides a telephone inquiry line +61 2 6263 3795, email address, firb@treasury.gov.au and a website <http://www.firb.gov.au> for people seeking information or advice on the policy and legislation.

2004-05 outcomes

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 2004-05 were \$110,396 (\$105,861 in 2003-04). Remuneration of Board members was around 94 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 2004-05 were \$2.22 million (\$2.39 million in 2003-04). These expenses mainly comprised employee salary (including superannuation and accruing leave entitlements) and administrative costs. Over the course of 2004-05, the Division employed an average of 24 staff, the same average number as for 2003-04.

Processing of proposals

In 2004-05, 4,927 applications for foreign investment approval were received, comprising 4,360 approved, 55 rejected and 287 withdrawn by the parties with the remaining 225 judged exempt or not subject to the Act. In 2004-05, 4,219 cases were decided within the Division under the Treasurer's authorisations and 196 were decided by a Treasury minister, in most cases by the Treasurer's Parliamentary Secretary.

Additionally, the Division handled approximately 40,000 telephone inquiries, and answered 163 letters (122 in 2003-04) and 1,679 email messages (1,960 in 2003-04) in relation to potential proposals, and the policy and the Act.

In 2004-05, 65 interim orders, 55 'final orders' and six 'divestiture orders' were made and published in the Commonwealth of Australia Gazette.² Final orders are 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 made without approval is subsequently assessed, in terms of the policy, as being contrary to the national interest.

Consultation arrangements

In examining large or otherwise significant proposals, consultations are undertaken with State and Australian government departments and authorities with responsibilities relevant to the proposal. Advice and comments provided by such agencies is important in assessing the implications of proposals and, in particular, determining whether they raise any national interest issues. Such consultation is undertaken on a strictly confidential basis to protect the information provided by the applicant.

2 The FATA provides the Treasurer with the power to make orders prohibiting an acquisition (a 'final order') or having the effect of requiring an interest to be disposed (a 'divestiture order').

The Board acknowledges the assistance received during 2004-05 from Australian and State government departments and authorities. It 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 welcomes submissions from third parties. Consideration of such submissions can be an important part of the examination process and the development of advice on the proposal to the Treasurer.

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 generally serve the national interest. This reflects the positive stance of successive Australian Governments towards foreign investment given the important role it plays in national development.

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

In preparing the Board's advice, consideration is also given to whether a proposal is consistent with the terms of the policy as set out in Policy Statements available on the Board's website (<http://www.firb.gov.au>). These set out guidelines on national interest matters, including in relation to real estate and other sensitive sectors. A proposal that does not meet the requirements set out in the policy would be regarded as being contrary to the national interest. Additional guidance on the national interest includes:

- existing whole-of-government policy and law – reflecting the view that existing policy and law define important aspects of the national interest (for example, telecommunications, media, aviation, environmental regulation and competition policy);
- national security interests; and
- economic development.

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, the Board has appropriate procedures 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, in situations where the applicant has breached, or is strongly suspected of having breached the FATA, the assistance of other government agencies may be sought in ensuring compliance. In seeking such assistance, relevant personal information may be passed to those agencies. Most commonly those agencies will be the Department of Immigration and Multicultural Affairs (Immigration), the Australian Taxation Office (ATO) and/or the Australian Federal Police (AFP).

In the event that action is taken by third parties to obtain access to confidential information, such information will not be made available without the permission of the person(s) who provided the information, except upon order of a court of a competent jurisdiction or through the operation of the FOI Act.

In 2004-05, the Division dealt with eight applications under the FOI Act (the same number as in 2003-04) seeking information concerning foreign investment matters. The FOI Act provides for the denial in certain circumstances of access to commercially confidential documents. In line with the provisions of the FOI Act, the Division consults 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 applicant.

Monitoring and compliance activity

The Act provides the Treasurer with wide-ranging powers to take legal action to protect and enforce the intent of the policy. The powers include the ability to:

- unwind or divest (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 a foreign person (including a natural person or a company) that fails to obtain prior approval;
- prosecute a foreign person that fails to comply with an order to sell shares, assets or property; and
- prosecute a foreign person that fails to comply with conditions attached to any approval granted under the foreign investment legislation.

Furthermore, provisions of the *Crimes Act 1914* and the *Criminal Code Act 1995* and the FATA 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 lack of compliance with conditions may result in future proposals being rejected. It is general policy to report serious

breaches of the Act to Immigration, the AFP and other government agencies as appropriate.

The Division's Investment and Compliance Unit (the Unit) systematically monitors whether foreign persons are complying with the conditions of their approvals. This involves the active cooperation of many in the business community, local government authorities, the legal profession and on occasion, the general public. During 2004-05, the Unit examined nearly 3,000 higher risk past proposals (especially those relating to vacant land and development proposals by foreign citizens) to ensure compliance with the conditions attached to foreign investment approvals. In addition, compliance activities focused on:

- settling outstanding compliance matters;
- separate investigations of instances of possible non-compliance reported by members of the public; and
- improving awareness of the policy in the local government arena and within appropriate State and Australian Government agencies.

During the year, the Unit also reviewed existing compliance and monitoring procedures and documentation with a view to ensuring consistent treatment of cases of non-compliance. Processes for handling cases involving a serious breach of the approval conditions were reviewed, including the protocols for reporting such cases to Immigration and other government agencies as appropriate. This review confirmed existing practices with minor amendments. These reports have in some cases resulted in further investigations by Immigration prior to issuing visas or in refusal to issue a visa to those who have breached FATA conditions.

Links with the AFP, Immigration, ATO and the Australian Transaction Reports and Analysis Centre (AUSTRAC) were strengthened with the exchange of information and advice within the limits allowed by the Privacy Act.

A matter was referred to the Commonwealth Director of Public Prosecutions regarding a foreign person who refused to comply with an order to divest their interest in a real estate property. The matter is due to be heard by the Federal Court early in 2006.

A complaint was lodged with the Commonwealth Ombudsman regarding a request to dispose of a property acquired prior to the complainant gaining permanent residency status. The Ombudsman determined that the legal powers to prosecute a person for failing to comply with a condition imposed at the time of approval existed, but noted that the procedure in the Act for compulsory sale did not come into operation until the person had been convicted of an offence under the Act. The Ombudsman recommended the adoption of guidelines for dealing with such situations and that the person be advised that the matter may be referred to the Director of Public Prosecutions for consideration. Such guidelines have since been adopted.

Chapter 1: Foreign Investment Review Board

The Unit also reports all major property sales by foreign interests to the ATO for the assessment of any tax liability such as capital gains tax. In 2004-05, 102 such cases were referred to the ATO.

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

Chapter 2

Foreign investment proposals

Foreign investment proposals

This chapter provides an overview and statistical information on the proposals that were approved in 2004-05.

Features of these statistics

While this chapter provides a useful source of data on foreign direct investment in Australia, the Board urges particular caution in the use of these statistics, including when making comparisons with earlier years. As set out in Chapter 4 of this Report, there are also substantial differences between the Board's statistics and those from the Australian Bureau of Statistics (ABS), which seek to measure a wider range of investment transactions between residents of Australia and non-residents.

The statistics contained in this Report are not a comprehensive measure of total foreign investment in any year, nor do they purport to measure changes in levels of foreign ownership of particular industries. The data is restricted to those investments that fall within the scope of the *Foreign Acquisitions and Takeovers Act 1975* (FATA or the Act) and the Government's foreign investment policy (the policy). In addition:

- The data does not cover foreign investments below the exemption thresholds that apply under the Act and the notification thresholds set by the policy, including for new businesses and acquisitions by foreign governments. Nor does the data cover expansions of existing foreign-owned businesses (both in existing areas and into related areas). The current exemption thresholds for the various sectors are specified in the summary of the policy, a copy of which is at **Appendix A**.
- The figures are based on the investment funds being sourced from overseas. The extent to which approved investment proposals will actually result in foreign capital inflows depends not only upon whether the proposals are implemented, but also upon the proportion that is financed from foreign sources. Some (and in some cases all) of the proposed funds to be invested may be contributed by Australians, for example, where they are in partnership with foreign interests or the investment is financed from existing Australian operations.
- Each foreign investment proposal is categorised into a single industry sub-code and hence does not accurately reflect proposals that span several industries or where the target is a diversified company.
- The data do not reflect all changes in foreign ownership as, in some cases, both the vendor and purchaser are defined as a 'foreign person' under the Act.

The Board's statistics are also not a reliable indicator of trends in foreign investment inflows because:

- they include proposals that are approved but which may not actually be implemented, or could be implemented in a later year, or over a number of years;
- they are inherently irregular and can be skewed due to very large investment proposals; and
- major liberalisations of foreign investment policy that have occurred since the mid-1980s limit comparability over time.
 - For example, the increase in the notification exemption threshold from \$5 million to \$50 million in 1999 has acted to reduce the number of proposals.

The term 'proposed investment' is used widely throughout this Report. Proposed investment is the aggregation of the proposed:

- acquisition costs (including shares, real estate or other assets);
- development costs following the acquisition; and
- cost of both establishment and development in the case of new businesses.

Applications decided in 2004-05

Chart 2.1 depicts the number of applications decided over the past seven years, classified by real estate and other sectors. Chart 2.2 shows the value of proposed investment associated with decided applications.

Chart 2.1: Applications decided — number

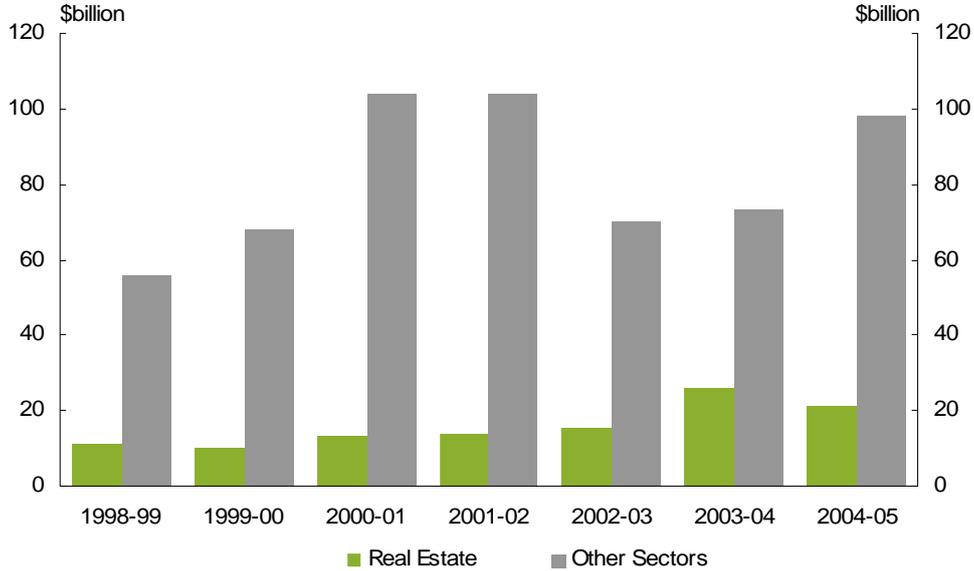
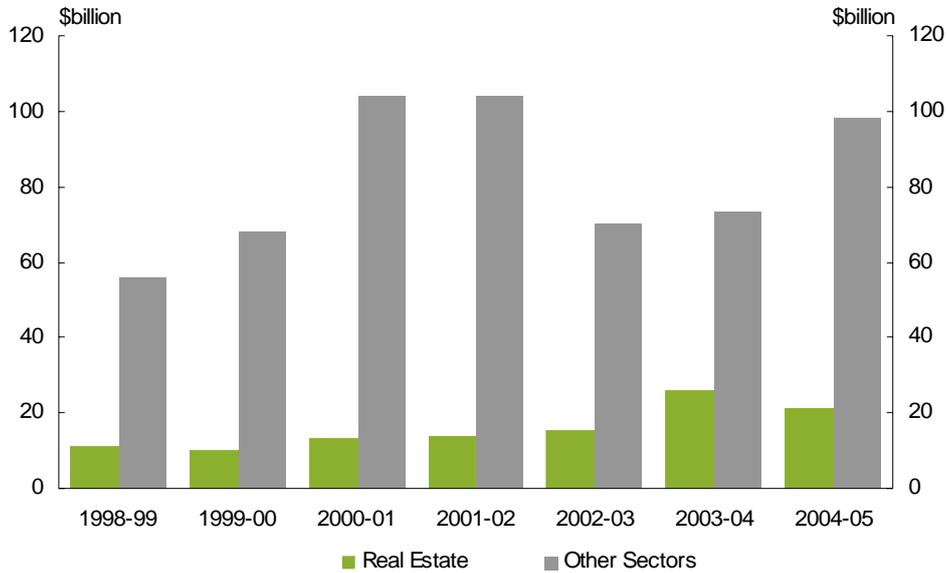


Chart 2.2: Applications decided — proposed investment



The number of applications decided during 2004-05 was around 2 per cent lower than in 2003-04. The value of proposed foreign investment associated with decided applications was 21 per cent higher than in 2003-04.

A breakdown of the outcome for applications considered over the last four years is provided in Table 2.1.

Table 2.1: Applications considered (number and proposed investment) 2001-02 to 2004-05

Action	2001-02		2002-03		2003-04		2004-05	
	Number	\$billion	Number	\$billion	Number	\$billion	Number	\$billion
Approved unconditionally	1,041	70.2	1,105	53.5	995	58.9	1,127	60.4
Approved with conditions	3,405	47.7	3,562	32.2	3,452	40.1	3,233	59.1
Total approved	4,446	117.9	4,667	85.7	4,447	99.0	4,360	119.5
Rejected(a)	77	0.1	80	0.0	64	0.1	55	0.0
Total decided	4,523	118.0	4,747	85.8	4,511	99.1	4,415	119.5
Withdrawn(b)	402	-	365	-	319	-	287	-
Total	4,925		5,112		4,830		4,702	

Note: Totals may not add due to rounding.

- Indicates a figure of zero and '0.0' indicates a figure of less than \$50 million.

(a) In 2004-05, includes one case which was not considered a serious business investment but which resulted in formal rejection under the Act.

(b) The proposed acquisition cost and development expenditure is not recorded for withdrawn applications.

Of the 4,360 applications approved in 2004-05, 3,233 were approved subject to conditions and 1,127 without conditions being imposed. All but 64 of the conditional approvals were in the real estate sector, where 80 per cent of all approvals were subject to conditions. These included conditions relating to the period during which development must commence (usually 12 months), requiring temporary residents to reside in and sell established dwellings when they cease to reside in them, and the imposition of reporting requirements on advanced 'off-the-plan' approvals. For the majority of conditional approvals outside the real estate sector, the condition related to the period that the approval would stand, ordinarily 12 months.

The value of proposed investment approved in 2004-05 was \$119.5 billion, a 21 per cent increase from 2003-04. The majority of the increase was in the conditional approval category with an investment value of \$59.1 billion compared with \$40.1 billion in 2003-04. Further information and analysis of the approved investment amounts is provided in other tables in this chapter.

A total of 55 proposals were rejected in 2004-05 (that is, were the subject of a final order made under the Act) representing 1 per cent of all decided proposals.

In 2004-05, 287 proposals were withdrawn by the notifying parties. Foreign investors are encouraged to discuss proposals with the Board's secretariat to ensure they are consistent with the policy. In some cases, the parties decide to withdraw proposals that would be inconsistent with the policy instead of proceeding to a formal rejection. In other cases proposals are withdrawn because they ultimately did not proceed for commercial or a variety of other reasons.

Approvals by sector

General summary

Table 2.2 provides approved investment proposals for 2004-05 by industry sector. Chart 2.3 depicts approved investment in each sector on a proportional basis by value. The majority of the total proposed investment is attributable to the proposed acquisition cost. The skewing of the foreign investment data towards the acquisition costs reflects the notification requirements – the expansion of existing businesses generally does not require foreign investment approval. Bearing in mind the limitations of the Board's data, during 2004-05:

- the mineral exploration and development sector had the largest proposed investment, with approvals totalling \$33.5 billion (\$10.4 billion in 2003-04); and
- other sectors with significant proposed investment were services \$30.5 billion (\$34.8 billion in 2003-04), manufacturing \$22.1 billion (\$23.1 billion in 2003-04) and real estate \$20.9 billion (\$25.7 billion in 2003-04).

Table 2.2: Total approvals by industry sector in 2004-05 (\$billion)

Industry sector(a)	Number of approvals(b)	Acquisition cost	Proposed investment on development	Total proposed investment
Agriculture, forestry & fishing	11	0.41	0.13	0.54
Finance & insurance	27	8.12	3.12	11.23
Manufacturing	54	21.37	0.75	22.12
Mineral exploration & development	69	26.35	7.15	33.50
Services (excluding tourism)	119	30.09	0.37	30.46
Tourism	54	0.72	-	0.72
Real estate(c)	3,949	16.12	4.78	20.91
Total	4,283	103.18	16.29	119.47

Note: Totals may not add due to rounding.

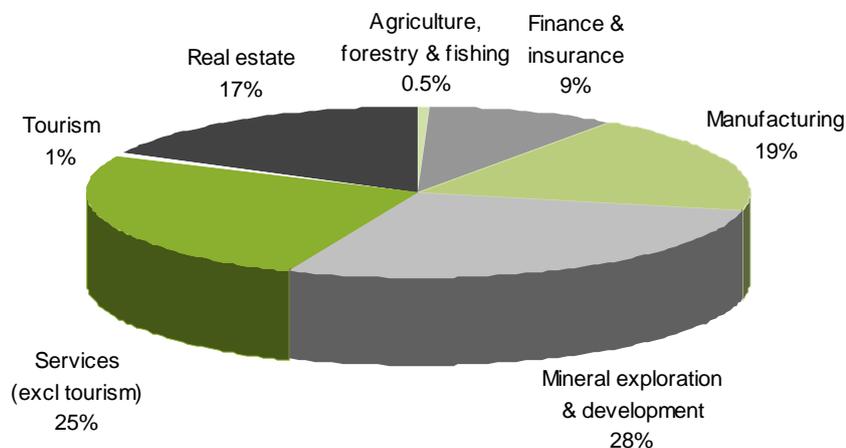
- Indicates a figure of zero.

(a) Data has been compiled by reference to the Australian and New Zealand Standard Industrial Classification published by the ABS, except proposals involving newspaper printing and publishing which have been allocated to service industries (the ABS classifies these under manufacturing). Acquisitions of diversified company groups are classified according to the industry of the major activity of the group. Acquisitions of real estate to be used for purposes incidental to the main business activity of the purchaser are classified according to that activity.

(b) Excludes 77 proposals involving financing arrangements and corporate restructures.

(c) Total proposed investment in the real estate sector may be overstated as it includes approvals for 'annual programmes' and 'off-the-plan' (OTP) approvals provided to real estate developers. A significant proportion of the dwellings covered by OTP approvals are not ultimately sold to foreign persons.

Chart 2.3: Approvals by industry sector in 2004-05 — by proposed investment value



Note: Totals may not add due to rounding.

Agriculture, forestry and fishing

During 2004-05, total proposed investment in the agriculture, forestry and fishing sector was \$543.7 million, around 31 per cent lower than 2003-04 (\$782.9 million). The largest proposal approved involved an investment of \$198.7 million.

Finance and insurance

Total proposed investment in the finance and insurance sector increased significantly from \$2.7 billion in 2003-04 to \$11.2 billion in 2004-05. There were 27 proposals approved, of which 15 involved investment of \$100 million or more. Four proposals were approved for the establishment of a new business, with total combined investment of \$3.1 billion.

Manufacturing

Total proposed investment in the manufacturing sector for 2004-05 was \$22.1 billion, a slight decrease from \$23.1 billion in 2003-04. Proposals in the electricity and gas (generation and supply) industry accounted for 50 per cent (\$11.1 billion in 2004-05 and \$13.2 billion in 2003-04) of total proposed investment in this sector.

Table 2.3 gives a breakdown of approved investment in the manufacturing sector in 2004-05.

Table 2.3: Manufacturing sector approvals by number and total proposed investment in 2004-05 (\$billion)

Industry sector(a)	Number of approvals	Acquisition cost	Proposed investment on development	Total proposed investment
Chemical, petroleum and coal products	6	0.76	-	0.76
Electricity and gas	12	10.52	0.61	11.14
Food, beverages and tobacco	13	6.84	-	6.84
Machinery and equipment	11	0.77	-	0.77
Metal products	6	1.87	-	1.87
Wood, wood products and furniture	2	0.04	0.01	0.04
Other(b)	4	0.56	0.13	0.69
Total	54	21.37	0.75	22.12

Note: Totals may not add due to rounding.

- Indicates a figure of zero.

(a) Acquisitions of diversified company groups are classified according to the industry of the major activity of the group. Acquisitions of real estate to be used for purposes incidental to the main business activity of the purchaser are classified according to that activity.

(b) Includes non-metallic mineral products, water, sewerage and drainage and miscellaneous manufacturing.

Mineral exploration and development

Total proposed investment in the mineral exploration and development sector increased significantly from \$10.4 billion in 2003-04 to \$33.5 billion in 2004-05. During 2004-05, 69 proposals were approved, comprising 10 to establish new businesses and 59 acquisitions of interests in existing businesses. There were 20 proposals involving total investment of \$100 million or more, including five for more than \$1 billion. The data includes two large proposals for the same target company: Xstrata Plc's proposed takeover and BHP Billiton's successful takeover of WMC Resources Limited which involved a total approved amount in excess of \$17 billion.

Table 2.4 gives a breakdown of approved investment in the mineral exploration and development sector.

Table 2.4: Mineral exploration and development sector approvals by number and total proposed investment in 2003-04 and 2004-05 (\$billion)

Industry sector(a)	Acquisitions				New businesses			
	Number of approvals		\$billion		Number of approvals		\$billion	
	2003-04	2004-05	2003-04	2004-05	2003-04	2004-05	2003-04	2004-05
Coal	19	22	1.89	1.15	1	5	0.38	6.47
Gold	12	9	1.15	1.55	-	-	-	-
Oil and gas	9	10	1.72	0.74	3	3	3.12	0.51
Metallic minerals excluding gold	16	14	2.04	22.85	-	2	-	0.11
Other	2	4	0.09	0.12	1	-	0.00	-
Total	58	59	6.89	26.40	5	10	3.50	7.10

Note: Totals may not add due to rounding.

- Indicates a figure of zero and '0.00' indicates a figure of less than \$5 million.

(a) Acquisitions of diversified company groups are classified according to the industry of the major activity of the group. Acquisitions of real estate to be used for purposes incidental to the main business activity of the purchaser are classified according to that activity.

Services (excluding tourism)

During 2004-05, 119 proposals were approved for investment in the services industry sector (excluding tourism) with total proposed investment of \$30.5 billion. Proposals in the communications industry accounted for around 50 per cent (\$15.1 billion) of the total approved investment. There were 46 proposals involving proposed investment of \$100 million or more, including four of \$1 billion or more.

Table 2.5 gives a breakdown of approved investment in the services (excluding tourism) sector.

Table 2.5: Services sector (excluding tourism) approvals by number and total proposed investment in 2004-05 (\$billion)

Industry sector(a)	Number of approvals	Acquisition cost	Proposed investment on development	Total proposed investment
Construction	8	1.22	-	1.22
Communications	22	15.14	0.00	15.14
Health	13	1.79	0.23	2.02
Property and business services	33	2.38	0.10	2.48
Trade - retail	9	1.81	-	1.81
Trade - w wholesale	13	1.08	-	1.08
Transport(b)	11	2.80	-	2.80
Transport - other (including pipelines)	5	3.68	-	3.68
Other(c)	5	0.20	0.05	0.25
Total	119	30.09	0.37	30.46

Note: Totals may not add due to rounding.

- Indicates a figure of zero and '0.00' indicates a figure of less than \$5 million.

(a) Acquisitions of diversified company groups are classified according to the industry of the major activity of the group. Acquisitions of real estate to be used for purposes incidental to the main business activity of the purchaser are classified according to that activity.

(b) Includes road, rail, air and water transport services.

(c) Includes entertainment and recreational services, restaurants and clubs, and personal services.

Tourism

Total approved foreign investment in the tourism sector decreased from \$1.5 billion in 2003-04 to \$716 million in 2004-05. Of the 54 proposals approved, only two proposals were for investment of \$100 million or more.

Real estate

Urban land is defined under the Act to be all Australian land that is not used wholly and exclusively for carrying on a business of primary production. Reflecting community concerns over foreign ownership of land, the policy places certain restrictions on acquisitions in this sector. As a result, all proposals relating to acquisitions of urban land must be submitted for examination, unless explicitly exempted by the *Foreign Acquisitions and Takeovers Regulations 1989* (the Regulations, see **Appendices A and E**).

Table 2.6 gives a breakdown of approved investments in real estate in 2004-05. The number of approvals decreased slightly from 4,059 in 2003-04 to 3,949 in 2004-05. Total proposed investment associated with these proposals decreased from \$25.7 billion in 2003-04 to \$20.9 billion in 2004-05.

Table 2.6: Real estate sector approvals by type, number of proposals and total proposed investment in 2004-05 (\$billion)

	Number of approvals	Acquisition cost	Proposed investment on development	Total proposed investment
Residential				
Developed	1,840	1.19	-	1.19
For development				
- ordinary approvals	1,079	1.68	2.63	4.31
- off-the-plan				
individual	644	0.35	-	0.35
developer	275	7.01	-	7.01
<i>Sub-total 'Off-the-plan'</i>	919	7.36	-	7.36
- annual programs	10	1.08	0.53	1.61
<i>Sub-total 'For development'</i>	2,008	10.12	3.16	13.28
Total residential	3,848	11.30	3.16	14.46
Commercial				
Developed	36	4.53	-	4.53
For development				
- ordinary approvals	57	0.25	1.60	1.84
- annual programs	8	0.05	0.03	0.07
<i>Sub-total 'For development'</i>	65	0.29	1.62	1.91
Total commercial	101	4.82	1.62	6.44
Total residential and commercial	3,949	16.12	4.78	20.91

Note: Totals may not add due to rounding.

- Indicates a figure of zero.

Residential real estate

The Government's foreign investment policy places certain restrictions on the purchase of developed residential real estate by foreign persons. A copy of the policy summary is located at **Appendix A**.

Developed

In 2004-05, 1,840 proposals were approved for acquisitions of developed residential real estate compared with 1,946 in 2003-04. Total proposed investment approved was \$1.2 billion compared with \$1.2 billion in 2003-04. There were 32 **rejections** of proposed acquisitions of developed residential property by temporary residents in 2004-05 (33 in 2003-04). The total potential acquisition cost involved in these rejected proposals was \$21.6 million.

The rejections, in most cases, were for one or more of the following reasons:

- the prospective foreign purchaser did not hold a temporary resident visa that permitted continuous residence in Australia for a further period of 12 months or more;
- the foreign person was not going to use the property as their principal place of residence; and/or
- the applicant held a student visa and the value of the property they proposed to purchase exceeded the \$300,000 general limit that is applicable to student visa holders.

For development

During 2004-05, 2,008 proposals were approved for the acquisition of residential real estate for development (including eligible redevelopment), a slight increase from the 1,999 that were approved in 2003-04.³ Total proposed investment approved was \$13.3 billion compared with \$14.1 billion in 2003-04. Proposed development expenditure decreased from \$5.6 billion in 2003-04 to \$3.2 billion in 2004-05.

Ordinary approvals comprise the purchase of vacant land generally for single dwelling construction, broadacre land for residential subdivision and integrated residential developments (such as the construction of townhouses and units). In 2004-05, 1,079 proposals (1,126 in 2003-04) to acquire residential real estate for development were approved, with total proposed investment of \$4.3 billion (\$6.6 billion 2003-04). Approvals are generally subject to a condition that continuous development commences within 12 months. In addition, the parties are required to report on the completion of development to demonstrate compliance with the development condition. The Government views seriously any breaches of conditions imposed under the Act on approvals (see section below on Residential Real Estate Compliance).

In 2004-05, 644 proposals from *individuals* were approved under the '**off-the-plan**' arrangements, involving proposed investment of \$351 million (compared with 573 and \$280 million in 2003-04). These involve applicants that propose to purchase a newly constructed dwelling directly from a developer. There were also 275 proposals approved from *real estate developers* seeking 'advance approval' (compared with 292 in 2003-04). Such approval enables developers to sell up to 50 per cent of the individual dwellings in a new development to foreign persons, who are then not required to separately seek foreign investment approval. The developer is required to report

³ The acquisition of house and land packages, where construction has not commenced, are treated as vacant land for development rather than falling under the 'off-the-plan' category.

completed sales to the Board. The value of such developments rose from \$6.1 billion in 2003-04 to \$7.0 billion in 2004-05.

Certain points should be noted in relation to the Board's statistics for 'off-the-plan' applications. Firstly, the Board's figures overstate the likely extent of actual foreign purchases: developers with 'off-the-plan' approval seldom sell to foreign purchasers the full 50 per cent of the dwellings for which they hold approval. In most cases the proportion is under 10 per cent. There is also a significant lag between the granting of approval, which usually occurs during the construction phase, and sales.

Secondly, the 'off-the-plan' category has the approved value attributed entirely to acquisition cost and not to proposed development expenditure. This reflects the fact that the approval relates to the purchase and expected sale price of completed dwellings.

The '**annual programme**' arrangements allow developers to apply for annual approvals for a programme of land acquisition up to a specified monetary limit, on condition that they subsequently report to the Board on the actual acquisitions and developments undertaken. While the granting of such an approval relieves the developer of the requirement to seek approval for individual land acquisitions, it does not relieve them of responsibility for complying with the requirements of foreign investment policy and the conditions of their approval, for example remaining within the approved amount.

In 2004-05, a total of 18 annual programmes were approved, 10 for residential real estate and eight for commercial real estate (compared with eight and seven respectively in 2003-04). These involved proposed acquisition costs totalling approximately \$1.1 billion and proposed development expenditure of \$558 million (compared with total proposed investment of \$691 million and \$433 million respectively in 2003-04). This comprised \$1.6 billion for residential and \$72 million for commercial real estate.

There was a decrease in the number of **rejections** relating to the proposed acquisition of residential real estate for development from 26 in 2003-04 to 20 in 2004-05. The rejections, in most cases, were for one or more of the following reasons:

- the planned development expenditure was not considered sufficient in relation to the acquisition price for the property (the policy requires that proposed development expenditure is equivalent to at least 50 per cent of the acquisition cost or current market value of the land, whichever is higher);
- the proposed timetable for development was unsatisfactory given the normal requirement that it take place within 12 months;

- the property proposed to be acquired for the purpose of redevelopment was not considered to be uninhabitable, or at the end of its economic life, and consequently the proposed redevelopment would not result in an addition to the housing stock;
- the prospective foreign purchaser had not established that they had the technical and financial capacity, nor the necessary planning approvals, to undertake the proposed development within a reasonable timeframe;
- the property being purchased was a new dwelling and there was no other similar dwelling developed by the same vendor that met the required criteria for the purchase of new dwellings by foreign persons; and/or
- the applicant had breached conditions associated with a previously approved application.

Commercial real estate

Developed

In 2004-05, there were 36 approvals to purchase developed commercial real estate (for example, shopping centres, office buildings, warehouses) involving a total proposed investment value of \$4.5 billion (compared with 51 approvals and an investment value of \$4.4 billion in 2003-04). This data represents only part of the total foreign investment that would have occurred as the Regulations applicable during the reporting period exempt acquisitions of developed commercial property, excluding accommodation facilities, valued at less than \$50 million, or \$800 million for US investors.

For development

There were 57 approvals to purchase land for commercial development involving total proposed investment of \$1.8 billion. Although the number of proposals approved increased slightly from 2003-04, total expected investment decreased by \$4.1 billion (56 proposals and proposed investment of \$5.9 billion in 2003-04). This was mainly attributed to the presence of a single proposal in 2003-04 which had a proposed investment value of \$3.3 billion.

Real estate by State

Table 2.7 provides details of proposed investment of real estate for each State and Territory.

Queensland was again the main location of proposed foreign investment in real estate with 35 per cent of the total approved (44 per cent in 2003-04). Proposals for New South Wales represented 26 per cent (31 per cent in 2003-04) of the proposals approved while those for Victoria and Western Australia accounted for 8 per cent and 6 per cent respectively, (compared with 7 per cent and 8 per cent in 2003-04).

There was a significant increase in the value of the proposals approved that involved land acquisitions in more than one State or Territory, from 7 per cent of the total value in 2003-04 to 22 per cent in 2004-05. The increase was mainly attributed to a single proposal for the acquisition of an interest in various commercial properties valued at \$2 billion. This single proposal distorts the percentage figures quoted above, for example removing it from the total results in Queensland and New South Wales having percentages in 2004-05 of 39 per cent and 29 per cent respectively.

Table 2.7: Real estate sector approvals by State and category in 2004-05 (\$billion)

Location	Residential		Commercial		Total
	Developed	For development	Developed	For development	
New South Wales	0.46	2.52	2.35	0.16	5.48
Victoria	0.15	1.43	0.02	0.06	1.67
Queensland	0.24	5.62	0.10	1.38	7.33
Western Australia	0.26	0.78	0.03	0.16	1.22
South Australia	0.06	0.18	0.01	-	0.25
Tasmania	0.01	0.02	-	0.00	0.03
Australian Capital Territory	0.01	0.06	-	-	0.07
Northern Territory	0.00	0.05	-	0.12	0.18
More than one State(a)	-	2.61	2.03	0.03	4.67
Total	1.19	13.28	4.53	1.91	20.91
Number of proposals	1,840	2,008	36	65	3,949

Note: Totals may not add due to rounding.

- Indicates a figure of zero and '0.00' indicates a figure of less than \$5 million.

(a) Comprises approved proposals where the investment is to be undertaken in more than one State or Territory.

Approvals by country of investor

Data on proposed investment associated with approvals in 2004-05 are shown by selected country, aggregated by State in Table 2.8 and by industry sector in Table 2.9.

- The United States of America (USA) was once again the largest source of proposed foreign investment in Australia. The other major sources of foreign investment were Switzerland, United Kingdom (UK) and Germany.
- Approved proposed investment from the USA increased from \$29.9 billion in 2003-04 to \$37.2 billion in 2004-05. This proposed investment was primarily in the services (excluding tourism) sector, accounting for 50 per cent of total US investment. Refer to Chapter 4 for further discussion on the USA/Australia foreign investment position.
- Switzerland is recorded as a significant source of approved proposed investment in 2004-05, accounting for a total of \$20.3 billion. This included a single large proposal, namely Xstrata's unsuccessful takeover of WMC Resources Limited.

Foreign Investment Review Board Annual Report 2004-05

- Approved proposed investment from the UK increased significantly from \$6.8 billion in 2003-04 to \$18.1 billion in 2004-05. The majority of UK proposed investment was in the mineral exploration and development sector, accounting for 55 per cent of total proposed UK investment. The increase included a single large approved proposal, namely BHP Billiton's takeover of WMC Resources Limited.
- Germany continued as a major foreign investor in 2004-05 accounting for \$7.6 billion of total proposed investment, mainly located in the finance and insurance sector.

Table 2.8: Approved investment by State and country in 2004-05 (\$billion)

	USA	UK	Germany	Switzerland	Singapore	Hong Kong	NZ	World other	Aust(b)	Total
New South Wales	186	0.69	1.08	0.09	109	0.10	0.02	2.66	0.27	7.85
Victoria	6.91	0.26	0.61	0.93	0.04	0.04	0.03	1.32	0.33	10.45
Queensland	0.54	0.96	0.02	0.02	0.32	0.32	0.03	5.91	1.82	9.93
Western Australia	4.60	0.89	0.01	0.06	0.14	0.01	0.00	1.97	0.63	8.31
South Australia	0.02	0.04	0.00	-	0.01	0.00	0.00	0.23	0.00	0.32
Tasmania	0.00	0.04	0.00	-	-	-	0.00	0.02	0.00	0.07
Australian Capital Territory	0.06	0.01	0.00	-	-	0.00	-	0.07	-	0.13
Northern Territory	0.00	0.23	0.00	-	-	-	-	0.40	0.00	0.63
More than one State(a)	22.98	15.00	5.83	19.05	135	2.73	2.66	7.25	4.06	80.89
Offshore takeover	0.23	-	0.01	0.16	-	-	-	0.50	-	0.89
Total	37.20	18.12	7.56	20.29	2.94	3.20	2.73	20.32	7.12	119.47

Note: Totals may not add due to rounding.

- Indicates a figure of zero and '0.00' indicates a figure of less than \$5 million.

(a) Comprises approved proposals where the investment is to be undertaken in more than one State or Territory.

(b) Investment identified as originating from Australia represents the contribution by Australian-controlled companies and Australian residents to the total investment associated with foreign investment proposals in which they are in partnership with foreign interests. It does not generally include the contribution attributable to minority Australian shareholders in companies with majority or controlling foreign shareholders.

Table 2.9: Approved investment by country of investors and industry sector in 2004-05 (\$million)

	Number of approvals(c)	Agriculture forestry & fishing	Finance & insurance	Manufacturing	Mineral exploration & development	Real estate	Services (excluding tourism)	Tourism	Total
USA	302	65	4,720	3,522	7,601	2,520	18,668	101	37,197
Canada	78	-	-	198	1,201	52	51	-	1,503
UK	2,027	43	409	5,273	10,043	1,680	672	4	18,123
Germany	117	-	2,868	1,701	10	1,042	1,938	2	7,562
Other EC	290	-	547	1,104	273	864	1,089	63	3,940
Switzerland	58	2	2,241	146	12,697	34	5,093	82	20,294
New Zealand	43	-	275	2,293	-	47	102	10	2,727
Japan	93	42	0	49	335	370	36	147	978
Singapore	182	-	-	59	29	2,458	171	224	2,940
Malaysia	128	-	-	4	-	432	155	5	596
Other ASEAN	128	-	-	2,080	176	69	-	1	2,325
China	206	2	-	-	39	181	36	6	264
Hong Kong	36	-	-	2,128	-	414	633	20	3,196
Not allocated(a)	258	1	-	-	-	6,893	-	-	6,894
World - other	605	305	172	944	921	393	1,074	8	3,816
<i>Sub-total - 'World'</i>	<i>4,551</i>	<i>460</i>	<i>11,232</i>	<i>19,500</i>	<i>33,325</i>	<i>17,447</i>	<i>29,719</i>	<i>672</i>	<i>112,356</i>
Australia(b)	102	84	0	2,617	175	3,458	739	43	7,117
Total	4,653	544	11,232	22,117	33,501	20,905	30,458	716	119,473

Note: Totals may not add due to rounding.

- Indicates a figure of zero and '0' indicates a figure of less than \$0.5 million.

- (a) 'Off the plan' approvals to real estate developers have been recorded as not allocated to country because the country of investors is not known in advance.
- (b) The investment identified as originating from Australia represents the contribution by Australian-controlled companies and Australian residents to the total investment associated with foreign investment proposals in which they are in partnership with foreign interests. It does not generally include the contribution attributable to minority Australian shareholders in companies with majority or controlling foreign shareholders.
- (c) These figures indicate the total number of proposals in which investors from the particular country have an interest. Proposals involving investment originating from more than one country count as one proposal for each of the countries concerned. Therefore, the number reported is greater than the number reported in Table 2.1.

Chapter 3

Overview of the *Foreign Acquisitions
and Takeovers Act 1975*

Overview of the *Foreign Acquisitions and Takeovers Act 1975*

The *Foreign Acquisitions and Takeovers Act 1975* (FATA or the Act) provides legislative support for the Government's foreign investment policy (the policy). A copy of the Act is at **Appendix D** and a copy of a summary of the policy is at **Appendix A**.

Introduction

The Act empowers the Treasurer to examine proposals by foreign persons to:

- acquire, or increase, a substantial shareholding in, or a controlling interest in the assets of, a prescribed Australian corporation valued above the exemption thresholds;⁴ or
- acquire an interest in Australian urban land.

The Act empowers the Treasurer to prohibit a proposal that he decides would be contrary to the national interest (sections 18, 19, 20, 21 and 21A), or to approve it subject to conditions to ameliorate national interest concerns (section 25). It also permits the Treasurer to make orders for foreign persons to divest shares, assets or interests in urban land where the acquisition is decided to be contrary to the national interest.

The national interest, and hence what might be contrary to it, is not defined in the Act. Instead it confers upon the Treasurer the power to decide in each case whether a particular proposal would be contrary to the national interest. The Government's foreign investment policy statements set out guidelines on national interest matters in relation to real estate and other sensitive sectors. Ordinarily a proposal that does not meet the requirements set out in the policy would be regarded as being contrary to the national interest and subject to rejection.

⁴ The exemption threshold is \$50 million, or for US investors is \$831 million for 2006, except in relation to prescribed sensitive sectors, or by entities controlled by a US government, where it is \$52 million. The US-specific thresholds, which derive from the Australia-United States Free Trade Agreement (AUSFTA), commenced on 1 January 2005, are indexed annually starting from the 2005 levels of \$800 million and \$50 million.

The Act also requires the prior notification of certain proposals, namely where a foreign person proposes to acquire a substantial shareholding in a prescribed Australian corporation (section 26) or an interest in Australian urban land (section 26A).⁵

Notification

Section 26 makes it compulsory for a foreign person to notify the Treasurer of a proposal to acquire or increase a substantial shareholding in a prescribed Australian corporation where the total assets exceed, or the transaction values it above, the exemption thresholds set under the *Foreign Acquisitions and Takeovers Regulations 1989* (the Regulations) see **Appendix E**.

Section 26A makes it compulsory for a foreign person to notify the Treasurer of a proposal to acquire an interest in Australian urban land, unless the acquisition is exempt under the Regulations.

Substantial penalties apply for non-compliance with the notification provisions of sections 26 and 26A. On conviction, a natural person may be subject to a fine not exceeding 500 penalty units or imprisonment for a period not exceeding two years, or both. A corporation may be subject to a fine not exceeding 500 penalty units (currently \$110 per unit).

Section 25 applies where the Treasurer has received a notice from a person, including those notices that are required under sections 26 and 26A. It also provides an avenue for the notification of proposals falling within the scope of the Act or of the Government's foreign investment policy, but which are not subject to compulsory notification under the Act (for example, off-shore takeovers, acquisitions of business assets, acquisitions of shares in prescribed Australian corporations that are less than a substantial shareholding, or establishment of a new business involving an investment of \$10 million or more).

Formal notification of a proposal under sections 25, 26 or 26A, must be made in accordance with the forms prescribed in the *Foreign Acquisitions and Takeovers (Notices) Regulations 1975* (copy at **Appendix E**). A valid notice activates the commencement of the 30-day statutory examination period. If the Treasurer does not take action (under

5 A 'substantial interest' is defined by the Act as where a person, alone or together with any 'associate(s)', is in a position to control, not less than 15 per centum of the voting power or holds interests in not less than 15 per centum of the issued shares, of a corporation.
An 'aggregate substantial interest' is where two or more persons together with any 'associate(s)', is in a position to control not less than 40 per centum of the voting power or holds interests in not less than 40 per centum of the issued shares, of a corporation.
'Australian urban land' is defined as any land on which a primary production business is not being conducted.

sections 18, 19, 20, 21A or 25) within this period, the power to prohibit the proposal or to impose conditions expires. A further period of 10 days is available to publish any order in the *Commonwealth of Australia Gazette* and to notify the parties. The 30-day examination period may be extended by up to a further 90 days by the making of an interim order (sections 22 and 25(3) of the Act).

Examination

The Treasurer's powers to examine and to take action in relation to foreign investment proposals are primarily contained in sections 18, 19, 20, 21, 21A and 25.

Section 18 deals with proposals involving the acquisition of shares in prescribed corporations which carry on an Australian business (unless the transaction values it, or its total assets are, below the exemption thresholds). Where an acquisition would result in a foreign person acquiring a controlling interest, and the Treasurer concludes that this would be contrary to the national interest, it may be prohibited by the issue of an order (known as a final order). The Treasurer's powers under the section apply irrespective of whether the controlling interest is being acquired by a foreign person, or by an additional or by a different, foreign person(s).

Sections 19, 20 and 21 confer upon the Treasurer powers similar to section 18 but in respect of other types of acquisitions and arrangements. Section 19 deals with acquisitions of business assets, section 20 with arrangements relating to the corporation's governance and operation such as board representation or alterations to constituent documents such as the articles of association, and section 21 with the leasing or hiring of assets, management agreements or profit sharing arrangements.

Section 21A deals with proposals to acquire interests in Australian urban land. It empowers the Treasurer to examine proposed acquisitions of interests in Australian urban land and make an order prohibiting those that he considers would be contrary to the national interest.

'Australian urban land' is defined broadly (see section 12A). Consequently, section 21A applies not only to direct purchases of Australian urban land, but also to the purchase of shares in companies and units in trusts, where more than half of their assets are in the form of Australian urban land.

The Treasurer's powers in section 21A to take action against acquisitions of interests in Australian urban land are not limited to acquisitions of a controlling interest as is the case in sections 18 to 21. There is also no exemption threshold (in monetary or per centum terms) for acquisitions under section 21A, although the Regulations provide a number of exemptions for certain categories of urban land acquisitions.

Sections 18, 19, 20, 21 and 21A give the Treasurer the power to order the divestment or unwinding of a proposal which is subsequently found to be contrary to the national interest.

Section 25 allows conditions to be applied to a decision which would address national interest concerns that would otherwise arise. This power is available where the Treasurer can make an order under sections 18, 19, 20, 21 and 21A.

Foreign-to-foreign transactions

Transactions involving takeovers by foreign persons of businesses operating in Australia which are already foreign-owned or controlled are subject to examination and action under the Act. This applies either where a foreign-owned business operating in Australia is the target of a takeover by another foreign person (a 'foreign-to-foreign takeover') or where the target is another offshore company that also conducts a business in Australia (an 'offshore takeover'). In each case for the Act to apply, the value of the target company must be above the exemption thresholds set under the Regulations.

These transactions are assessed against the policy applicable to the relevant sector of the economy and having regard to the fact that they are not likely to involve any reduction in Australian ownership or control. Such takeovers normally do not raise issues that make the transaction contrary to the national interest. Where issues are raised, the Government would seek to resolve any concerns through consultation with the parties involved.

Prior approval for contractual arrangements

The Act makes it an offence to acquire, or increase, a substantial shareholding or an interest in Australian urban land without providing prior notification to the Treasurer. Consequently, parties proposing to enter into transactions subject to the Act should ensure that the relevant agreements are conditional on foreign investment approval, or alternatively ensure they seek prior approval. This applies to underwriting arrangements and the exercise of pre-emptive rights and real estate purchases, including those undertaken at auction or by way of tender. Entering an agreement that is not conditional may result in the acquisition of an interest that is in breach of the Act and expose the acquirers to possible divestment action.

Foreign control

Under the Act, a 'substantial interest' in an Australian corporation, is deemed to be a controlling interest unless the Treasurer is satisfied that the acquirer is not in a position to determine the policy of the corporation (see section 9). However, a variety of factors other than a person's share ownership may be relevant to the Treasurer's consideration of where ultimate control of a corporation lies. These include:

- voting rights attached to the various shareholdings and the rights of shareholders, including in relation to representation on the Board or controlling body;
- the distribution and composition of share ownership; and

- arrangements or agreements between shareholders and a corporation or controlling body that would enable a shareholder to exercise a measure of control, including through the provision of finance, technology, materials, markets and marketing or management expertise.

The extent to which each of these factors is relevant would depend on the particular circumstances of each case and therefore the determination of control is undertaken on a case-by-case basis.

Enforcement provisions

If the Treasurer raises no objections to a proposal subject to conditions and the parties do not comply with the conditions, the parties commit an offence under section 25(1C). Failure to comply with an order made by the Treasurer constitutes an offence under section 30. The Act empowers the Treasurer to make orders to prohibit schemes entered into for the purpose of avoiding its provisions (section 38A). In addition, the provision of false or misleading information can constitute an offence under Chapter 7 of the *Criminal Code Act 1995*.

Other aspects of foreign investment policy

Foreign portfolio shareholdings

Under the Act, a substantial interest in a corporation is deemed to be a controlling interest unless the Treasurer is satisfied to the contrary. Accordingly, a substantial interest is normally taken to constitute a non-portfolio holding.

An interest less than a substantial shareholding is normally regarded as being a portfolio shareholding when determining levels of ownership for the purposes of foreign investment policy. There are, however, exceptions to this approach, including where:

- A person with less than a substantial interest is able to exert a measure of control through representation on the board of the company and/or is able to influence its policy and operations through other means, for example, the provision of technology, finance or marketing links. Such shareholdings may be taken into account in calculating the level of foreign ownership of the company. Other arrangements affecting control of the company may also come within the scope of the Act.
- Foreign shareholdings (including portfolio shareholdings) aggregate to 40 per cent or more in a company or venture, which the Act defines to be a controlling interest unless the Treasurer is satisfied to the contrary.

- More than half the assets of a company are in the form of Australian urban land, proposed acquisitions by foreign persons of shareholdings of less than 15 per cent are subject to the Act (see **Appendix E**).

Responsibilities of the foreign investor

The Government seeks the cooperation of foreign investors in the application of foreign investment policy. As part of this process and in its role of maintaining awareness of the activities of foreign controlled corporations operating in Australia, the Board welcomes opportunities to discuss with foreign companies their operations and plans for investment in Australia.

The Government also directs the attention of foreign investors to the *Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises* (see **Appendix F**). The Guidelines form an integral part of the OECD Declaration on International Investment and Multinational Enterprises, with which Australia has associated itself. The Government encourages foreign companies operating in Australia to observe these Guidelines.

Taxation

Taxation revenue arising from foreign investment represents a significant benefit to Australia. Special taxation controls apply to the financing of foreign investments in Australian companies and businesses to ensure that foreign investors do not, through the structuring of their investments, obtain a taxation advantage not available to local investors.

The provisions of the income tax legislation seek to ensure that financing arrangements associated with foreign investment reflect normal commercial practice. This is of particular relevance where funds for the implementation of a proposal are to be provided by foreign associates of the parties to a proposal, for instance, by a foreign parent or associated company. In these circumstances, the Government is concerned to ensure that the capital structure employed, and especially the proportion of debt to equity funds employed, reflects the commercial practices of the industry concerned.

Foreign government investment in Australia

Special considerations can arise in respect of proposals by foreign governments or their agencies to invest in Australia. Where such investments are not subject to the Act, the parties are required under the Government's foreign investment policy, to notify and seek approval, irrespective of the size of the proposed investment.

The Government requires commercial investments by foreign governments or their agencies to be structured in a manner that enables all normal taxes and charges to be levied, and avoids questions of sovereign immunity arising.

Chapter 4

International investment issues and Australia's international investment position

International investment issues and Australia's international investment position

Introduction

One of the Government's principal policy objectives is to generate and capture benefits for the Australian community through international trade and investment liberalisation. This is pursued through a multi-faceted trade policy involving complementary multilateral, regional and bilateral engagements.

The Treasury's Foreign Investment and Trade Policy Division (the Division) is responsible for ensuring effective representation of Australia's foreign investment policy and negotiating position on international investment issues. This includes multilateral forums, such as the Organisation for Economic Co-operation and Development (OECD) and the World Trade Organization (WTO); regional forums, such as Asia-Pacific Economic Cooperation (APEC); and bilateral forums, such as free trade agreements (FTAs), investment protection and promotion agreements (IPPAs) and other bilateral partnerships.

The Division also supports the Executive Member of the Board in his role as the Australian National Contact Point (ANCP) for the *OECD Guidelines for Multinational Enterprises* (the OECD Guidelines) and related corporate social responsibility issues. The role of the ANCP is to ensure the effective administration and promotion of the OECD Guidelines in Australia.

Over the past two decades growth in worldwide flows of foreign direct investment (FDI) has been particularly strong. This growth in FDI largely reflects the worldwide relaxation of trade and investment controls, together with advancements in information technologies, communications and transport.

Australia has traditionally relied on inward FDI to meet the shortfall between domestic saving and the level of domestic investment. Foreign investment supplements local savings thereby supporting higher rates of economic growth and employment levels which in turn delivers higher wellbeing for Australians. Inward FDI also continues to play a significant role in making Australian industry internationally competitive, and thereby contributing to export growth, facilitating access to new technologies, financing new and often risky innovations, and providing opportunities for global integration and networking.

Over the past 15 years Australian outward FDI stocks have grown more strongly than inward FDI stocks. This trend of Australian firms increasingly investing abroad has added another dimension to the contribution that FDI makes to Australia's economic growth. Outward FDI enables Australian firms to expand their business beyond the potential constraints imposed by the limited size of the domestic market. By extending their market presence and access to resources, expertise and technology in other markets, Australian firms are able to become more efficient and competitive in global markets. Outward FDI furthermore has a multiplier effect through stimulating the demand for goods and services provided by component and other input suppliers.

The strong growth in global cross-border FDI activity is also linked to the recent increase in government-to-government investment-related negotiations in multilateral, regional and bilateral forums. Given the importance of FDI flows to Australia and the positive role that investment-related agreements can play in enhancing international investment flows, Australia pursues a broad agenda on investment in international forums.

Multilateral investment issues

While at the multilateral level, there is not a comprehensive instrument covering foreign investment, an international legal framework for FDI has begun to emerge. The Division's role in negotiating international investment agreements and the investment chapters in Australia's free trade agreements allows it to contribute to the further development of an international rules-based system that takes appropriate account of both the interests of foreign investors and the wellbeing of Australians. The Division's involvement in the OECD Investment Committee and promotional work on the OECD Guidelines domestically supports Australia's other contributions to the international policy framework for investment. By promoting the OECD Guidelines, the Division seeks to encourage good corporate behaviour and the positive contribution of multinational enterprises to sustainable development.

While the Division has primary responsibility for the OECD Guidelines and the Government's engagement on international investment issues in the OECD, the Department of Foreign Affairs and Trade (DFAT) has direct responsibility for Australia's involvement in trade-related forums such as the World Trade Organization (WTO) and Asia-Pacific Economic Cooperation (APEC). The Division provides advice and briefings on foreign investment issues to the Treasurer and DFAT.

Organisation for Economic Co-operation and Development (OECD)

The Division represents Australia on international investment issues in the OECD Investment Committee. The Investment Committee's mission is to provide a forum for international cooperation, policy analysis and advice to governments on how best to enhance the positive contribution of investment worldwide.

OECD Investment Committee

The Committee provides a well-placed forum for addressing the policy challenges facing OECD and non-OECD countries as they seek to attract investment and maximise its benefits to host societies. The Committee represents the community of policy makers, including treaty negotiators and National Contact Point representatives for the OECD Guidelines, from countries which are the source of more than 80 per cent of global investment flows. It is responsible for the OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations. The Investment Committee also has primary responsibility for the OECD Declaration on International Investment and Multinational Enterprises (the Declaration). The Declaration was adopted by OECD Governments in 1976 to facilitate direct investment among OECD Members. It represents a broad political commitment to open and transparent investment policies and encourages the positive contribution of multinational enterprises. Since adoption, the Declaration has been the basis for extensive inter-governmental cooperation on developing best policy practices and peer review-based approaches to outreach activities. The text of the Declaration is at **Appendix F**.

The Committee's work programme falls into five main categories: promoting transparent and non-discriminatory investment policies; encouraging the positive contribution of multinational enterprises to sustainable development; cooperating with non-Members to mobilise investment for development; monitoring developments in international investment agreements; and monitoring foreign direct investment trends.

The main projects being undertaken by the Investment Committee include:

- *Business integrity in weak governance zones*. This project has been on the Committee's agenda since April 2004 and is now nearing completion. The aim of the project is to assist companies in responsibly managing their investments in weak governance zones through the development of a risk management tool. The tool is non-prescriptive and consistent with the objectives and principles of the OECD Guidelines. During the course of the project the Committee considered the generic challenges that emerge from investments in weak governance zones, based on a case study of investments by OECD companies in the Democratic Republic of the Congo. In preparing terms of reference on conducting business with integrity in weak governance zones, the Committee largely focused on issues raised by the OECD Guidelines and six other OECD integrity instruments. This work has been subject to extensive consultation with stakeholders and the draft text is currently available for public comment. The risk management tool is scheduled for finalisation in the first half of 2006.
- *Investment for development – Policy Framework for Investment (PFI)*. The PFI is being developed by a Task Force established by the Investment Committee, which involves OECD and non-OECD Governments, civil society representatives and other international organisations. The objective of the PFI is to promote a shared view among OECD and non-OECD Governments and business of what constitutes

'good policies' in a range of areas bearing on investment. The PFI provides a comprehensive, evolving and non-prescriptive operational guide on a broad range of policies relevant to the investment climate, such as trade policy, competition policy, taxation policies and corporate and public governance. It has been designed for governments engaged in domestic reform, regional cooperation or international policy dialogue and aims to create an investment environment that is not only attractive to investors but enhances the benefits of investment. The PFI is scheduled to be completed by the May 2006 OECD Ministerial Meeting.

- *Analysis of key obligations and emerging issues in international investment treaties.* Against the background of a proliferation of international investment agreements, the emergence of a 'new generation' of bilateral and regional agreements and a growing body of jurisprudence, the Committee has committed to undertaking in-depth analysis of the core provisions and arbitration procedures included in international investment agreements. To date, the work has largely focused the legal literature, evolving arbitral jurisprudence and state practice in relation to the implications of 'Most-Favoured-Nation' provisions, interpretations of 'fair and equitable treatment' and 'indirect expropriation'. The Committee has progressed this work during the reporting period by analysing the coverage of FDI by OECD investment agreements and undertaking a stocktake of the novel features that have recently been included in such agreements. In early 2005, the Committee commenced a new strand of work on the improvements to investor-state dispute settlement mechanisms.
- *Investment for development – outreach.* The Committee's aims in this area are to increase the capacity of non-Members (China, Russia, India, Africa, Middle East and North Africa (MENA), Asia, Latin America, South East Europe and Eurasia) to attract more and higher quality investment by engaging in dialogue and sharing best practice advice for promoting a favourable environment for both foreign and domestic investment. The Committee undertakes its outreach work in a number of forums including, ad hoc working groups, regional roundtables, peer reviews and background reports. The OECD Global Forum on International Investment (GFII) has been established as a vehicle for the continuing policy dialogue with non-Members. Investment policy programmes with Russia, China and other major players have continued over the period and initiatives in Africa, Asia and the Middle East have also been launched recently.

As part of its responsibility to oversee Member and non-Member countries' adherence to the Declaration, the Committee also has broad responsibility for the OECD Guidelines and is the reporting post for National Contact Points on their activities relating to the promotion and implementation of the Guidelines. In addition to the recommendations contained in the OECD Guidelines, the Declaration deals with three related instruments aimed at:

- providing national treatment to foreign-owned enterprises on a best endeavours basis;

- promoting cooperation among governments in relation to international investment incentives and disincentives; and
- minimising the imposition of conflicting requirements on multinational enterprises by governments of different countries.

OECD Guidelines for Multinational Enterprises

The OECD Guidelines provide voluntary principles and standards for responsible business conduct consistent with applicable domestic laws.

The OECD Guidelines are recommendations by governments to multinational enterprises (MNEs) operating in or from the 30 OECD Member countries and nine non-Member adhering countries (Argentina, Brazil, Chile, Estonia, Israel, Lithuania, Slovenia, Latvia and Romania). They are the only comprehensive and multilaterally-endorsed code of conduct for MNEs that governments are committed to promoting.

The Guidelines apply to MNEs activities in OECD and non-OECD countries alike. They establish principles covering a broad range of issues including information disclosure, employment and industrial relations, environment, combating bribery, consumer interests, science and technology, competition, human rights and taxation. The Guidelines were last reviewed in June 2000.

The Australian Government has established a National Contact Point to implement and promote the Guidelines to Australian businesses and other interested parties. The Australian National Contact Point (ANCP) is the Executive Member of the Foreign Investment Review Board.

An important aspect of the OECD Guidelines is its formal review mechanism, which provides for an examination of a multinational enterprises' conduct where that conduct is claimed to be contrary to the Guidelines. Such an examination is termed a 'specific instance' and it is conducted by the relevant National Contact Point. In accordance with the OECD's procedural guidelines for National Contact Points, the ANCP has committed to contribute to the resolution of issues relating to the implementation of the Guidelines in any such specific instances. In June 2005, the ANCP received a submission from several Australian and overseas non-government organisations alleging that the Australian operations of a UK-controlled multinational enterprise were inconsistent with the Guidelines. At the end of June 2005, the specific instance was still under examination.

The promotional activities of the ANCP during the period have been focused on finalising the upgrade of the ANCP website, promoting the Guidelines to business groups and developing a more targeted approach to the consultation process with government agencies, non-government organisations (NGOs), business, and other social partners. This has involved:

- Consultation sessions with social partners in Canberra in November 2004 and in Melbourne in May 2005. These sessions provide a forum for interested parties to raise issues relevant to the Guidelines with the ANCP, facilitate discussion on OECD working papers and provide ideas and assistance with the promotion of the Guidelines.
- Finalising the review and upgrade of the website dedicated to the ANCP and the Guidelines (www.ausncp.gov.au). The upgrade has improved registered users' access to the secure section of the site and has thereby enhanced the ability of the ANCP to consult with social partners electronically.
 - The website provides: the text of the Guidelines; a secure section for registered social partners to access and comment on 'for official use' Investment Committee and Guidelines related OECD material; the ANCP's Service Charter; procedures for lodging specific instances and the ANCP's procedures for handling them; frequently asked questions about the Guidelines and specific instances; and a notice board publicising upcoming events.
- Outreach to the business community in relation to promoting the Guidelines and efforts to establish a network of business contacts to consult on the Guidelines and related issues. This included:
 - a presentation on the OECD Guidelines and OECD Corporate Governance Principles to the Australian Stock Exchange Corporate Governance Council at its September 2004 meeting; and
 - increased business attendance and participation at the November 2004 ANCP community consultation.
- Providing for the inclusion of an attachment providing information on the OECD Guidelines and the ANCP in all letters advising the outcome of non-real estate foreign investment proposals subject to the operation of the *Foreign Acquisitions and Takeovers Act 1975*.
- Chairing an interdepartmental meeting on the Guidelines and the specific instance that was raised with the ANCP in June 2005.
- Attending regular interdepartmental committee meetings chaired by the Attorney-General's Department on bribery and the OECD Bribery Convention. The ANCP has also met separately with the Attorney-General's Department to explore increased cooperation between the agencies on raising awareness of the OECD Guidelines and the OECD Bribery Convention.
- Continued efforts to promote the Guidelines through embassy and consular networks. This has included the ANCP personally briefing senior DFAT officials prior to them taking up postings.

Chapter 4: International investment issues and Australia's international investment position

- Attending corporate social responsibility conferences hosted by other organisations (for example, the 2004 Prime Minister's Community Partnership Conference and Awards and the bi-annual Department of Foreign Affairs and Trade and NGO Human Rights Consultations).

More information on the OECD Guidelines and the activities of the ANCP can be found at www.ausncp.gov.au.

World Trade Organization (WTO)

Australia also pursues its interests on international investment through involvement in the WTO Working Group on the Relationship between Trade and Investment (WGTI). The WGTI was formed following the Uruguay Round at the WTO Ministerial Conference in Singapore in 1996.

Following the Fifth Ministerial Conference held in Cancún in September 2003, where developing countries expressed particular resistance to negotiating on the 'Singapore Issues' (that is, investment, competition policy, transparency in government procurement and trade facilitation), Ministers decided, at the July 2004 General Council Meeting, not to proceed with negotiations on multilateral rules on investment under the current WTO round. While investment has since been referred back to the WGTI for further consideration, the future work programme of the WGTI remains uncertain.

The Division provides investment policy advice and briefings to the Department of Foreign Affairs and Trade, which represents Australia at the WGTI meetings.

Asia-Pacific Economic Cooperation (APEC)

APEC was established in 1989 in response to the growing interdependence among Asia-Pacific economies. Its goal is to advance Asia-Pacific economic dynamism and sense of community. APEC has become the primary regional vehicle for promoting open trade and practical economic cooperation. APEC Members aim to meet the Bogor Goals of free and open trade and investment by 2010 for developed economies and 2020 for developing economies.

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 liberalisation in their economies and to improve transparency.

In the lead-up to Australia hosting APEC in 2007, the Division has taken on a more active and strategic role in APEC's work on investment liberalisation and facilitation by accepting the convenorship of the Investment Experts Group (IEG). The IEG is tasked with taking forward APEC's investment liberalisation objectives. As convenor, Australia is developing a more comprehensive work plan focussed on:

- both general and sectoral investment liberalisation;
- increased transparency of investment regimes in the APEC region;
- work to increase coherence and convergence in the approach to investment chapters in free trade agreements of APEC Members; and
- increasing policy dialogue with business and international organisations to improve analytical outputs and deliver more projects directed at demonstrated capacity building needs.

Preliminary work is underway to develop the relationship with the United Nations Conference on Trade and Development (UNCTAD) in the area of dispute settlement. UNCTAD has indicated a strong willingness to contribute to a regional workshop to discuss key substantive and procedural issues in 2006.

Business is also sharing its ideas concerning improvement of the regional investment environment, with particular focus on financial services' liberalisation. Discussions with IEG hold the promise of work targeted at the further reduction of impediments to foreign direct investment flows, and improved evaluation of offers in the financial services sector in both the WTO and preferential trade agreements.

The IEG is forging closer working relationships with other APEC trade and investment facilitation working groups to draw on their areas of expertise. It is also actively seeking greater participation by member economies in taking on the hosting of investment seminars, and in using their own expertise to drive particular projects. Australia, as a member economy, has taken on responsibility for the publication of the sixth APEC Investment Guidebook.

Bilateral investment issues

With the slow rate of progress in multilateral negotiations on trade and the decision not to negotiate multilateral rules on investment in the WTO, Australia has significantly increased its participation in bilateral trade and investment agreements. In addition to the long-standing and successful Agreement with New Zealand (the ANZCER announced in 1983), Free Trade Agreements (FTAs) with Singapore, the United States and Thailand have entered into force. In the first half of 2005, Australia commenced FTA negotiations with the United Arab Emirates (UAE), China, Malaysia and the Association of South-East Asian Nations (ASEAN), in partnership with New Zealand. A feasibility study into a possible FTA with Japan is also underway.

Bilateral agreements can play an important role in improving investment climates, reducing regulatory barriers to international trade and investment and enhancing the benefits that can be derived from FDI. Recent evidence indicates a link between the quality of the overall investment climate and the quality of productive investment that is ultimately attracted. Bilateral agreements can provide greater security, certainty and

Chapter 4: International investment issues and Australia's international investment position

opportunities for outward FDI from Australia, and at the same time, ensure that Australia is a desirable destination for overseas investors. This includes by reducing existing compliance costs faced by investors and the cost of capital for Australian businesses.

In contrast to multilateral forums, bilateral agreements are less cumbersome to initiate and maintain, and they may be tailored to meet the needs of unique relationships between nations. They can secure practical results for Australian businesses and establish a high benchmark for the multilateral system. However, they can also introduce complexity and hence new compliance costs where each agreement contains slightly different provisions and exemption thresholds or triggers.

Bilateral agreements can be complementary to regional and multilateral efforts by providing momentum to our wider multilateral trade objectives. They can provide precedents, examples of best practice and ensure that progress in improving the global environment for FDI continues particularly when multilateral measures are incomplete or slow to develop.

Investment Promotion and Protection Agreements

Investment Promotion and Protection Agreements (IPPAs) are bilateral investment agreements between governments, which aim to stimulate the flow of investment by providing investors with guarantees relating to non-commercial risk. IPPAs guarantee non-discriminatory treatment and set out rules governing restrictions on the right to expropriate investments, transfer funds and repatriate profits, and access dispute settlement procedures. Australia's IPPAs apply at the post-establishment stage of the investment cycle, that is, Australia's sovereign right to admit investments (either through acquisitions or the establishment of new businesses) is unaffected by the provisions included in such agreements.

Australia negotiates its IPPAs on the basis of a Cabinet-approved model IPPA text. Australia's IPPAs provide a standard of fair and equitable treatment for investors and 'most-favoured-nation' commitments (that is, investors of the Party must not be treated any less favourably than investors from any other foreign country). Australia's IPPAs also provide undertakings about expropriation/nationalisation (including the nature of compensation for any such actions) and establish mechanisms for resolving disputes over investment matters.

To date, Australia has signed IPPAs with Argentina, Chile, the Czech Republic, Egypt, Hong Kong, Hungary, India, Indonesia, Laos, Lithuania, Pakistan, Papua New Guinea, the Peoples' Republic of China, Peru, the Philippines, Poland, Romania, Uruguay and Vietnam. Agreements with Sri Lanka, Mexico and Turkey have also been signed, but are not yet in force. Australia is currently negotiating IPPAs with Iran and Lebanon.

Other agreements involving investment

Australia-New Zealand Closer Economic Relations

The Closer Economic Relations Agreement between Australia and New Zealand (ANZCER) has been in force for over 20 years (since 1983) and represents a comprehensive bilateral free trade agreement. The main objective of ANZCER is to expand free trade by eliminating barriers to trade and promoting fair competition. The Agreement has assisted in building momentum for trade liberalisation between Australia and New Zealand. By 1990, five years ahead of schedule, all tariffs and quantitative restrictions had been removed from trans-Tasman trade in goods. While the ANZCER does not include a specific chapter on investment, it has facilitated cooperation between Australia and New Zealand on this issue.

In 1999, the Joint Prime Ministerial Taskforce on Australia New Zealand Bilateral Economic Relations (ANZBER) was established to address a number of issues including impediments to trans-Tasman investment. The review resulted in significant liberalisation of the investment regimes of Australia and New Zealand.

Australia and New Zealand continue to enjoy a close relationship with high levels of investment flowing between the two countries. In February 2005, the Australian Treasurer and the New Zealand Minister for Finance agreed to investigate the possibility of adding an investment component to ANZCER.

Australia-Singapore Free Trade Agreement

The Australia-Singapore Free Trade Agreement (SAFTA) entered into force on 28 July 2003. SAFTA is the first bilateral FTA to be concluded by Australia since ANZCER.

SAFTA contains a comprehensive investment chapter that provides for investment liberalisation and protection against expropriation. Under the Agreement, Singapore treats Australian investors like its domestic investors, except in areas specifically exempted. The Agreement also provides for greater transparency in relation to the de facto investment restrictions in Singapore's government-linked companies.

SAFTA also provides for a review of the Agreement every two years after entry into force. The first SAFTA Ministerial Review Meeting took place in July 2004. As part of this Review, Australia extended its schedules of reservations for services and investment to include a listing of State and Territory measures.

Australia has also established a Help Desk to assist Singaporean business investors with applications for direct investment in Australia. The Division has primary responsibility for the operation of the Help Desk. Further information is available at: www.firb.gov.au/content/singapore/welcome.asp.

Australia-Thailand Free Trade Agreement

The Australia-Thailand Free Trade Agreement (TAFTA) entered into force on 1 January 2005. TAFTA is the first FTA that Thailand has negotiated with a developed economy.

Under the Agreement, both countries have made market access commitments on investment that go beyond their respective obligations in the General Agreement on Trade and Services (GATS). The Agreement also provides for further negotiations on market access in services and investment to be undertaken three years after its entry into force.

The Investment Chapter of TAFTA also provides investors and their investments with fair and equitable treatment, full protection and security, the free transfer of funds, and ensures that prompt and adequate compensation for any losses incurred through expropriation and strife is received.

Australia-United States Free Trade Agreement

The Australia-United States Free Trade Agreement (AUSFTA) entered into force on 1 January 2005.

Australia and the US have a strong bilateral investment relationship. The US is the largest country source of foreign investment in Australia, with US investment accounting for nearly 30 per cent of the stock of foreign investment in Australia.

Under the AUSFTA, Australia has significantly liberalised its foreign investment regime, as it applies to US investors. The following changes to Australia's foreign investment policy have been made under the AUSFTA:

- exemption from the *Foreign Acquisitions and Takeovers Act 1975* (FATA or the Act) of acquisitions of interests in financial sector companies as defined by the *Financial Sector (Shareholdings) Act 1998* and therefore subject to the national interest test applying under the latter legislation;
- introduction of an exemption threshold of \$800 million for the calendar year 2005, indexed annually to the GDP implicit price deflator, of acquisitions of interests in Australian businesses in non-sensitive sectors (see below);
- introduction of a exemption threshold of \$50 million for the calendar year 2005, indexed annually to the GDP implicit price deflator, of acquisitions of interests in Australian businesses in prescribed sensitive sectors. These are:
 - media;
 - telecommunications;

- transport (including airports, port facilities, rail infrastructure, international and domestic aviation and shipping services provided either within, or to and from, Australia);
 - the supply of training or human resources, or the manufacture or supply of military goods or equipment or technology, to the Australian or other defence forces;
 - the manufacture or supply of goods, equipment or technology able to be used for a military purpose;
 - the development, manufacture or supply of, or the provision of services relating to, encryption and security technologies and communications systems; and
 - the extraction of (or holding of rights to extract) uranium or plutonium or the operation of nuclear facilities;
- introduction of an exemption threshold of \$50 million for the calendar year 2005, indexed to the GDP implicit price deflator, for acquisitions subject to the FATA by entities in which a United States government holds a prescribed interest;
 - introduction of an exemption threshold of \$800 million for the calendar year 2005, indexed annually to the GDP implicit price deflator, for acquisitions of interests in non-residential developed commercial property (other than accommodation facilities); and
 - removal of existing policy-based notification requirements for the establishment of new Australian businesses other than where the investment involves a United States government.

Other than the commitments on developed commercial property, the AUSFTA does not provide concessions to US investors in relation to the acquisition of interests in Australian real estate.

Australia-China Free Trade Agreement negotiations

On 18 April 2005, Prime Minister John Howard and his Chinese counterpart agreed to launch negotiations on a bilateral FTA. The decision to proceed to FTA negotiations follows the completion of a joint feasibility study, which found that an FTA would provide substantial economic benefits to both countries. As part of those arrangements Australia formally recognised China as a market economy.

As at 31 December 2004, Australia's total stock of investment in China was \$1.25 billion (of which only \$466 million was FDI), making China the 23rd largest destination for Australian outward investment. The stock of Chinese investment in Australia totalled \$1.98 billion, making China Australia's 17th largest source of foreign investment.

Australia-Malaysia Free Trade Agreement negotiations

On 7 April 2005, the Prime Minister and his Malaysian counterpart announced that Australia and Malaysia would enter into negotiations for an FTA. The announcement followed the completion of parallel scoping studies by the two Governments into the likely impacts of a bilateral agreement.

As at 31 December 2004, Malaysia was Australia's 28th largest destination for outward investment with the Australian stock of total investment in Malaysia valued at \$736 million (the FDI component was \$406 million). The Malaysian stock of investment in Australia for the same period was \$5.3 billion (of which \$2.8 billion was FDI) making Malaysia the 13th largest source of foreign investment in Australia.

Australia-New Zealand-ASEAN Free Trade Agreement negotiations

On 30 November 2004 at the ASEAN – Australia – New Zealand Commemorative Summit, Prime Minister John Howard, together with his New Zealand and ASEAN counterparts, announced that negotiations would commence on an FTA between Australia, New Zealand and ASEAN in early 2005.

The first two rounds of the FTA negotiations, held in February and March 2005, focused on procedural issues, including modalities for the negotiations and the possible architecture of an agreement. During the third round of negotiations in June 2005, the discussions were progressed on the substantive issues under each of the four Working Groups – rules of origin, services, investment and legal issues.

Two-way investment between Australia and the ASEAN is substantial. The cumulative stock of total investment from ASEAN countries in Australia, as at 31 December 2004, was \$27 billion. However, FDI accounted for only \$7 billion of this figure. Australia's investment stocks in the ASEAN countries totalled \$19 billion for the same period, of which only \$3 billion was FDI.

Australia-United Arab Emirates (UAE) Free Trade Agreement negotiations

At the fourth meeting of the Australia-UAE Joint Ministerial Commission (JMC) in Canberra on 15 March 2005, Australia's Trade Minister Mr Mark Vaile and the United Arab Emirates' Economy and Planning Minister, Sheikha Lubna Al Qassimi, announced that the two countries would commence negotiations on a bilateral FTA.

The first two rounds of negotiations, which were held in Canberra in March and Abu Dhabi in June, included Working Group discussions on goods, services and investment, and legal issues. On investment, negotiations have progressed from the substantive information exchange process to discussions on draft text for inclusion in a chapter.

Two-way investment between Australia and the UAE is very modest. At 31 December 2004, the UAE ranked as only the 37th largest destination for Australian outward investment with the Australian total stock of investment in the UAE valued at

\$93 million. Of this, only \$21 million was FDI. While the statistics for UAE investment in Australia are not available, it can be assumed that they are likewise very modest.

Australia-Japan Trade and Economic Framework

On 20 April 2005, the Prime Ministers of Australia and Japan agreed to commence a joint feasibility study into a possible FTA. The study will analyse the possible implications of a comprehensive FTA to enable both countries to consider whether they should proceed to formal FTA negotiations. The feasibility study is scheduled to be completed by 20 April 2007.

A joint study into the costs and benefits of trade and investment liberalisation between Australia and Japan was finalised and released on 20 April 2005. The study was undertaken under the Australia-Japan Trade and Economic Framework (AJTEF) signed in July 2003. As part of that study, the Division prepared a case study on the bilateral FDI relationship, including a discussion of the possible beneficial impacts of liberalising FDI restrictions in both countries.

The AJTEF commits both countries to work to achieve comprehensive trade and investment liberalisation. It builds on two other formal agreements between Australia and Japan – the Agreement on Commerce between the Commonwealth of Australia and Japan, 1957 and the Basic Treaty of Friendship and Co-operation between Australia and Japan, 1976 – to further strengthen the bilateral economic relationship between the two countries.

Recent developments

Further up-to-date information on Australia's bilateral and multilateral relationships, can be found in the international section of the Foreign Investment Review Board's (FIRB or the Board) website located at www.firb.gov.au/content/international.asp.

International investment position

This section summarises trends in foreign investment in Australia and Australian investment abroad using Australian Bureau of Statistics (ABS) and United Nations Conference on Trade and Development (UNCTAD) data.

Foreign investment in Australia refers to the stock of financial assets in Australia owned by non-residents and financial transactions that increase or decrease this stock. Conversely, Australian investment abroad refers to the stock of foreign financial assets owned by Australian residents and financial transactions that increase or decrease that stock.

ABS data on Australia's international investment position, which are compiled in accordance with the relevant international statistical standards promulgated by the OECD and the International Monetary Fund, are based on different criteria from those used by the Board.

There are substantial differences between the Board's statistics and ABS statistics. These include differences in coverage, concepts and timing. ABS data are a measure of the actual cross-border transactions that have occurred and the level of foreign investment held at a particular time. The Board's figures are an aggregation of those proposals submitted for approval, regardless of the source of finance used, along with the proposed associated expenditures. The limitations of the Board's data are explained in Chapter 2.

Foreign investment levels

As a resource rich country with relatively high demand for capital, Australia has relied on foreign investment to meet the shortfall between domestic savings and domestic investment. Australia welcomes foreign investment and acknowledges that FDI has allowed the Australian people to enjoy higher rates of economic growth, employment and higher wellbeing than otherwise would have been possible. FDI provides access to the latest technology, production techniques and management skills. It also brings added value through commercial links that offer access to new markets.

The ABS estimated stock of foreign investment in Australia, as at 31 December 2004, was \$1,155 billion. This represents an increase of \$165 billion (16.7 per cent) over the level at 31 December 2003. FDI accounted for \$343 billion of the total stock of investment, a \$76 billion (28.5 per cent) increase from \$267 billion in 2003.

The stock of Australian investment abroad, as at 31 December 2004, was \$650 billion. This represents an increase of \$110 billion (20.4 per cent) over the stock at 31 December 2003. FDI accounted for \$254 billion of the total stock of investment, an increase of \$53 billion (26.4 per cent) from 2003.

As is demonstrated by Table 4.1, after three years of decline, worldwide FDI inflows rose slightly in 2004 to US\$648.1 billion. Despite this rise, global FDI inflows in 2004 amounted to less than 50 per cent of their peak in 2000. While the early 2000s have witnessed a slowing of worldwide FDI activity, flows are still high by historic standards and compare favourably to average annual FDI inflows of US\$404.1 billion during the 1990s.

Over recent years, Australian FDI flows have not followed the same path as global flows. While the global economy experienced a slowdown in economic activity in the early 2000s, the Australian economy continued to perform strongly, recently being ranked as the most resilient economy in the world to economic cycles.⁶ This economic strength contributed to record FDI flows in 2004.

The inflow of US\$42.6 billion of FDI into Australia in 2004 represents the largest ever annual inflow of direct investment from abroad. The 2004 figure is approximately three times greater than the previous record of US\$15.6 billion in 2002. Perhaps even

6 2005 IMD World Competitiveness Yearbook <http://www01.imd.ch/wcc/>.

more remarkable is the fact that in 2004 Australia was the fifth largest recipient of FDI worldwide, behind the United States, United Kingdom, China and Luxembourg.

While Australia continues to be a net capital importer, Australian firms are investing overseas in ever increasing numbers. The outflow of US\$16.3 billion of FDI from Australia in 2004 was the largest ever outflow of direct investment abroad, and is approximately 6.5 per cent greater than the US\$15.3 billion outflow experienced in 2003.

Table 4.2 shows a significant increase in the estimated value of the stock of FDI in Australia. As at the end of 2004, the inward stock of FDI stood at US\$253.6 billion, an increase of 35.7 per cent over the 2003 figure. The strength of the Australian economy is also reflected in the 31.8 per cent increase in the stock of FDI overseas, from US\$127.1 billion as at the end of 2003 to US\$167.5 billion as at the end of 2004.

Table 4.1: Foreign Direct Investment flows in selected countries (US \$billion)

Country	Inflows						Outflows					
	1999	2000	2001	2002	2003	2004	1999	2000	2001	2002	2003	2004
Australia	2.9	13.1	4.0	15.6	7.0	42.6	-0.7	0.8	12.2	7.9	15.3	16.3
Belgium(a)	119.7	88.7	88.2	15.6	32.1	34.4	122.3	86.4	100.6	12.7	36.9	26.1
Brazil	28.6	32.8	22.5	16.6	10.1	18.2	17	2.3	-2.3	2.5	0.2	9.5
Canada	24.7	66.8	27.5	215	6.3	6.3	17.2	44.7	36.1	26.8	215	47.5
China	40.3	40.7	46.9	52.7	53.5	60.6	18	0.9	6.9	2.5	-0.2	18
France	46.5	43.3	50.5	49.0	42.5	24.3	126.9	177.4	86.8	50.4	53.1	47.8
Germany	56.1	198.3	211	50.5	27.3	-38.6	108.7	56.6	36.9	15.2	-3.6	-7.3
Hong Kong, China	24.6	61.9	23.8	9.7	13.6	34.0	19.4	59.4	11.3	17.5	5.5	39.8
India	2.2	2.3	3.4	3.4	4.3	5.3	0.1	0.5	14	11	0.9	2.2
Indonesia	-19	-4.6	-3.0	0.1	-0.6	10	0.1	0.2	0.1	0.2	0.0	0.1
Ireland	18.2	25.8	9.7	29.0	26.9	9.1	6.1	4.6	4.1	10.3	3.5	-7.4
Italy	6.9	13.4	14.9	14.5	16.4	16.8	6.7	12.3	215	17.1	9.1	19.3
Japan	12.7	8.3	6.2	9.2	6.3	7.8	22.7	316	38.3	32.3	28.8	310
Korea, Rep. of	9.4	8.6	3.7	3.0	3.8	7.7	4.2	5.0	2.4	2.6	3.4	4.8
Luxembourg(a)	119.7	88.7	88.2	117.2	91.1	57.0	122.3	86.4	100.6	126.1	1010	59.0
Malaysia	3.9	3.8	0.6	3.2	2.5	4.6	14	2.0	0.3	19	14	2.1
Mexico	13.2	16.6	26.8	15.1	11.4	16.6	15	10	4.4	0.9	18	2.2
Netherlands	41.2	63.9	51.9	25.0	19.3	-4.6	57.6	75.6	48.0	33.9	37.8	15
New Zealand	14	3.3	19	0.7	2.4	2.4	0.8	13	-11	0.2	0.3	0.8
Philippines	17	13	10	18	0.3	0.5	-0.0	-0.1	-0.2	0.1	0.2	0.4
Russian Federation	3.3	2.7	2.5	3.5	8.0	11.7	2.2	3.2	2.5	3.5	9.7	9.6
Singapore	16.1	17.2	15.0	5.8	9.3	16.1	7.5	5.3	17.1	4.1	3.7	10.7
South Africa	15	0.9	6.8	0.8	0.7	0.6	16	0.3	-3.2	-0.4	0.6	16
Spain	15.8	37.5	28.0	43.7	29.0	18.4	42.1	54.7	33.1	36.5	30.8	54.2
Switzerland	11.7	19.3	8.9	6.3	16.6	4.5	33.3	44.7	18.2	7.9	15.1	25.2
Thailand	6.1	3.4	3.8	0.9	2.0	1.1	0.3	-0.0	0.2	0.1	0.5	0.4
Turkey	0.8	10	3.3	1.1	1.8	2.7	0.6	0.9	0.5	0.2	0.5	0.9
United Arab Emirates	-10	-0.5	1.2	1.3	0.0	0.8	0.1	2.1	0.4	0.4	0.0	-0.0
United Kingdom	88.0	118.8	52.6	24.0	20.3	78.4	2015	233.4	58.9	50.3	66.5	65.4
United States	283.4	314.0	159.5	71.3	56.8	95.9	209.4	142.6	124.9	134.9	119.4	229.3
Vietnam	1.5	1.3	1.3	1.2	1.5	1.6	-	-	-	-	-	-
World	1,086.8	1,388.0	817.6	716.1	632.6	648.1	1,092.3	1,186.8	721.5	652.2	616.9	730.3

(a) For 1999-2001 Belgium and Luxembourg figures are combined.
Source: UNCTAD World Investment Report (2004 and 2005 editions).

Table 4.2: International direct investment position in selected countries (US \$billion)

Country	Inward Position						Outward Position					
	1999	2000	2001	2002	2003	2004 ^(a)	1999	2000	2001	2002	2003	2004 ^(a)
Australia	120.6	111.1	107.9	134.8	186.9	253.6	89.5	85.4	92.2	93.1	127.1	167.5
Belgium(b)	179.9	195.2	203.5	192.4	224.5	258.9	151.8	179.8	181.5	185.3	222.2	248.4
Brazil	86.5	103.0	121.9	100.8	132.8	151.0	49.7	51.9	49.7	54.4	54.9	64.4
Canada	175.0	212.7	213.8	224.2	274.3	303.8	201.4	237.6	250.7	274.4	312.2	369.8
China	186.2	193.3	203.1	216.5	228.4	245.5	26.9	27.8	34.7	37.2	37.0	38.8
France	244.6	259.8	295.3	386.6	510.9	535.2	334.1	445.1	508.9	586.1	721.6	769.4
Germany	235.3	271.6	272.2	297.8	386.5	348.0	413.4	541.9	617.8	695.8	840.9	833.7
Hong Kong, China	405.3	455.5	419.3	336.3	381.3	456.8	321.6	388.4	352.6	309.4	339.6	405.6
India	15.4	17.5	20.3	25.4	30.8	38.7	1.7	1.9	2.6	4.0	5.1	6.6
Indonesia	29.3	24.8	15.2	7.1	10.3	11.4	6.8	6.9	***	***	***	***
Ireland	72.8	127.1	134.1	178.6	217.2	229.2	25.2	27.9	40.8	54.0	64.5	96.0
Italy	108.6	121.2	113.4	130.8	180.9	220.7	181.9	180.3	182.4	194.5	238.9	280.5
Japan	46.1	50.3	50.3	78.1	89.7	97.0	248.8	278.4	300.1	304.2	335.5	370.5
Korea, Rep. of	28.6	37.2	40.9	43.9	47.6	55.3	23.3	26.8	29.0	31.1	34.5	39.3
Luxembourg(b)	179.9	195.2	203.5	34.8	125.9	182.9	151.8	179.8	181.5	16.4	117.5	176.5
Malaysia	49.0	52.7	34.0	37.0	41.7	46.3	18.4	21.3	8.4	10.1	11.7	13.8
Mexico	78.1	97.2	140.4	155.2	165.9	182.5	6.6	7.5	11.9	12.1	13.6	15.9
Netherlands	192.6	243.7	282.9	350.0	433.4	428.8	263.8	305.5	332.2	398.6	544.4	545.8
New Zealand	32.9	28.1	22.1	27.7	35.6	49.9	7.0	6.1	7.6	7.5	9.1	9.3
Philippines	11.4	12.8	10.4	11.9	12.2	12.7	1.9	1.6	0.7	0.8	1.2	1.6
Russian Federation	1.1	32.2	55.4	72.4	86.8	98.4	1.1	20.1	32.4	54.6	72.3	81.9
Singapore	101.3	112.6	121.4	136.8	144.4	160.4	55.7	56.8	72.2	85.8	90.2	100.9
South Africa	51.8	43.5	30.6	29.6	45.7	46.3	33.0	32.3	17.6	22.0	27.2	28.8
Spain	132.9	154.8	180.0	225.3	296.0	346.7	125.2	166.1	194.6	209.9	264.4	332.7
Switzerland	76.0	86.8	88.8	124.8	161.8	181.0	194.6	233.4	253.6	293.3	342.6	393.0
Thailand	31.1	29.9	33.3	38.2	47.5	48.6	3.0	2.2	2.6	2.6	3.0	3.4
Turkey	18.2	19.2	19.7	18.7	32.5	35.2	2.8	3.7	4.6	5.8	6.1	7.0
United Arab Emirates	1.6	1.1	2.2	3.6	3.6	4.4	0.4	0.8	1.0	1.4	1.5	1.4
United Kingdom	385.1	438.6	506.7	523.3	609.0	771.7	686.4	897.8	869.7	994.1	1235.9	1378.1
United States	955.7	1256.9	1344.0	1340.0	1378.0	1473.9	1216.0	1316.2	1460.3	1601.4	1788.9	2018.2
Vietnam	18.2	20.6	23.0	26.1	27.5	29.1	-	-	-	-	-	-
World	4,914.8	5,786.0	6,197.7	6,703.6	7,987.1	8,902.2	5,156.9	6,148.3	6,564.2	7,288.4	8,731.2	9,732.2

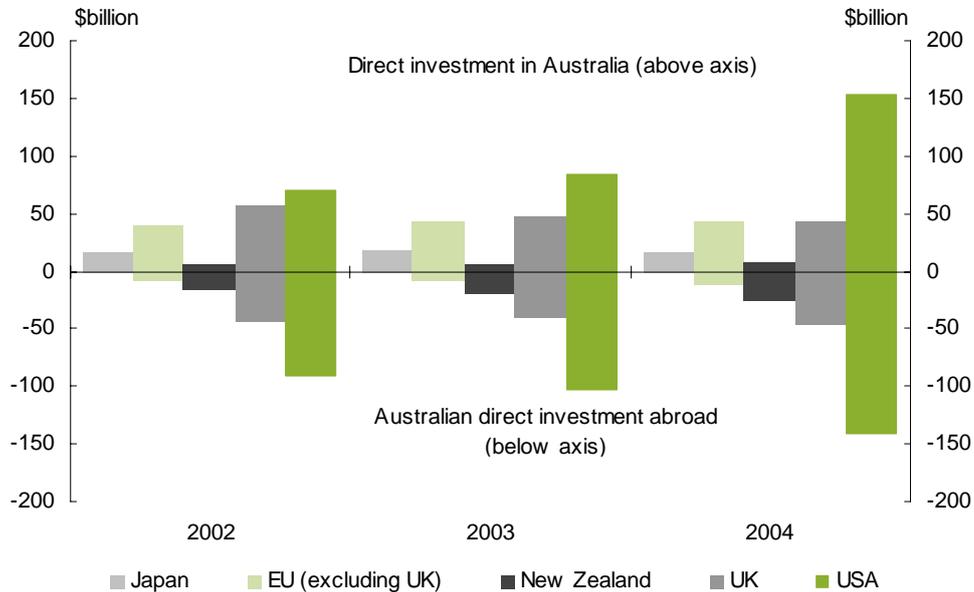
(a) Estimated figures.

(b) For 1999-2001 Belgium and Luxembourg figures are combined.

*** Negative accumulation of flows; value included in global total.

Source: UNCTAD, FDI/TNC database (www.unctad.org/fdistatistics).

Chart 4.1: Level of foreign direct investment by country at 31 December 2004 (\$billion)



Source: ABS Catalogue No. 5352.0 International Investment Position, Australia: Supplementary Country Statistics 2004.

Foreign investment levels by country

Chart 4.1 gives a breakdown of Australia's inward and outward FDI positions with our major FDI partners (the US, the UK, Japan, New Zealand and the EU) as at 31 December 2002, 2003 and 2004.

The US is the single largest source of FDI in Australia and the largest destination for Australian FDI abroad. The stock of Australian direct investment in the US experienced an increase of 36 per cent in 2004 to an estimated \$140.3 billion. The stock of US FDI in Australia grew by 84 per cent in 2004 to an estimated \$153.2 billion. The UK is the other major source of direct investment in Australia. However the stock of UK FDI has fallen from \$55.4 billion to an estimated \$43.2 billion over the last three years.

Japanese direct investment in Australia has risen slightly over the last three years from a stock of \$16.6 billion to an estimated \$17.3 billion. The level of direct investment from the EU (excluding the UK) also rose slightly over the same period from a stock of \$38.4 billion in 2002 to an estimated \$42.8 billion in 2004. The stock of FDI from New Zealand has risen 43 per cent over the last three years to an estimated \$7.8 billion in 2004.

Foreign investment flows

Foreign investment transactions involve changes in the levels of Australian foreign assets and liabilities (including the creation or extinction of foreign assets and liabilities). A current account deficit is balanced by a surplus on the capital and financial account, after allowing for errors and omissions. The balance on the financial account represents net financial transactions with the rest of the world, that is, the inflow of foreign investment into Australia, minus the outflow of Australian investment abroad.

International investment flows and stocks are divided into 'direct', 'portfolio', 'financial derivatives', 'other investment' and 'reserve assets'. Under the international standards used to compile ABS foreign investment statistics, direct investment represents capital invested in an enterprise by an investor in another country which gives the investor a 'significant influence' (either potentially or actually exercised) over the key policies of the enterprise. Ownership of 10 per cent or more of the ordinary shares or voting stock of an enterprise is considered, under the ABS framework, to indicate 'significant influence' by an investor. Portfolio investment is cross-border investment in equity and debt securities other than direct investment. Other investment is a residual group that comprises many different kinds of investment. Reserve assets are those external financial assets available to and controlled by the Reserve Bank of Australia or the Australian Treasury for use in financing payment imbalances or intervention in foreign exchange markets.

Table 4.3: Foreign investment flows (\$billion)^{(a)7}

	2000-01	2001-02	2002-03	2003-04	2004-05
Australian investment abroad					
Direct investment					
Equity and reinvested earnings	-2.8	-26.0	-12.1	-26.1	54.0
Other capital	-6.9	4.8	4.3	-1.6	1.3
Portfolio investment					
Equity	-17.2	-17.9	-12.4	-8.7	-11.0
Debt	-7.9	-10.1	-5.0	-15.8	-13.8
Derivatives	0.9	-0.7	3.3	24.4	21.9
Other investment(b)	-6.1	-6.2	-0.1	-14.5	-2.1
Reserve assets	-8.9	0.8	-5.6	-5.1	-8.1
<i>Total Australian investment abroad</i>	<i>-48.9</i>	<i>-55.3</i>	<i>-27.6</i>	<i>-47.5</i>	<i>42.3</i>
Foreign investment in Australia					
Direct investment					
Equity and reinvested earnings	7.1	16.3	15.6	12.4	-1.3
Other capital	5.1	5.0	5.8	-3.7	2.9
Portfolio investment					
Equity	18.7	10.7	3.3	16.8	-39.6
Debt	24.2	28.6	31.5	85.1	68.8
Derivatives	-1.4	1.5	-4.3	-22.4	-21.2
Other investment(b)	10.4	14.1	16.0	4.5	3.9
<i>Total foreign investment in Australia</i>	<i>64.1</i>	<i>76.2</i>	<i>67.9</i>	<i>92.7</i>	<i>13.4</i>
Net foreign investment	15.2	20.9	40.3	45.1	55.7

Note: Figures may not add due to rounding.

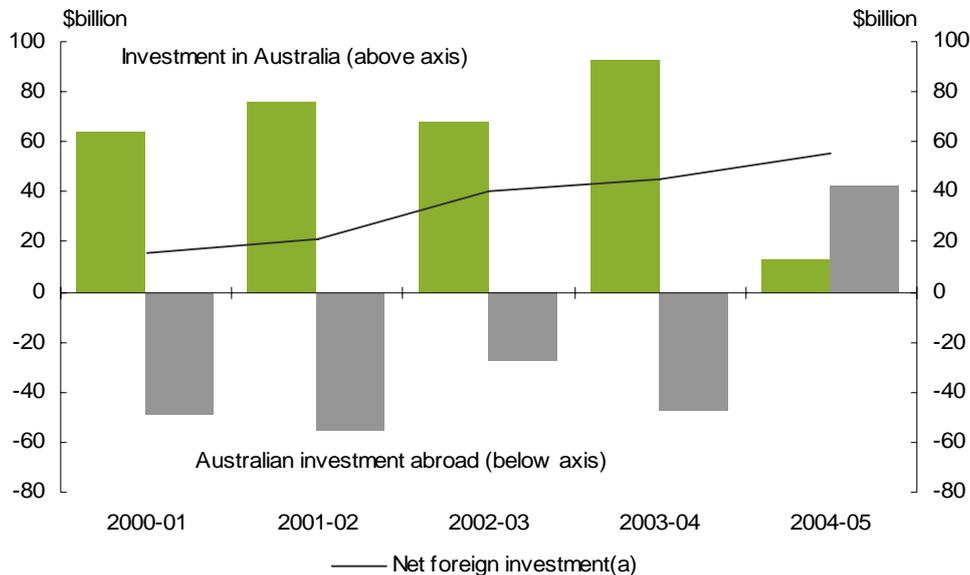
(a) In keeping with balance of payment conventions, credit entries are shown without sign and debit items are shown as negative entries. Thus, investment flows going from Australia to offshore destinations are shown as a negative.

(b) Other investment includes all other investment.

Source: ABS 5302.0 Balance of Payments and International Investment Position, Australia, June Qtr 2005, Table 24 — Financial Account (a)(b).

7 The figures for 2004-05 have been significantly affected by one particular transaction whereby a major corporate reorganisation was recorded both as a transaction reducing Australian Investment Abroad and also reducing Direct Investment in Australia. The net effect of this transaction was zero.

Chart 4.2: Foreign investment flows⁸



(a) The net foreign investment figure has been derived from determining the difference between foreign investment in Australia and Australian investment abroad.

Source: ABS 5302.0 Balance of Payments and International Investment Position, Australia, June Qtr 2005, Table 24 — Financial Account (a)(b).

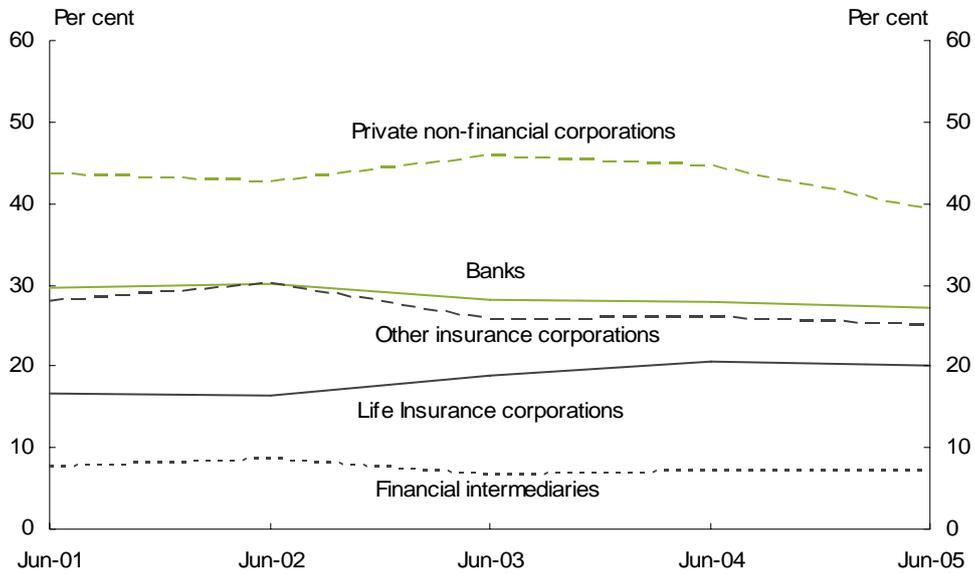
Table 4.3 provides a breakdown of the flow of foreign investment over the past five years measured by ABS statistics. Chart 4.2 provides a summary of the major trends in foreign investment flows from the same data. These indicate that Australia remains a net importer of capital.

Foreign investment by sector

Over the period 1 July 2004 to 30 June 2005, the percentage of foreign ownership of Australian equity declined for all reported sectors (Chart 4.3). Over the past five years, the aggregate level of foreign ownership has remained relatively stable across all sectors.

⁸ The figures for 2004-05 have been significantly affected by one particular transaction whereby a major corporate reorganisation was recorded both as a transaction reducing Australian Investment Abroad and also reducing Direct Investment in Australia. The net effect of this transaction was zero.

Chart 4.3: Foreign ownership of Australian equity by sector



Source: ABS 5232.0 Financial Accounts, Australia, June quarter 2005, Tables 40 and 41 — Listed and Unlisted Shares and Other Equity Market (a).

Useful references on international investment issues

Websites

Organisation	Address
Asia-Pacific Economic Cooperation (APEC)	www.apec.org.sg
Attorney-General's Department	www.ag.gov.au
Australian Bureau of Statistics	www.abs.gov.au
Australian Competition and Consumer Commission	www.accc.gov.au
ANCP for the OECD Guidelines for Multinational Enterprises	www.ausncp.gov.au
Australian Prudential Regulatory Authority	www.apra.gov.au
Australian Securities and Investment Commission	www.asic.gov.au
Australia Treasurer	www.treasurer.gov.au
Business and Industry Advisory Committee to the OECD	www.biac.org
ComLaw	www.comlaw.gov.au
Department of Foreign Affairs and Trade	www.dfat.gov.au
Department of Immigration and Multicultural and Indigenous Affairs	www.immi.gov.au
Department of Treasury	www.treasury.gov.au
Foreign Investment Review Board	www.firb.gov.au
International Monetary Fund	www.imf.org
Invest Australia	www.investaustralia.gov.au
OECD Guidelines for Multinational Enterprises	www.oecd.org
Organisation for Economic Co-operation and Development (OECD)	www.oecd.org
United Nations	www.un.org
World Trade Organization (WTO)	www.wto.org

Specific documents

Document title	Available at:
Code of Liberalisation of Capital Movements	www.oecd.org
Economic Round Up (Treasury series)	www.treasury.gov.au
General Agreement on Tariffs in Trade (GATT)	www.wto.org
General Agreement on Trade in Services (GATS)	www.wto.org
Guide to the Investment Regimes of the APEC Member Economies	www.apec.org.sg
International Direct Investment Statistics Yearbook	www.oecd.org
International Investment Agreements (UNCTAD series)	www.un.org
OECD Code of Liberalisation of Current Invisible Operations	www.oecd.org
OCED Declaration on International Investment and Multinational Enterprises	www.ausncp.gov.au
OECD Guidelines for Multinational Enterprises	www.ausncp.gov.au
Policies and International Integration: Influences on Trade and Foreign Direct Investment (OECD Study)	www.oecd.org
The Trade and Investment Effects of Preferential Trading Arrangements — Old and New Evidence (Australian Productivity Commission — Staff Working Paper)	www.pc.gov.au
Treasury Annual Report	www.treasury.gov.au
UNCTAD Series on Issues in International Investment Agreements	www.untad.org
UNCTAD World Investment Directory	www.untad.org
UNCTAD World Investment Report	www.untad.org

Appendix A

Summary of Australia's foreign investment policy

Summary of Australia's foreign investment policy

General

The Government's approach to foreign investment policy is to encourage foreign investment consistent with community interests. In recognition of the contribution that foreign investment has made and continues to make to the development of Australia, the general stance of policy is to welcome foreign investment. Foreign investment provides scope for higher rates of economic activity and employment than could be achieved from domestic levels of savings. Foreign direct investment also provides access to new technology, management skills and overseas markets.

2. The Government recognises community concerns about foreign ownership of Australian assets. One of the objectives of the Government's foreign investment policy is to balance these concerns against the strong economic benefits to Australia that arise from foreign investment.

3. The foreign investment policy provides for Government scrutiny of many proposed foreign purchases of Australian businesses and properties. The Government has the power under the *Foreign Acquisitions and Takeovers Act 1975* (the FATA) to block proposals that are required to be notified and which are determined to be contrary to the national interest.¹ The FATA and the *Foreign Acquisitions and Takeovers Regulations 1989* provide monetary thresholds for the notification of individual investment proposals, with separate thresholds applying for acquisitions by United States investors.² The FATA also provides legislative backing for ensuring compliance with the policy.

4. In the majority of industry sectors, smaller proposals are exempt from notification and larger proposals are approved unless judged contrary to the national interest. The screening process undertaken by the Foreign Investment Review Board (FIRB) enables comments to be obtained from relevant parties and other Government agencies in considering whether larger or more sensitive foreign investment proposals are contrary to the national interest.

1 This Summary of Australia's Foreign Investment Policy should be considered in conjunction with the *Foreign Acquisitions and Takeovers Act 1975* and the *Foreign Acquisitions and Takeovers Regulations 1989*.

2 Under the Australia-United States Free Trade Agreement (AUSFTA) which came into effect on 1 January 2005.

5. The Government determines what is 'contrary to the national interest' by having regard to the widely held community concerns of Australians. Reflecting community concerns, specific restrictions on foreign investment are in force in more sensitive sectors such as the media and developed residential real estate. The screening process provides a clear and simple mechanism for reviewing the operations of foreign investors in Australia whenever they seek to establish or acquire new business interests or purchase additional properties. In this way the Government is able to encourage foreign investors to operate in Australia as good corporate citizens if they wish to extend their activities in Australia.

6. By far the largest number of foreign investment proposals involves the purchase of real estate. The Government seeks to ensure that foreign investment in residential real estate increases the supply of residences and is not speculative in nature. The Government's foreign investment policy seeks to channel foreign investment in the housing sector into activity that directly increases the supply of new housing (that is, new developments such as house and land, home units and townhouses) and brings benefits to the local building industry and their suppliers.

7. The effect of the more restrictive policy measures on developed residential real estate is twofold. Firstly, it helps reduce the possibility of excess demand building up in the existing housing market and secondly, it aims to encourage the supply of new dwellings, many of which would become available to Australian residents, either for purchase or rent. The cumulative effect should be to maintain greater stability of house prices and the affordability of housing for the benefit of Australian residents.

Prior approval

8. The types of proposals by foreign interests to invest in Australia, which require prior approval and therefore should be notified to the Government, are as follows:

- acquisitions of substantial interests in existing Australian businesses, the value of whose gross assets exceeds \$50 million or where the proposal values the business at over \$50 million. For US investors a notification threshold of \$831 million instead applies, except for investments in prescribed sensitive sectors,³ or by an entity controlled by a US government, which are subject to a \$52 million threshold.⁴ The FATA does not apply to investments by US investors in those financial sector entities which are subject to the operation of the *Financial Sector (Shareholdings) Act 1998*;
- proposals to establish new businesses involving a total investment of \$10 million or more. Proposals by US investors, except an entity controlled by a US government, do not require notification but remain subject to other relevant policy requirements;

3 The AUSFTA prescribed 'sensitive sectors' are set out in the Attachment.

4 The US thresholds are subject to annual indexation.

Appendix A: Summary of Australia's foreign investment policy

- portfolio investments in the media of 5 per cent or more and all non-portfolio investments irrespective of size;
 - takeovers of offshore companies whose Australian subsidiaries or gross assets exceed \$50 million, or the applicable US investor threshold of either \$831 million or \$52 million;
 - direct investments by foreign governments and their agencies irrespective of size;
 - acquisitions of interests in urban land (including interests that arise via leases, financing and profit sharing arrangements and the acquisition of interests in urban land corporations and trusts) that involve:
 - developed non-residential commercial real estate, where the property is subject to heritage listing, valued at \$5 million or more and the acquirer is not a US investor;
 - developed non-residential commercial real estate, where the property is not subject to heritage listing, valued at \$50 million or more, or \$831 million for US investors;
 - accommodation facilities irrespective of value;
 - vacant real estate irrespective of value;
 - residential real estate irrespective of value; or
 - proposals where any doubt exists as to whether they are notifiable. (Funding arrangements that include debt instruments having **quasi-equity** characteristics will be treated as direct foreign investment.)
9. A foreign interest is defined as:
- a natural person not ordinarily resident in Australia;
 - a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest;
 - a corporation in which two or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest;
 - the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or

- the trustee of a trust estate in which two or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.

*A **substantial foreign interest** occurs when a single foreigner (and any associates) has 15 per cent or more of the ownership or several foreigners (and any associates) have 40 per cent or more in aggregate of the ownership of any corporation, business or trust.*

*A **'US investor'** is a national or permanent resident of the United States of America; a US enterprise; or a branch of an entity located in the United States of America and carrying on business activities there.⁵*

Examination by sector

10. Below is an outline of the Government's foreign investment policy and the examination guidelines for the various industry sectors. The majority of proposals will fall within these guidelines. However, some may not. The latter proposals will be examined on a case-by-case basis.

11. The *Foreign Acquisitions and Takeovers Act 1975* applies to most examinable proposals and provides penalties for non-compliance.

12. In relation to investments by foreign interests in these sectors, all proposals above certain thresholds need prior approval and therefore need to be notified with separate notification and approval arrangements applying to those sectors set out below. Notification thresholds are:

- greater than \$50 million* for acquisitions of substantial interests in all existing businesses;
- \$10 million** or more for the establishment of new businesses; and
- greater than \$50 million* for offshore takeovers.

* *For US investors an indexed threshold of \$831 million applies where the general \$50 million threshold would instead apply, except for investments in prescribed sensitive sectors, or by an entity controlled by a US government, which are subject to*

5 A US enterprise is an entity constituted or organised under a law of the United States. The form in which the entity may be constituted or organised may be, but is not limited to a corporation, a trust, a partnership, a sole proprietorship, and a joint venture. A branch may be 'carrying on business activities in the United States of America' where it is doing so in a way other than being solely a representative office; and in a way other than being engaged solely in agency activities, including the sale of goods or services that cannot reasonably be regarded as undertaken in the United States of America; and by having its administration in the United States of America.

Appendix A: Summary of Australia's foreign investment policy

an indexed \$52 million threshold. The prescribed sensitive sectors applying to US investors are listed in the Attachment.

*** Proposals by US investors to establish new businesses, except by an entity controlled by a US government, do not require notification but remain subject to other relevant policy requirements.*

13. All tourism proposals, which incorporate an accommodation facility, irrespective of value, need to be notified.

14. The Government registers, but normally raises no objections to, proposals above the relevant notification thresholds where the gross assets/total investment falls below \$100 million. However, proposals in the sensitive sectors or those which raise specific national interest issues may be subject to more detailed examination.

15. The Government fully examines notifiable proposals to acquire existing businesses (with gross assets of \$100 million or more) or establish new businesses (with a total investment of \$100 million or more) and raises no objections to those proposals unless they are contrary to the national interest.

16. Approvals of proposals may be made subject to the parties meeting certain conditions. In practice, such conditions ordinarily relate to the time period for real estate development or to environmental requirements.

Urban land⁶

17. Proposed acquisitions of residential real estate are exempt from examination in the case of:

- Australian citizens living abroad purchasing either in their own name or through an Australian corporation or a trust;
- foreign nationals who are the holders of permanent resident visas or are holders, or are entitled to hold, a 'special category visa' purchasing either in their own name or through an Australian corporation or a trust; and
- foreign nationals purchasing, as joint tenants, with their Australian citizen spouse.

18. Proposed acquisitions of real estate for development are normally approved subject to specific conditions requiring continuous substantial construction to commence within 12 months. Once construction is complete, the parties are required to provide the completion date and actual development expenditure.

6 This is a brief summary of the urban land policy. Further details of the urban land policy are provided in the document Foreign Investment Policy – Urban Land (Real Estate) available on the website at www.firb.gov.au.

19. Foreign interests are normally given approval to buy:

- vacant residential land, including house and land packages where construction has not commenced (on condition that continuous construction of a dwelling is commenced within 12 months); and
- house and land packages where construction has commenced, home units, townhouses, etcetera 'off-the-plan', under construction or newly constructed, but never occupied or previously sold. 'Off-the-plan' sales to foreigners are only permitted for new development projects or extensively refurbished commercial structures, which have been converted to residential, on condition that no more than half the dwellings in a development are sold to foreign interests.

20. Proposed acquisitions of residential property (both vacant land and existing dwellings) which are within the bounds of a resort that the Treasurer had designated as an 'Integrated Tourism Resort' (ITR) prior to September 1999 are exempt from examination. For resorts designated as ITRs from September 1999, the exemption only applies to developed residential property, which is subject to a long term (10 years or more) lease to the resort/hotel operator, making it available for tourist accommodation when not occupied by the owner. All other property, including vacant land for development, within the ITR would be subject to the normal foreign investment restrictions. Strict conditions must be fully met to qualify for Integrated Tourism Resort status.⁷

21. Certain categories of foreign nationals, who will be temporarily resident in Australia continuously for 12 months, may be given approval to purchase developed residential real estate for use as their principal place of residence (that is, not for rental purposes) while in Australia. This category includes long-stay retirees. A condition of such purchases is that the residence must be sold when the foreign nationals' temporary resident visas expire, they leave Australia, or the property is no longer used as their principal place of residence.

22. All other proposals by foreign interests to acquire developed residential real estate are examinable and are not normally approved, except in the case of foreign companies, with an established substantial business in Australia, buying for named senior executives resident in Australia for periods longer than 12 months, provided the accommodation is sold when no longer required for this purpose. Whether a company is eligible, and the number of properties that may be acquired under this category, will depend upon the extent of the foreign company's operations and assets in Australia. Unless there are special circumstances, foreign companies normally will not be permitted to buy more than two houses under this category. Foreign companies would

⁷ For the name and locations of current ITRs, refer to the document entitled '*Foreign Investment Policy - Integrated Tourism Resorts*', available on the website.

not be eligible under this category where the property would represent a significant proportion of its assets in Australia.

23. Proposed acquisitions of developed non-residential commercial real estate are normally approved unless they are contrary to the national interest.

24. Proposed acquisitions of hotels and motels operating under one title are normally approved (unless considered contrary to the national interest) under the tourism sector policy. Proposed acquisitions of strata titled hotel accommodation may be approved in certain designated hotels. Full details of the requirements for designated hotels are contained in the Australian urban land (real estate) policy. Other accommodation facilities such as guesthouses, hostels, holiday flats and undesignated strata titled hotels or motels are examined under policy applying to the residential real estate sector.

Banking

25. Foreign investment in the banking sector needs to be consistent with the *Banking Act 1959*, the *Financial Sector (Shareholdings) Act 1998* (FSSA) and banking policy, including prudential requirements. Any proposed foreign takeover or acquisition of an Australian bank will be considered on a case-by-case basis and judged on its merits. Acquisitions of interests by US investors in financial sector companies, as defined by the FSSA, are exempt from the notification requirements of the FATA. The FSSA continues to apply.

26. The Government will permit the issue of new banking authorities to foreign owned banks where the Australian Prudential Regulation Authority (APRA) is satisfied the bank and its home supervisor are of sufficient standing, and where the bank agrees to comply with APRA's prudential supervision arrangements.

Civil aviation

Domestic services

27. Foreign persons (including foreign airlines) can generally expect approval to acquire up to 100 per cent of the equity in an Australian domestic airline (other than Qantas), unless this is contrary to the national interest.

International services

28. Foreign persons (including foreign airlines) can generally expect approval to acquire up to 49 per cent of the equity in an Australian international carrier (other than Qantas) individually or in aggregate provided the proposal is not contrary to the national interest. In the case of Qantas, total foreign ownership is restricted to a maximum of 49 per cent in aggregate, with individual holdings limited to 25 per cent and aggregate ownership by foreign airlines limited to 35 per cent. In addition, a number of national interest criteria must be satisfied, relating to the nationality of Board members and operational location of the enterprise.

Airports

29. Foreign investment proposals for acquisitions of interests in Australian airports are subject to case-by-case examination in accordance with the standard notification requirements. In relation to the airports offered for sale by the Commonwealth, the *Airports Act 1996* stipulates a 49 per cent foreign ownership limit, a 5 per cent airline ownership limit and cross ownership limits between Sydney airport (together with Sydney West) and Melbourne, Brisbane and Perth airports.

Shipping

30. The *Shipping Registration Act 1981* requires that, for a ship to be registered in Australia, it must be majority Australian-owned (that is, owned by an Australian citizen, a body corporate established by or under law of the Commonwealth or of a State or Territory of Australia), unless the ship is designated as chartered by an Australian operator.

Media

31. All direct (that is, non-portfolio) proposals by foreign interests to invest in the media sector irrespective of size are subject to prior approval under the Government's foreign investment policy. Proposals involving portfolio share holdings of 5 per cent or more must also be submitted for examination.

Broadcasting

32. While proposals for a foreign person to acquire an interest in an existing broadcasting service or to establish a new broadcasting service are subject to case-by-case examination under foreign investment policy, the following criteria also must be satisfied. A broadcasting regulatory regime, enacted through the *Broadcasting Services Act 1992* (BSA), stipulates that:

- a foreign person must not be in a position to exercise control of a commercial television broadcasting licence, and must not have company interests in a licence that exceed 15 per cent or 20 per cent in aggregate held by two or more foreign persons. No more than 20 per cent of directors may be foreign persons.
- a foreign person must not have company interests of more than 20 per cent in a subscription television broadcasting licence, and the aggregate interests held by foreign persons must not exceed 35 per cent.

33. There are no foreign ownership and control limits on commercial radio or on other broadcasting services under the BSA.

Newspapers

34. Foreign investment in mass circulation national, metropolitan, suburban and provincial newspapers is restricted. All proposals by foreign interests to acquire an interest of 5 per cent or more in an existing newspaper or to establish a new newspaper

in Australia are subject to case-by-case examination. The maximum permitted aggregate foreign interest (non-portfolio) investment/involvement in national and metropolitan newspapers is 30 per cent with any single foreign shareholder limited to a maximum interest of 25 per cent (and in that instance unrelated foreign interests would be allowed to have aggregate (non-portfolio) shareholdings of a further 5 per cent). Aggregate foreign interest direct involvement in provincial and suburban newspapers is limited to less than 50 per cent for non-portfolio shareholdings.

Telecommunications

35. Telstra Corporation Ltd (Telstra) is predominantly owned by the Commonwealth of Australia (51.8 per cent) with the remainder of the equity in the partially privatised company held by institutional and individual investors. Aggregate foreign ownership of Telstra is restricted to 35 per cent of the privatised equity and individual foreign investors are only allowed to acquire a holding of no more than 5 per cent of the privatised equity.

Approval period

36. Approval under the Government's foreign investment policy is normally only given for a specific transaction which is expected to be completed in a timely manner. If an approved transaction does not proceed at that time and/or the parties enter into new agreements at a later date, or if a transaction is not completed within 12 months, further approval must be sought for the transaction.

37. Approvals for share acquisitions involving a full or partial bid under the *Corporations Act 2001* only apply to the shares acquired during the bid period. For example, if approval is given for a full bid and the bidder only acquires 60 per cent of the shares, but then subsequently wishes to proceed to acquire further shares on market using the creep provisions of the *Corporations Act 2001* or to acquire the balance of the shares through a subsequent bid, further prior approval must be sought.

38. Where a proposal involves option agreements for the purchase of shares, assets or property, prior approval is required to acquire the options. Normally, approvals for options will also extend to the exercise of those options, provided the option is exercised within 12 months of approval. Subsequent approval for the exercise of the options may be sought on an annual basis.

39. The time period for an approval may be varied where it can be shown that an extended period is fundamental to the success of a proposal and that extending the timing of the proposal does not involve an activity (for example, real estate speculation) that would be contrary to the national interest. In this situation the extended period will be stated in the approval.

Applications

40. The information normally required to enable foreign investment proposals to be processed is set out below. Copies of relevant annual reports for the most recent financial year should accompany the application. There is no statutory charge for processing applications.

41. All applications should be addressed in writing to:

The Executive Member
Foreign Investment Review Board
c/- The Treasury
CANBERRA ACT 2600

42. The Government recognises the commercial-in-confidence sensitivity of much of the information provided to the Foreign Investment Review Board (the Board). The Government respects this confidential status and ensures that appropriate security is given to it. Where third parties outside of Government seek to obtain access to confidential information held by the Government, subject to the operation of applicable legislation, it will not be made available without the permission of the applicant, except upon the order of a court of competent jurisdiction. In this respect, the Government will pursue the defence of this policy through the judicial system.

43. In addition, the Government is obligated to respect the privacy of personal information that is provided by applicants to the Board in accordance with and subject to the requirements of the *Privacy Act 1988* and the *Freedom of Information Act 1982*. In accordance with those Acts, the Government advises that in situations where the applicant has breached, or is strongly suspected of having breached the *Foreign Acquisitions and Takeovers Act 1975* (FATA), the Board may seek the assistance of other Government agencies in its efforts to ensure applicants comply with the FATA. 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 and Indigenous Affairs, the Australian Taxation Office or the Australian Federal Police.

44. The requirements set out below are supplementary to those of the notification provisions of sections 25, 26 and 26A of the FATA (for which there are prescribed forms).

Takeovers of enterprises with total assets of (or valued at) \$100 million and over requiring notification

1 Parties to the proposal

For both the purchaser and target business:

- name;
- location of major establishments;
- major activities;
- major subsidiaries and associated companies;
- financial details for the most recent year, namely, total gross assets, net tangible assets and pre-tax profits (with the most recent financial statements, including balance sheets);
- details of Australian/overseas ownership (including identity of ultimate or beneficial owners); and
- country of ultimate control of purchaser.

2 Type of proposal

- Acquisition/issue of shares:
 - the number, class and voting rights of shares, including the percentage of the total equity involved.
- Acquisition of assets:
 - description of the assets involved.
- Agreements/arrangements entered into or terminated; alteration of a constituent document:
 - full details, supported by copies of appropriate documents or relevant extracts there from.

3 Consideration

- Amounts involved.
- Type of funds (equity/loan), source of funds (for example, from overseas associate companies or from Australian capital market).

4 Reason(s) for the proposal

- From viewpoints of the vendor, target and purchaser.

5 Brief description of the purchaser's future intentions for the business, including amount of development expenditure proposed

Takeovers of enterprises with total assets of (or valued at) less than \$100 million

6 Parties to the proposal

For both the purchaser and target business:

- name;
- location of major establishments;
- major activities;
- details of total assets (with relevant balance sheets); and
- country of ultimate control of purchaser.

7 Type of proposal

Describe whether it involves shares or assets of an existing business:

- if it is a reorganisation of shares/assets or other arrangements within a corporate group; and
- if it is a rural property, and, if so, the number of hectares, current and proposed use of the property.

8 Consideration and proposed expenditure

- Amounts involved including proposed development expenditure, if any.

New business or project involving total investment (including debt) during the establishment phase of \$100 million and above

9 Parties to the proposal

- Name, location, major activities and scale of each, major affiliates (Australian/overseas); and
- Financial details for the most recent year, namely, total gross assets, net tangible assets and pre-tax profits together with relevant balance sheets and profit and loss and trading accounts.

10 The proposal

- Description of proposal: total funds to be invested and the proportion of these to be provided as equity capital, the sources of the loan and equity capital (for example, from overseas associates or Australian capital market), the proposed location of the investment, the purpose of the investment.

11 Ownership of the proposed business

- Details of proposed beneficial ownership (identify shareholdings by associated interests) and the corresponding pattern of voting rights held, board representation rights, and other rights concerning management and control.

12 Industry information

- A description of the industry in which the new venture will be engaged and its expected position in the industry, other significant members of the industry, their ownership and respective shares of the market.

13 Other considerations

- Information should also be provided on any patents, royalty and licensing arrangements and export franchises held by the applicant and which might be made available to the local firm and the basis on which these would be made available; what restrictions, if any, will be placed on the new venture together with any plans for local research and development;
- Describe the environmental impact, if any, of the proposal, and provide details of any environmental studies undertaken;
- Describe efforts, if any, made to obtain Australian participation in the proposal; and
- For mining proposals, describe plans, if any, for value adding activity in Australia or any value adding opportunities which may flow from the project.

New business or project involving total investment (including debt) during the establishment phase of less than \$100 million

14 Parties to the proposal

- Name, location, major activities and scale of each, major affiliates (Australian/overseas); and
- Financial details for the most recent year, that is, total gross assets, together with relevant balance sheets.

15 The proposal

- Description of proposal: total funds to be invested and a description of the industry in which the new venture will be engaged.

16 Ownership of the proposed business

- Details of proposed beneficial ownership (identify shareholdings by associated interests).

Urban real estate acquisitions

Please refer to the separate summary of the policy applying to the acquisition of interests in Australian urban land.

Further enquiries

Further information on Australia's foreign investment policy may be found at the Foreign Investment Review Board's webpage, <http://www.firb.gov.au>.

Should you have any further enquiries please contact the Board's Executive on:

General enquiries	(02) 6263 3795
Fax	(02) 6263 2940
<i>From overseas</i>	
General enquiries	61 (2) 6263 3795
Fax	61 (2) 6263 2940
E-mail	firb@treasury.gov.au

Attachment

Prescribed Sensitive Sectors under The Australia-United States Free Trade Agreement (AUSFTA)

For US investors subject to the AUSFTA, the prescribed sensitive sectors are:

- media;
- telecommunications;
- transport (including airports, port facilities, rail infrastructure, international and domestic aviation and shipping services provided within, or to and from, Australia);
- the supply of training or human resources, or the manufacture or supply of military goods or equipment or technology, to the Australian Defence Force or other defence forces;
- the manufacture or supply of goods, equipment or technology able to be used for a military purpose;
- the development, manufacture or supply of, or the provision of services relating to, encryption and security technologies and communications systems; and
- the extraction of (or the holding of rights to extract) uranium or plutonium or the operation of nuclear facilities.

Appendix B

**Legislation, media releases and policy statements and
publications**

Legislation, media releases and policy statements and publications

Legislation

1. Foreign Acquisitions and Takeovers Regulations (Amendment), No 1 – **23 March 2004.**
2. Foreign Acquisitions and Takeovers Regulations (Amendment), No 199 – **10 September 1999.**
3. Foreign Acquisitions and Takeovers Regulations (Amendment), No 416 – **17 January 1996.**
4. Foreign Acquisitions and Takeovers Regulations (Amendment), No 295 – **31 August 1994.**
5. Foreign Acquisitions and Takeovers Regulations (Amendment), No 302 – **24 September 1991.**
6. *Foreign Takeovers Amendment Act 1989*, No 14 of 1989 – **August 1989.**
7. *Commonwealth Functions (Statutes Review) Act 1981*, No 74 of 1981 – **June 1981.**
8. Statutory Rules 1976, No 203 – **September 1976.**
9. *Foreign Takeovers Amendment Act 1976*, No 93 of 1976 – **September 1976.**
10. Statutory Rules 1975, No 226 – **December 1975.**
11. *Foreign Takeovers Act 1975*, No 92 of 1975 – August 1975 (now known as the *Foreign Acquisitions and Takeovers Act 1975* as amended).
12. *Companies (Foreign Take-overs) Act 1973*, No 199 of 1973 – **December 1973.**
13. *Companies (Foreign Take-overs) Act 1972*, No 134 of 1972 – **November 1972.**

Media releases and policy statements

1. Statement by the Treasurer, The Hon Peter Costello MP – BHP Billiton Group – No objections raised to the acquisition of WMC Resources Limited, subject to conditions – **4 April 2005.**
2. Statement by the Treasurer, The Hon Peter Costello MP – Xstrata Plc – No objections raised to the acquisition of WMC Resources Limited, subject to conditions – **11 February 2005.**
3. Statement by the Treasurer, The Hon Peter Costello MP – Village Roadshow Limited – seeking information from parties who have acquired shares in Village Roadshow Limited on behalf of a number of foreign investors, including interests held by Swiss nominee banks – **9 February 2004.**
4. Statement by the Treasurer, The Hon Peter Costello MP – announcement of the re-appointment of The Hon Chris Miles as a member of the Foreign Investment Review Board – **9 June 2004.**
5. Statement by the Treasurer, The Hon Peter Costello MP – No objections raised to the proposal for The News Corporation Limited to relocate its place of incorporation to the United States – **29 June 2004.**
6. Statement by the Treasurer, the Hon Peter Costello MP – Xstrata Plc – No objections raised to the Acquisition of MIM Holdings Ltd – **28 May 2003.**
7. Statement by the Treasurer, the Hon Peter Costello MP – No objections raised to Mitsui's Acquisition of Remaining Interest in Moura Mine – **12 April 2002.**
8. Statement by the Treasurer, the Hon Peter Costello MP – Singapore Telecommunications Limited – Acquisition of Cable & Wireless Optus Limited – **28 August 2001.**
9. Statement by the Treasurer, the Hon Peter Costello MP – Singapore Telecommunications Limited – Application for Foreign Investment Approval to Acquire Cable & Wireless Optus Limited – **22 August 2001.**
10. Statement by the Treasurer, the Hon Peter Costello MP – Foreign Investment Approval of Brambles Industries Limited – GKN Plc – **26 July 2001.**
11. Statement by the Treasurer, the Hon Peter Costello MP – Foreign Investment Approval of BHP Limited-Billiton Plc Merger – **4 June 2001.**
12. Statement by the Treasurer, the Hon Peter Costello MP – Foreign Investment Proposal – Shell Australia Investments Limited's Acquisition of Woodside Petroleum Limited – **23 April 2001.**

Appendix B: Legislation, media releases and policy statements and publications

13. Statement by the Treasurer, the Hon Peter Costello MP – Foreign Investment Case: Acquisition by Air New Zealand Limited of the News Corporation’s 50 per cent interest in Ansett Holdings Limited – **13 June 2000**.
14. Statement by the Assistant Treasurer, Senator the Hon Rod Kemp – Virgin receives Foreign Investment Approval – **7 December 1999**.
15. Statement by the Treasurer, the Hon. Peter Costello MP – Foreign Investment Policy Changes – **3 September 1999**.
16. Statement by the Treasurer, the Hon Peter Costello MP – Foreign Investment Case: Tyndall Australia Ltd’s Portfolio Investment in John Fairfax Holdings Ltd – **4 August 1998**.
17. Statement by the Treasurer, the Hon Peter Costello MP – Foreign Investment Policy: Ownership structure for the Ten Group Ltd (TGL) – Canwest/TNQ Float Proposal – **6 March 1998**.
18. Statement by the Treasurer, the Hon Peter Costello MP – Release of the Report of the Financial System Inquiry and Initial Government Response on Mergers Policy – **9 April 1997**.
19. Statement by the Assistant Treasurer, Senator the Hon Rod Kemp, – Foreign Investment Policy: Forced Divestiture of Residential Real Estate involving Australian Trustee – **11 December 1996**.
20. Statement by the Treasurer, the Hon Peter Costello MP – Uranium Sector – **19 November 1996**.
21. Statement by the Treasurer, the Hon Peter Costello, MP – Rationalisation of Notification Thresholds for Portfolio Investments in the Media Sector – **18 September 1996**.
22. Statement by the Treasurer, the Hon Ralph Willis MP – Government Response to the Reports by the Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in Relation to the Print Media – **26 September 1995**.
23. Statement by the Treasurer, the Hon John Dawkins MP – Foreign Investment Policy: Mass Circulation Newspapers – **20 April 1993**.
24. Statement by the Treasurer, the Hon John Dawkins MP – Modification to Foreign Investment Policy. Residential Real Estate and Developed Non-Commercial Real Estate – **1 April 1993**.
25. Statement by the Treasurer, the Hon John Dawkins MP – Economic Statement: Foreign Investment Policy Changes – **26 February 1992**.

26. Statement by the Treasurer, the Hon John Kerin MP – Foreign Investment in the Print Media – **10 October 1991**.
27. Statement by the Treasurer, the Hon John Kerin MP – Foreign Investment Policy: Integrated Tourism Resorts – **25 July 1991**.
28. Statement by the Treasurer, the Hon Paul Keating MP – Proclamation of Foreign Takeovers Amendment Act 1989 and Gazettal of Foreign Acquisitions and Takeovers Regulations – **6 July 1989**.
29. Statement by the Treasurer, the Hon Paul Keating MP – Foreign Investment Policy: New Oil and Gas Developments – **20 January 1988**.
30. Statement by the Treasurer, the Hon Paul Keating MP – Foreign Investment Policy: Developed Residential Real Estate – **29 September 1987**.
31. Statement by the Treasurer, the Hon Paul Keating MP – Thin Capitalisation and Corporate Restructures in relation to Foreign Investment Policy – **30 April 1987**.
32. Statement by the Treasurer, the Hon Paul Keating MP – Further Liberalisation of Foreign Investment Policy – **30 April 1987**.
33. Statement by the Treasurer, the Hon Paul Keating MP – Foreign Investment Policy Relaxations – **28 July 1986**.
34. Statement by the Acting Treasurer, the Hon Chris Hurford MP – Economic and Rural Policy Statement – **15 April 1986**.
35. Statement by the Acting Treasurer, the Hon Chris Hurford MP – Review of Foreign Investment Policy – **29 October 1985**.
36. Statement by the Treasurer, the Hon Paul Keating MP – New Banking Authorities – **27 February 1985**.
37. Statement by the Treasurer, the Hon Paul Keating MP – Foreign Investment Policy and Stockbroking – **18 December 1984**.
38. Statement by the Treasurer, the Hon Paul Keating MP – Participation in Banking in Australia and Other Issues of Financial Deregulation – **10 September 1984**.
39. Statement by the Treasurer, the Hon Paul Keating MP – Foreign Investment Policy and Stockbroking – **18 April 1984**.
40. Statement by the Treasurer, the Hon Paul Keating MP – Review of Foreign Investment Policy – **20 December 1983**.

Publications

- Foreign Investment Review Board Reports: 1977 to 2004.
- Guidelines relating to Australia's foreign investment policy:
 - General Summary;
 - Urban Land;
 - Primary Production Businesses and Rural Land;
 - Off-the-plan; and
 - Integrated Tourism Resorts.
- Application Forms:
 - R3 – Application for residential real estate purchase by individuals;
 - C1 – Application for residential real estate by a company or a trust; and
 - D2 – Application for prior approval to sell up to 50 per cent of a new residential development to foreign investors.

Information on Australia's foreign investment policy and the relevant application forms are available on the Foreign Investment Review Board's website: www.firb.gov.au.

Appendix C

Chronology of policy measures

Chronology of policy measures

30 March 2004

The Foreign Acquisitions and Takeovers Regulations 2004 (No. 1) provided a mechanism to exempt from the *Foreign Acquisitions and Takeovers Act 1975* acquisitions of interests in shares in Australian companies held by foreign custodians on behalf of Australian investors. The custodian must apply in writing to the Treasurer for an exemption and must meet the requirements specified in the regulation.

February 2004

The Australia-United States Free Trade Agreement was finalised in February 2004 and came into effect on 1 January 2005. A number of changes were made to Australia's foreign investment policy as it applies to US investors only through amendments to the Foreign Acquisitions and Takeovers Act and the Foreign Acquisitions and Takeovers Regulations 1989 (refer also to **Appendix A**).

3 May 2000

The *Aviation Legislation Amendment Act (No. 1) 2000* increased the maximum percentage of equity permitted by a foreign airline in an Australian international carrier (other than Qantas) to 49 per cent. Previously a foreign airline was permitted to own up to 25 per cent.

Note: In the case of Qantas, total foreign ownership is restricted to a maximum of 49 per cent in aggregate, with individual holdings limited to 25 per cent and aggregate ownership by foreign airlines limited to 35 per cent. In addition, a number of national interest criteria must be satisfied, relating to the nationality of Board members and operational location of the enterprise.

29 October 1999

The Government amended the policy concerning domestic civil aviation to allow foreign persons, including foreign airlines, to acquire up to 100 per cent of the equity of an Australian domestic airline, unless the acquisition is contrary to the national interest. Previously, foreign airlines flying to Australia were permitted to own up to 25 per cent of the equity in a domestic carrier individually or up to 40 per cent in aggregate.

10 September 1999

Numerous changes were made to the Foreign Acquisitions and Takeovers Regulations 1989. These included changes to the notification thresholds that:

- increased the notification threshold for foreign investment in existing businesses from \$5 million (\$3 million for rural businesses) to \$50 million;

- increased the notification threshold from \$20 million to \$50 million for the Australian assets of an offshore company where it is to be acquired by another offshore company; and
- increased the notification threshold applying to the acquisition of developed non-residential commercial real estate (including certain lease arrangements) from \$5 million to \$50 million except where such properties are subject to heritage listing (in that case the threshold remains at \$5 million).

Other amendments to regulations specify:

- an exemption so that Australian citizens and their foreign spouses purchasing as joint tenants are no longer required to seek approval for purchases of residential real estate in Australia;
- an exemption to remove foreign investment approval requirements for individuals who hold, or are entitled to hold, a special category visa, or who hold a permanent visa and invest in Australian residential real estate through Australian companies and trusts;
- an exemption for the acquisition of interests in Australian urban land by foreign owned responsible entities of managed investment funds (under section 601EB of the *Corporations Act 2001*) provided such investment is primarily for the benefit of scheme members ordinarily resident in Australia;
- rules to permit the acquisition by foreign interests of strata-titled hotel rooms in designated hotels where each room is subject to a long-term (10 years or more) hotel management agreement and where management retains ownership of the common property;
- rules to limit the exemption provided by newly designated Integrated Tourist Resorts so that the exemption from the normal foreign investment restrictions only applies to foreign purchasers of developed property which is subject to a long term lease to the resort/hotel operator making it available for tourist accommodation when not occupied by the owner; and
- rules to clarify the scope of a certificate of exemption issued by the Treasurer for foreign interests acquiring real estate off-the-plan, as provided in the existing regulation 3(e).

1 April 1999

The policy relating to applications by developers seeking advanced approval to sell up to 50 per cent of a development to foreign investors was altered so that only developers with ten or more (previously four or more) dwellings could apply for advanced approval (in special circumstances, advance approval may be given for developments consisting of between four and ten dwellings). The other change

affecting this category was that the reporting requirements were relaxed so that developers are required to report all sales (that is, Australian and foreign) to the Board every twelve months (previously every six months) until all the dwellings in the development have been sold or occupied.

14 August 1997

The Treasurer announced the removal of foreign ownership restrictions that were specific to Optus and Vodafone. From 14 August 1997, all proposals by foreign interests to invest in Optus and Vodafone are subject only to the generally applicable provisions of foreign investment policy. These general provisions also apply to new entrants to the telecommunications sector or investment in existing businesses in that sector. The announcement did not affect in any way the ownership restrictions in relation to Telstra.

9 April 1997

In releasing the Final Report of the Financial System Inquiry, the Treasurer announced the removal of the blanket prohibition on a foreign takeover of any of the major banks and that any proposed foreign takeover or acquisition will need to be assessed, like any other proposed foreign takeover or acquisition, on the basis of its merits in accordance with the *Foreign Acquisitions and Takeovers Act 1975*. In making these assessments, however, the Government will apply the principle (as concluded by the Inquiry) that any large scale transfer of Australian ownership of the financial system to foreign hands would be contrary to the national interest.

19 December 1996

The *Telstra (Dilution of Public Ownership) Act 1996* was assented to. The Act places limits on foreign ownership. Aggregate foreign ownership is to be restricted to 35 per cent of the one third equity to be sold, and individual foreign investors will be allowed to acquire a holding of no more than 5 per cent of that one third equity.

19 November 1996

The Treasurer announced the Government's decision that foreign investment policy in relation to the uranium sector will be the policy that currently applies to the mining sector generally. This means that foreign investment above the notification thresholds in the uranium sector, such as the establishment of a new mine, will be subjected to the well established 'contrary to the national interest' test and that no specific investment restrictions will apply.

9 October 1996

The *Airports Act 1996* was assented to on 9 October 1996. This Act limits foreign ownership of airport operator companies to 49 per cent.

18 September 1996

The Treasurer announced the Government's decision to lift to 5 per cent, with immediate effect, the notification threshold that applies to portfolio investments by foreign interests in the media sector. This change rationalised the notification thresholds for the media sector so that all portfolio investments, not only in John Fairfax Holdings Ltd, are subject to the same 5 per cent notification threshold.

26 September 1995

The Treasurer announced that the limit on foreign ownership of provincial and suburban newspapers had been increased from 30 per cent to less than 50 per cent for non-portfolio shareholdings.

20 April 1993

The Treasurer announced the Government's decision to increase the maximum permitted aggregate foreign interest direct investment (that is, non-portfolio) involvement in national and metropolitan newspapers to 30 per cent with any single foreign shareholder limited to a maximum of 25 per cent (and in that instance unrelated foreign interests would be allowed to have aggregate (non-portfolio) shareholdings of a further 5 per cent).

1 April 1993

The Treasurer announced two changes to foreign investment policy:

- 'off-the-plan' acquisitions to include acquisitions that are part of extensively refurbished buildings subject to the building's use changing from non-residential to residential and the costs of refurbishment to be at least 50 per cent of total acquisition costs; and
- proposals by foreign interests to acquire developed non-residential commercial real estate were no longer required to have 50 per cent Australian equity. Prior to this change, acquisitions by foreign interests of developed non-residential commercial real estate were normally approved, unless judged contrary to the national interest, on the condition that the acquisition was being made with 50 per cent Australian equity participation. Where it could be demonstrated that 50 per cent Australian equity was not available on reasonable terms and conditions, proposals providing up to 100 per cent were approved.

26 February 1992

As part of the Government's *One Nation* Economic Statement, further policy liberalisations were announced, namely:

- the Government would register, but normally raise no objections to proposals above the notification thresholds where the relevant total assets/total investment falls below \$50 million. Notification thresholds are \$3 million for purchases of rural

properties, \$5 million for acquisitions of substantial interests in other existing businesses, \$10 million for the establishment of new businesses and \$20 million for offshore takeovers;

- the 50 per cent Australian equity and control guideline for participation in new mining projects, and the economic benefits test for takeovers of existing mining businesses, were abolished; and
- that new banking authorities would be issued to foreign owned banks where the Reserve Bank is satisfied the bank and its home supervisor are of sufficient standing, and where the bank agrees to comply with Reserve Bank prudential supervision and arrangements. Moreover, foreign owned banks will be allowed to bid for the smaller banks (if available for sale), that is, for banks other than the four majors.

25 July 1991

The Government decided that foreign investors may acquire any residential real estate (vacant land for development, units off-the-plan, or established properties) within a designated Integrated Tourism Resort (ITR) without the need to seek approval under the Foreign Acquisitions and Takeovers Act. The ITR exemption would only apply to residential real estate within resorts that have applied for and been designated exempt by the Treasurer.

6 July 1989

The Treasurer announced the proclamation, on 1 August 1989, of the *Foreign Takeovers Amendment Act 1975* and the gazettal of the Foreign Acquisitions and Takeovers Regulations. The amended legislation, to be known as the Foreign Acquisitions and Takeovers Act, gave legislative effect to the changes to residential real estate policy announced in September 1987.

20 January 1988

The Government announced that the Australian participation guidelines for foreign investment in respect of new mining projects over \$10 million would no longer apply to new oil and gas developments which could now be approved with 100 per cent foreign equity, provided they were not considered contrary to the national interest.

29 September 1987

The Government decided to restrict substantially foreign acquisitions of developed residential real estate and to introduce legislation to require compliance with the amended policy. The \$600,000 examination threshold was abolished and approvals of developed residential real estate were to be restricted to Australian citizens resident abroad, intending migrants and foreign companies buying for their senior executives resident in Australia.

30 April 1987

The Treasurer announced a number of further liberalisations including:

- passing amendments to the *Foreign Takeovers Act 1975* providing for the exemption from notification of takeovers below \$5 million (\$3 million for rural businesses);
- extending the national interest based test (applied to manufacturing, tourism and non-bank finance sectors since July 1986) to other sectors namely resource processing, services, insurance, sharebroking and rural properties; and
- improvements to the benefits associated with naturalised or naturalising status, namely, that all takeovers or new businesses involving naturalised or naturalising companies (including new mines where at least 50 per cent is owned by the naturalised or naturalising company) would be approved unless contrary to the national interest.

The Government also announced that it would introduce legislation to replace the thin capitalisation and corporate restructuring conditions of approval that had been imposed on foreign investors under foreign investment policy.

28 July 1986

The Treasurer announced a number of significant relaxations to policy including:

- the net economic benefits test and Australian equity requirements for takeovers and new businesses in the manufacturing, tourism and non-bank finance sectors were suspended and proposals were to be automatically approved unless contrary to the national interest;
- the minimum Australian equity requirements for real estate for development (both for retention or resale), and service industry real estate (hotels and motels, tourism resorts) were abolished;
- acquisitions of developed commercial real estate were to be allowed provided there was 50 per cent Australian equity (previously there was a virtual prohibition); and
- the policy test on rural property acquisitions over \$3 million was relaxed such that approval would now be granted where it could be demonstrated by the intending investor that proposed on-farm development expenditure would be at least one third of the acquisition price.

15 April 1986

As part of the Government's Economic and Rural Policy Statement, it announced the relaxation of the rules applying to foreign investment in rural land such that only proposals over \$3 million (previously \$1 million) would be subject to the stricter test of

providing effective Australian participation or benefits of national or regional significance to gain approval.

29 October 1985

The Acting Treasurer announced a number of modifications to policy aimed at streamlining existing procedures, the most significant of which were:

- the practice of requiring the demonstration of specific opportunities for Australians to purchase interests available for sale (the 'opportunities test') was discontinued;
- the administrative threshold below which takeovers were normally approved, in the absence of special circumstances, was increased from \$2 million to \$5 million;
- the notification threshold for new businesses (except in the media or civil aviation) was increased from \$5 million to \$10 million;
- the notification threshold for foreign investment in real estate was increased from \$350,000 to \$600,000;
- the liberalised stance in relation to merchant banks was extended to other non-bank financial intermediaries;
- the need for 50 per cent Australian equity for land bought for development and subsequent resale was to be applied only to developments costing \$10 million or more; and
- the exemption threshold for offshore takeovers was increased from \$3 million to \$20 million.

22 May 1985

The *Banks (Shareholdings) Act 1972* (which limits the size of shareholdings in banks authorised under the *Banking Act 1959*) was amended in order to facilitate the establishment of new banks in Australia. The major amendments were an increase in the size of individual shareholdings in a bank which might be held without the Governor-General's approval from 10 to 15 per cent, and allowing the Governor-General to grant exemptions from the new higher limit in the national interest.

27 February 1985

The Treasurer announced that the Government had selected 16 new banks which would be invited to establish operations in Australia. Each would be required to proceed with discussions with the Reserve Bank and the Treasury with a view to developing their proposals.

18 December 1984

The Treasurer announced the Government's decision to increase to 50 per cent the maximum permitted shareholding in Australian stockbroking businesses that might be held by foreign interests. This revised the previous limitations announced on 18 April 1984.

10 September 1984

The Government invited applications from domestic or foreign interests for a limited number of banking authorities and decided to initiate proceedings to enable the Bank of China to open a branch in Australia.

The Treasurer also announced the temporary waiving (for one year) of some sections of its foreign investment policy relating to the merchant banking sector. The 'Australian opportunities test' (that is, the requirement that Australians be given the opportunity to bid on market terms for interests available for sale) and the 'substantial economic benefits' test of foreign investment policy were to be set aside for a period of 12 months in respect of merchant bank restructuring proposals.

18 April 1984

Following a Trade Practices Commission (TPC) ruling that allowed stockbroking firms to incorporate, the Treasurer announced the results of a review of foreign investment policy as applied to the stockbroking industry (prior to the TPC ruling, non-residents were precluded from having an interest in unincorporated stockbroking firms). Under the revised policy, proposals by foreign interests to acquire shareholdings in stockbroking businesses would only be allowed to proceed, where they involved the acquisition of less than 15 per cent of shares by a single foreign interest or of less than 40 per cent by two or more foreign interests.

Appendix D

*Foreign Acquisitions and
Takeovers Act 1975*



Foreign Acquisitions and Takeovers Act 1975

Act No. 92 of 1975 as amended

This compilation was prepared on 25 November 2004
taking into account amendments up to Act No. 120 of 2004

The operation of amendments that have been incorporated may be affected by
application provisions that are set out in the Notes section

Prepared by the Office of Legislative Drafting,
Attorney-General's Department, Canberra

Contents

Part I—Preliminary

- 1 Short title [*see* Note 1]
- 2 Commencement [*see* Note 1]
- 3 Transitional provisions
- 4 Additional operation of Act
- 5 Interpretation
- 5A Ordinarily resident non-citizens
- 6 Associates
- 7 Australian business
- 8 Control of voting power
- 9 Substantial and controlling interests in corporations
- 9A Substantial interests in trust estates
- 10 Holding corporations and subsidiaries
- 11 Interests in shares
- 12 Interests in assets
- 12A Interests in Australian urban land
- 12B Interests in trust estates
- 12C Tracing of substantial interests in corporations and trust estates
- 13 Prescribed corporations
- 13A Exempt dealings
- 13B Valuation of assets for purposes of section 13A
- 13C Australian urban land corporations
- 13D Australian urban land trust estates
- 14 Voting power
- 15 Application of Act
- 16 Extra-territorial operation of Act
- 17 Persons obliged to comply with Act

Part IA—Exempt foreign investments

- 17A Exempt foreign investments in prescribed corporations etc.
- 17B Asset thresholds for exempt foreign investments in prescribed corporations etc.—prescribed foreign investors
- 17C Asset thresholds for exempt foreign investments in prescribed corporations etc.—prescribed foreign government investors
- 17D Exempt foreign investments in financial sector companies etc.
- 17E Prescribed foreign investor
- 17F Foreign government investor
- 17G Prescribed foreign government investor
- 17H Prescribed sensitive sector

Part II—Control of takeovers and other transactions

- 18 Acquisitions of shares
- 19 Acquisitions of assets

- 20 Arrangements relating to directorate of corporations
 - 21 Arrangements relating to control of Australian businesses
 - 21A Acquisitions of interests in Australian urban land
 - 22 Interim orders
 - 23 Revocation of orders
 - 24 Publication of orders
 - 25 Effect of notification of transactions
 - 26 Compulsory notification of certain section 18 transactions
 - 26A Compulsory notification of certain section 21A transactions
 - 27 Form of notification
 - 28 Notification of options
- Part III—Miscellaneous
- 30 Offences
 - 31 Offences by officers of corporations
 - 35 Powers of court to enforce Treasurer's orders
 - 36 Treasurer may require information
 - 37 Effect of Act on other laws
 - 38 Validity of acts done in contravention of Act
 - 38A Anti-avoidance
 - 39 Regulations

An Act relating to the foreign acquisition of certain land interests and to the foreign control of certain business enterprises and mineral rights

Part I—Preliminary

1 Short title [see Note 1]

This Act may be cited as the *Foreign Acquisitions and Takeovers Act 1975*.

2 Commencement [see Note 1]

This Act shall come into operation on a date to be fixed by Proclamation.

3 Transitional provisions

- (1) The *Companies (Foreign Take-overs) Act 1972*, the *Companies (Foreign Take-overs) Act 1973* and the *Companies (Foreign Take-overs) Act 1974* are repealed.
- (2) Notwithstanding the repeal of the *Companies (Foreign Take-overs) Act 1972-1974*, that Act, other than section 17 shall be deemed to continue in force in relation to:
 - (a) an offer (including an offer constituting, or made in pursuance of an invitation constituting, a take-over offer) to sell or purchase shares that was accepted before the date of commencement of this Act; and
 - (b) an issue of shares that occurred before that date.
- (3) Without limiting the generality of subsection (2), orders may be made under sections 14 and 15 of the repealed Act in pursuance of that subsection.
- (4) For the purposes of this Act, but without limiting the operation of subsection (2):
 - (b) an order in force under subsection 13(6) of the repealed Act immediately before that date has effect on and after that date as if it were an order made under section 22 of this Act;
 - (c) an order in force under paragraph 13(2)(c) or (3)(c) of the repealed Act immediately before that date has effect on and after that date as if it were an order made under subsection 18(2) of this Act; and

- (d) an order in force under paragraph 13(2)(d) or (3)(d) of the repealed Act immediately before that date has effect on and after that date as if it were an order made under subsection 18(3) of this Act.
- (4A) For the purposes of the institution, after the commencement of this subsection, of proceedings for an offence referred to in section 21 of the *Companies (Foreign Take-overs) Act 1972*, the reference in that section to the Commonwealth Industrial Court shall be read as a reference to the Federal Court of Australia.
- (5) Nothing in this section affects the operation of section 8 of the *Acts Interpretation Act 1901-1973*.
- (6) Expressions used in this section have the same respective meanings as they had in the repealed Act.

4 Additional operation of Act

- (1) Without prejudice to its effect apart from this subsection, this Act also has, by force of this subsection, the effect it would have if references in sections 19 and 21 to an Australian business carried on solely by a prescribed corporation or prescribed corporations were references to an Australian business carried on by a prescribed corporation or prescribed corporations together with any other person or persons.
- (2) Without prejudice to its effect apart from this subsection, this Act also has, by force of this subsection, the effect it would have if references in sections 19 and 21 to an Australian business carried on solely by a prescribed corporation or prescribed corporations were references to an Australian business carried on solely by a person other than a prescribed corporation or persons other than prescribed corporations.
- (3) Without prejudice to its effect apart from this subsection, this Act also has, by force of this subsection, the effect it would have if references in sections 19 and 21 to a foreign person were references to:
 - (a) a natural person not ordinarily resident in Australia;
 - (b) a corporation (other than a foreign corporation) in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest;
 - (c) a corporation (other than a foreign corporation) in which 2 or more persons, each of whom is either a natural person not

- ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest;
- (d) the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or
 - (e) the trustee of a trust estate in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.
- (4) Without prejudice to its effect apart from this subsection, this Act also has, by force of this subsection, the effect it would have if:
- (a) references in sections 19 and 21 to a foreign person were references to:
 - (i) a natural person not ordinarily resident in Australia;
 - (ii) a corporation (other than a foreign corporation) in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest;
 - (iii) a corporation (other than a foreign corporation) in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest;
 - (iv) the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or
 - (v) the trustee of a trust estate in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest; and
 - (b) references in those sections to an Australian business carried on solely by a prescribed corporation or prescribed corporations were references to an Australian business carried on by a prescribed corporation or prescribed corporations together with any other person or persons.
- (5) Without prejudice to its effect apart from this subsection, this Act also has, by force of this subsection, the effect it would have if:
- (a) references in sections 19 and 21 to a foreign person were references to:
 - (i) a natural person not ordinarily resident in Australia;

- (ii) a corporation (other than a foreign corporation) in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest;
 - (iii) a corporation (other than a foreign corporation) in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest;
 - (iv) the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or
 - (v) the trustee of a trust estate in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest; and
- (b) references in those sections to an Australian business carried on solely by a prescribed corporation or prescribed corporations were references to an Australian business carried on solely by a person other than a prescribed corporation or persons other than prescribed corporations.
- (6) Without prejudice to its effect apart from this subsection, this Act also has, by force of this subsection, the effect it would have if references in section 21A to a foreign person were references to:
- (a) a natural person not ordinarily resident in Australia;
 - (b) a corporation (other than a foreign corporation) in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest;
 - (c) a corporation (other than a foreign corporation) in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest;
 - (d) the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or
 - (e) the trustee of a trust estate in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.

5 Interpretation

- (1) In this Act, unless the contrary intention appears:

acquisition includes an agreement to acquire, but does not include an acquisition:

- (a) by will or by devolution by operation of law; or
- (b) by way of enforcement of a security held solely for the purposes of a moneylending agreement.

agreement means any agreement, whether formal or informal and whether express or implied, other than a moneylending agreement.

asset includes an interest in an asset.

Australia includes the external Territories to which this Act extends.

Australian corporation means a corporation of a kind referred to in paragraph 13(1)(a), (b) or (c).

Australian rural land means land situated in Australia that is used wholly and exclusively for carrying on a business of primary production.

Australian urban land means land situated in Australia that is not Australian rural land.

Australian urban land corporation means a corporation to which section 13C applies.

Australian urban land trust estate means a trust estate to which section 13D applies.

balance-sheet includes a statement of assets and liabilities or any similar document.

constituent document, in relation to a corporation, means the constitution of the corporation or any rules or other document constituting the corporation or governing its activities.

debenture includes debenture stock, bonds, notes and any other document evidencing or acknowledging indebtedness of a corporation, whether constituting a charge on the assets of the corporation or not.

director includes any person occupying the position of director of a corporation, by whatever name called.

financial corporation means a financial corporation to which paragraph 51(xx) of the Constitution is applicable, and includes a

corporation formed within the limits of Australia that carries on as its sole or principal business the business of banking or insurance, other than banking or insurance to which paragraph 51(xiii) or (xiv) of the Constitution, as the case may be, is not applicable.

foreign corporation means a foreign corporation to which paragraph 51(xx) of the Constitution is applicable or a corporation that is incorporated in an external Territory to which this Act does not extend.

foreign government investor has the meaning given by section 17F.

foreign person means:

- (a) a natural person not ordinarily resident in Australia;
- (b) a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest;
- (c) a corporation in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest;
- (d) the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or
- (e) the trustee of a trust estate in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.

interest in Australian urban land has the meaning given by section 12A.

land includes a building or other structure, or a part of a building or other structure.

lease includes a sub-lease.

mineral right means:

- (a) a right (however described) under a law of the Commonwealth or of a State or Territory to recover minerals, other than a right to recover minerals for the purposes of prospecting or exploring for minerals;
- (b) a lease by virtue of which the lessee has a right falling within paragraph (a); or

- (c) an interest in a right falling within paragraph (a) or in a lease falling within paragraph (b).

moneylending agreement means an agreement entered into in good faith in the ordinary course of carrying on a business of lending money, not being an agreement dealing with any matter unrelated to the carrying on of that business.

officer, in relation to a corporation, includes:

- (a) a director, secretary or employee of the corporation;
- (b) a receiver and manager of any part of the undertaking of the corporation appointed under a power contained in any instrument; or
- (c) a liquidator of the corporation appointed in a voluntary winding up.

prescribed foreign government investor has the meaning given by section 17G.

prescribed foreign investor has the meaning given by section 17E.

prescribed sensitive sector has the meaning given by section 17H.

primary production has the same meaning as in the *Income Tax Assessment Act 1936*.

profit and loss account includes any statement of profits and losses or any similar document.

repealed Act means the *Companies (Foreign Take-overs) Act 1972-1974*.

share, in relation to a corporation, means a share in the share capital of the corporation, and:

- (a) includes stock into which all or any of the share capital of the corporation has been converted; and
- (b) except in section 11 or 26, includes an interest in such a share or in such stock.

Territory means an internal Territory or an external Territory to which this Act extends.

trading corporation means a trading corporation to which paragraph 51(xx) of the Constitution is applicable.

- (2) In this Act, a reference to the determination of the policy of a business of exploiting a mineral right includes a reference to the determination of questions relating to the disposal of the right.
- (3) In this Act:
- (a) a reference to a person proposing to acquire shares or assets includes:
 - (i) a reference to a person making an offer to acquire shares or assets;
 - (ii) a reference to a person making or publishing a statement, however expressed, that expressly or impliedly invites a holder of shares or assets to offer to dispose of shares or assets; and
 - (iii) a reference to a person taking part in, or proposing to take part in, negotiations with a view to the acquisition of shares or assets;
 - (aa) a reference to a person proposing to acquire an interest in Australian urban land includes:
 - (i) a reference to a person making an offer to acquire such an interest;
 - (ii) a reference to a person making or publishing a statement, however expressed, that expressly or impliedly invites a holder of such an interest to offer to dispose of that interest; and
 - (iii) a reference to a person taking part in, or proposing to take part in, negotiations with a view to the acquisition of such an interest;
 - (b) a reference to a person proposing to enter into an agreement or arrangement includes a reference to a person taking part in, or proposing to take part in, negotiations with a view to entering into an agreement or arrangement; and
 - (c) a reference to a person proposing to terminate an arrangement includes a reference to a person taking part in, or proposing to take part in, negotiations with a view to terminating an arrangement.
- (4) In this Act, a reference to entering into an arrangement is a reference to entering into any formal or informal scheme, arrangement or understanding, whether expressly or by implication, and, without limiting the generality of the foregoing, includes a reference to:

- (a) entering into an agreement, other than a moneylending agreement;
 - (b) creating a trust, whether express or implied; and
 - (c) entering into a transaction;
- and references to an arrangement shall be construed accordingly.
- (5) In this Act, a reference to entering into an agreement or arrangement includes a reference to altering or varying an agreement or arrangement.
 - (6) In this Act, an act done or proposed to be done by an agent on behalf of his principal shall be deemed to be done or proposed to be done by his principal.
 - (8) A reference in this Act to an offence against this Act or against a particular provision of this Act includes a reference to an offence consisting of an attempt to commit such an offence.

5A Ordinarily resident non-citizens

- (1) For the purposes of this Act, a natural person who is not an Australian citizen is ordinarily resident in Australia at a particular time if and only if:
 - (a) the person has actually been in Australia during 200 or more days in the period of 12 months immediately preceding that time; and
 - (b) at that time, either:
 - (i) the person is in Australia and the person's continued presence in Australia is not subject to any limitation as to time imposed by law; or
 - (ii) the person is not in Australia but, immediately before the person's most recent departure from Australia, the person's continued presence in Australia was not subject to any limitation as to time imposed by law.
- (2) For the purposes of paragraph (1)(b), but without otherwise limiting the generality of that paragraph, a person's continued presence in Australia is subject to a limitation as to time imposed by law if the person is an unlawful non-citizen within the meaning of the *Migration Act 1958*.

6 Associates

For the purposes of this Act, the following persons are associates of a person:

- (a) the person's spouse or a parent or remoter lineal ancestor, son, daughter or remoter issue, brother or sister of the person;
- (b) any partner of the person;
- (c) any corporation of which the person is an officer;
- (d) where the person is a corporation—any officer of the corporation;
- (e) any employee or employer of the person;
- (f) any officer of any corporation of which the person is an officer;
- (g) any employee of a natural person of whom the person is an employee;
- (h) any corporation whose directors are accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the person or, where the person is a corporation, of the directors of the person;
- (i) any corporation in accordance with the directions, instructions or wishes of which, or of the directors of which, the person is accustomed or under an obligation, whether formal or informal, to act;
- (j) any corporation in which the person holds a substantial interest;
- (k) where the person is a corporation—a person who holds a substantial interest in the corporation;
- (ka) the trustee of a trust estate in which the person holds a substantial interest;
- (kb) where the person is the trustee of a trust estate—a person who holds a substantial interest in the trust estate;
- (l) any person who is, by virtue of this section, an associate of any other person who is an associate of the person (including a person who is an associate of the person by another application or other applications of this paragraph).

7 Australian business

- (1) A reference in this Act to an Australian business is a reference to a business that is carried on wholly or partly in Australia in anticipation of profit or gain.
- (2) For the purposes of this Act, the holder of a mineral right shall, by virtue of his holding that right, be deemed to carry on in Australia,

in anticipation of profit or gain, a business of exploiting that right, and that right shall be deemed to be an asset of that business.

- (3) A reference in this Act, other than this section, to an Australian business does not include a reference to a business that is, or is deemed to be, carried on by any of the following persons, whether alone or together with any other person or persons:
- (a) the Commonwealth, a State or a Territory;
 - (b) a corporation constituted for a public purpose by a law of the Commonwealth or of a State or Territory; or
 - (c) a local governing body.

8 Control of voting power

A reference in this Act to control of the voting power in a corporation is a reference to control that is direct or indirect, including control that is exercisable as a result or by means of arrangements or practices, whether or not having legal or equitable force, and whether or not based on legal or equitable rights.

9 Substantial and controlling interests in corporations

- (1) For the purposes of this Act:
- (a) a person shall be taken to hold a substantial interest in a corporation if the person, alone or together with any associate or associates of the person, is in a position to control not less than 15 per centum of the voting power in the corporation or holds interests in not less than 15 per centum of the issued shares in the corporation; and
 - (b) 2 or more persons shall be taken to hold an aggregate substantial interest in a corporation if they, together with any associate or associates of any of them, are in a position to control not less than 40 per centum of the voting power in the corporation or hold interests in not less than 40 per centum of the issued shares in the corporation.
- (2) Where:
- (a) a person holds a substantial interest in a corporation; or
 - (b) 2 or more persons hold an aggregate substantial interest in a corporation;
- that person shall be taken to hold a controlling interest in the corporation, or those persons shall be taken to hold an aggregate controlling interest in the corporation, as the case may be, unless the Treasurer is satisfied that, having regard to all the circumstances,

that person together with the associate or associates (if any) of that person is not, or those persons together with the associate or associates (if any) of each of them are not, in a position to determine the policy of the corporation.

9A Substantial interests in trust estates

- (1) For the purposes of this Act:
 - (a) a person shall be taken to hold a substantial interest in a trust estate if the person, alone or together with an associate or associates, holds a beneficial interest in not less than 15% of the corpus or income of the trust estate; or
 - (b) 2 or more persons shall be taken to hold an aggregate substantial interest in a trust estate if the persons, together with an associate or associates, hold, in the aggregate, beneficial interests in not less than 40% of the corpus or income of the trust estate.
- (2) Where, under the terms of a trust, a trustee has a power or discretion as to the distribution of the income or corpus of the trust estate to beneficiaries, each beneficiary shall, for the purposes of subsection (1), be taken to hold a beneficial interest in the maximum percentage of income or corpus of the trust estate that the trustee is empowered to distribute to that beneficiary.

10 Holding corporations and subsidiaries

- (1) For the purposes of this Act, but subject to subsection (2):
 - (a) a corporation shall be deemed to be a subsidiary of another corporation if that other corporation:
 - (i) is in a position to control more than one-half of the voting power in the first-mentioned corporation; or
 - (ii) holds more than one-half of the issued shares in the first-mentioned corporation (excluding any shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital); and
 - (b) a corporation shall be deemed to be a subsidiary of another corporation if the first-mentioned corporation is a subsidiary of any corporation that is that other corporation's subsidiary (including a corporation that is that other corporation's subsidiary by another application or other applications of this paragraph).

- (2) In determining whether a corporation is a subsidiary of another corporation:
- (a) any shares held or power exercisable by that other corporation in a fiduciary capacity shall be treated as not held or exercisable by it;
 - (b) subject to paragraphs (c) and (d), any shares held or power exercisable:
 - (i) by any person as a nominee for that other corporation (except where that other corporation is concerned only in a fiduciary capacity); or
 - (ii) by, or by a nominee for, a subsidiary of that other corporation, not being a subsidiary that is concerned only in a fiduciary capacity;shall be treated as held or exercisable by that other corporation;
 - (c) any shares held or power exercisable by any person by virtue of the provisions of any debentures of the first-mentioned corporation, or of a trust deed for securing any issue of such debentures, shall be disregarded; and
 - (d) any shares held or power exercisable by, or by a nominee for, that other corporation or its subsidiary (not being held or exercisable as mentioned in paragraph (c)) shall be treated as not held or exercisable by that other corporation if the ordinary business of that other corporation or its subsidiary, as the case may be, includes the lending of money and the shares are held or the power is exercisable solely by way of security for the purposes of a moneylending agreement.
- (3) A reference in this Act to a holding corporation of another corporation is a reference to a corporation of which that other corporation is a subsidiary.

11 Interests in shares

- (1) Subject to this section, a person holds an interest in a share if he has any legal or equitable interest in that share.
- (2) Without limiting the generality of subsection (1), where a person:
- (a) has entered into a contract to purchase a share;
 - (b) has a right, otherwise than by reason of having an interest under a trust, to have a share transferred to himself or to his order, whether the right is exercisable presently or in the future and whether on the fulfilment of a condition or not;

- (c) has the right to acquire a share, or an interest in a share, under an option, whether the right is exercisable presently or in the future and whether on the fulfilment of a condition or not; or
 - (d) is entitled (otherwise than by reason of his having been appointed a proxy or representative to vote at a meeting of members of a corporation or of a class of its members) to exercise or control the exercise of a right attached to a share, not being a share of which he is the registered holder;
- that person shall be deemed to hold an interest in that share.
- (3) A person shall not be deemed not to hold an interest in a share by reason only that he holds the interest in the share jointly with another person.
 - (4) It is immaterial, for the purpose of determining whether a person holds an interest in a share, that the interest cannot be related to a particular share.
 - (5) There shall be disregarded:
 - (a) an interest in a share of a person whose ordinary business includes the lending of money if he holds the interest solely by way of security for the purposes of a moneylending agreement;
 - (b) an interest of a person in a share, being an interest held by him by reason of his holding a prescribed office; and
 - (c) an interest of a prescribed kind in a share, being an interest of such person, or of the persons included in such class of persons, as is prescribed.
 - (6) An interest in a share shall not be disregarded by reason only of:
 - (a) its remoteness;
 - (b) the manner in which it arose; or
 - (c) the fact that the exercise of a right conferred by the interest is or is capable of being made subject to restraint or restriction.
 - (7) In relation to a corporation the whole or a portion of the share capital of which consists of stock, an interest of a person in any such stock shall be deemed to be an interest in an issued share in the corporation having the same nominal amount as the amount of that stock and having attached to it the same rights as are attached to that stock.

12 Interests in assets

For the purpose of determining whether a person holds an interest in an asset, the provisions of section 11 (other than paragraph (2)(d), subsection (4), paragraphs (5)(b) and (c) and subsection (7)) have effect as if references in those provisions to a share were references to an asset.

12A Interests in Australian urban land

- (1) In this Act, *interest in Australian urban land* means:
 - (a) a legal or equitable interest in Australian urban land, other than an interest under a lease or licence or in a unit in a unit trust estate;
 - (b) an interest in a share in a company that owns Australian urban land, being a share that entitles the holder to a right to occupy a dwelling of a kind known as a flat or home unit situated on the land;
 - (c) an interest as lessee or licensee in a lease or licence giving rights to occupy Australian urban land where the term of the lease or licence (including any extension) is reasonably likely, at the time the interest is acquired, to exceed 5 years;
 - (d) an interest in an arrangement involving the sharing of profits or income from the use of, or dealings in, Australian urban land;
 - (e) an interest in a share in an Australian urban land corporation;
 - (f) an interest in a unit in an Australian urban land trust estate; or
 - (g) if the trustee of an Australian urban land trust estate is a corporation—an interest in a share in that corporation.
- (2) For the purposes of this Act, an interest is an interest in Australian urban land even if it is the only interest that exists in the land or other thing concerned.
- (3) For the purposes of this Act, a person acquires an interest in Australian urban land even if:
 - (a) the person acquires the interest jointly with another person or persons;
 - (b) the person has previously acquired an interest in Australian urban land; or
 - (c) the interest is an increase in the amount of an existing interest of the person in Australian urban land.

- (4) For the purposes of this Act, where a person:
 - (a) enters into an agreement; or
 - (b) acquires an option;to acquire an interest in Australian urban land, the person shall be taken to have acquired that interest in Australian urban land.
- (5) For the purposes of this Act, a person shall be taken not to acquire an interest in Australian urban land if the person acquires the interest:
 - (a) solely to hold as security for the purposes of a moneylending agreement; or
 - (b) by way of enforcement of a security held solely for the purposes of a moneylending agreement.
- (6) For the purposes of this Act, a person shall be taken not to acquire an interest in Australian urban land if the person acquires the interest by will or by devolution by operation of law.
- (7) A reference in this Act to the acquisition of an interest in Australian urban land does not include a reference to the acquisition of an interest in Australian urban land from:
 - (a) the Commonwealth, a State or a Territory;
 - (b) a corporation constituted for a public purpose by a law of the Commonwealth or of a State or Territory; or
 - (c) a local governing body.
- (8) Where the regulations provide that this Act, or a specified provision or provisions of this Act, does not or do not apply in relation to an acquisition, of a kind specified in the regulations, of an interest in Australian urban land, this Act, or the provision or provisions, does not or do not so apply.

12B Interests in trust estates

- (1) For the purposes of this Act, a reference to a person holding an interest in a trust estate is a reference to a person holding a beneficial interest in the corpus or income of the trust estate.
- (2) For the purposes of this Act, where a person:
 - (a) has entered into a contract to purchase a beneficial interest in the corpus or income of a trust estate;
 - (b) has a right, otherwise than by reason of holding an interest in a trust estate, to have such an interest transferred to the person or to the person's order (whether the right is exercisable presently

- or in the future) and whether on the fulfilment of a condition or not; or
- (c) has the right to acquire such an interest under an option (whether the right is exercisable presently or in the future) and whether on the fulfilment of a condition or not;
- the person shall be taken to hold that interest in the trust estate.
- (3) For the purposes of this Act, a person holds an interest in a trust estate even if the person holds the interest jointly with another person.
- (4) For the purposes of this Act, a person shall be taken not to hold an interest in a trust estate if:
- (a) the person holds the interest solely by way of security for the purposes of a moneylending agreement; and
- (b) the ordinary business of the person includes the lending of money.
- (5) For the purposes of this Act, a person holds an interest in a trust estate despite:
- (a) its remoteness;
- (b) the manner in which it arose; or
- (c) the fact that the exercise of a right conferred by the interest is, or is capable of being made, subject to restraint or restriction.

12C Tracing of substantial interests in corporations and trust estates

Where:

- (a) a person holds a substantial interest, or 2 or more persons hold an aggregate substantial interest, (including a substantial interest held by that person, or an aggregate substantial interest held by those persons, by another application or other applications of this subsection) in a corporation or a trust estate (which corporation or the trustee of which trust estate is in this section called the *first level entity*); and
- (b) the first level entity:
- (i) is in a position to control all or any of the voting power, or holds interests in all or any of the issued shares, in a corporation (in this section called the *second level corporation*); or
- (ii) holds an interest in a trust estate (in this section called the *second level trust estate*);

the following provisions have effect for the purposes of this Act:

- (c) where subparagraph (b)(i) applies—the person or those persons together shall be taken to be in a position to control so much of the voting power of the second level corporation as the first level entity is in a position to control or to hold the interests in the issued shares in the second level corporation that the first level entity holds, as the case may be;
- (d) where subparagraph (b)(ii) applies—the person or those persons together shall be taken to hold the interest in the second level trust estate that the first level entity holds.

13 Prescribed corporations

- (1) A reference in this Act to a prescribed corporation is a reference to:
 - (a) a trading corporation;
 - (b) a financial corporation;
 - (c) a corporation incorporated in a Territory under the law in force in that Territory relating to companies;
 - (d) a foreign corporation that, on its last accounting date, held assets the sum of the values of which exceeded \$20,000,000 or such other amount as is prescribed, being assets consisting of all or any of the following:
 - (i) land situated in Australia (including legal and equitable interests in such land);
 - (ii) mineral rights;
 - (iii) shares in a corporation incorporated in Australia;
 - (e) a foreign corporation that was, on its last accounting date, a holding corporation of an Australian corporation or Australian corporations, where the sum of the values on that date of the assets of the Australian corporation or Australian corporations exceeded \$20,000,000 or such other amount as is prescribed;
 - (f) a corporation that was, on its last accounting date, a holding corporation of a foreign corporation referred to in paragraph (d) or (e);
 - (g) a foreign corporation that, on its last accounting date, held assets of a kind or kinds referred to in paragraph (d), where the sum of the values on that date of those assets was not less than one-half of the sum of the values on that date of the assets of that corporation and of all the subsidiaries of that corporation;
or
 - (h) a foreign corporation that was, on its last accounting date, a holding corporation of an Australian corporation or Australian corporations, where the sum of the values on that date of the

assets of that Australian corporation or those Australian corporations was not less than one-half of the sum of the values on that date of the assets of the foreign corporation and of all the subsidiaries of that corporation.

- (2) For the purposes of subsection (1), the assets of a corporation shall be deemed not to include any shares in a subsidiary of that corporation.
- (3) In this section, *last accounting date*, in relation to a corporation, means the date of the expiration of the most recent period in relation to which a profit and loss account of the corporation has been laid before it in general meeting, including an account so laid before it before the commencement of this Act.
- (4) For the purposes of this section, the value on a particular date of an asset of a corporation shall be taken to be:
 - (a) the value of that asset as shown in the last balance-sheet of the corporation that was prepared and audited before that date; or
 - (b) if no balance-sheet of the corporation was prepared and audited before that date, the value of that asset as shown on that date in the accounting records of the corporation.

13A Exempt dealings

- (1) Sections 18 and 26 do not apply to shares in an exempt corporation.
- (2) Section 20 does not apply to the control of an exempt corporation.
- (3) Sections 19 and 21 do not apply to the control of an exempt business.
- (4) For the purposes of this section:

exempt corporation means a corporation:

- (a) that is of a kind referred to in paragraph 13(1)(a), (b), (c), (g) or (h); and
- (b) the value of whose total assets, determined under section 13B, does not exceed:
 - (i) if more than 50% of the value of those assets is attributable to Australian rural land—\$3,000,000 or such other amount as is prescribed; or
 - (ii) in any other case—\$5,000,000 or such other amount as is prescribed;

exempt business means a business the value of whose total assets, determined under section 13B, does not exceed:

- (a) if more than 50% of the value of those assets is attributable to Australian rural land—\$3,000,000 or such other amount as is prescribed; or
- (b) in any other case—\$5,000,000 or such other amount as is prescribed.

13B Valuation of assets for purposes of section 13A

- (1) For the purposes of Part IA, or in determining whether a corporation is an exempt corporation, in relation to the application of section 18 or 26, the value of a corporation's total assets at a particular time is:
 - (a) where the corporation is not a holding corporation:
 - (i) the value of those assets as shown in the last balance-sheet of the corporation audited before that time or, if no balance-sheet was audited before that time, as shown at that time in the accounting records of the corporation; or
 - (ii) if the value of the issued shares of the corporation determined under subsection (2) or (3) is greater—that greater value; or
 - (b) where the corporation is a holding corporation:
 - (i) the aggregate value of the assets of the corporation, and of each of its subsidiaries that is a prescribed corporation carrying on an Australian business, determined, in each case, under subparagraph (a)(i); or
 - (ii) if the aggregate value of the issued shares of the corporation and each of those subsidiaries determined under subsection (2) or (3) is greater—that greater value.
- (2) For the purposes of subparagraphs (1)(a)(ii) and (b)(ii) in relation to the application of section 18, the value of the issued shares of a corporation, or the aggregate value of the issued shares of a group of corporations, is the value ascertained under the formula:

$$\frac{C \times TS}{NS}$$

where:

C is:

- (a) where the transaction referred to in section 18 is the proposed acquisition of shares—the total consideration for the acquisition; or
- (b) where the transaction is the issue of shares—the total issue price of all the shares to be issued;

TS is the total number of issued shares, immediately before the proposed acquisition or issue, of the corporation or group of corporations, as the case may be; and

NS is the number of shares proposed to be acquired or issued, as the case may be.

- (3) For the purposes of subparagraphs (1)(a)(ii) and (b)(ii) in relation to the application of section 26, the value of the issued shares of a corporation, or the aggregate value of the issued shares of a group of corporations, is the value ascertained under the formula:

$$\frac{C \times TS}{NS}$$

where:

C is the consideration for the shares acquired or proposed to be acquired under the agreement referred to in section 26;

TS is the total number of issued shares, immediately before the acquisition or proposed acquisition, of the corporation or group of corporations, as the case may be; and

NS is the number of shares to which the agreement relates.

- (4) For the purposes of Part IA, or in determining whether a business is an exempt business, in relation to the application of section 19, the value of a business' total assets is the consideration for the acquisition referred to in that section.
- (5) For the purposes of Part IA, or in determining whether a corporation is an exempt corporation, in relation to the application of section 20, the value of a corporation's total assets at a particular time is:
 - (a) where the corporation is not a holding corporation—the value of those assets as shown in the last balance-sheet of the corporation audited before that time or, if no balance-sheet was audited before that time, as shown at that time in the accounting records of the corporation; or

- (b) where the corporation is a holding corporation—the aggregate value of the assets of the corporation, and of each of its subsidiaries that is a prescribed corporation carrying on an Australian business, determined, in each case, under paragraph (a).
- (6) For the purposes of Part IA, or in determining whether a business is an exempt business, in relation to the application of section 21, the value of a business' total assets at a particular time is the value determined by a person who was at the time of the valuation a suitably qualified valuer acting at arm's length in relation to the valuation where:
- (a) the valuation was made at the particular time; or
 - (b) the valuation was made not more than 12 months before the particular time and the value had not increased significantly between the time of the valuation and the particular time.

13C Australian urban land corporations

- (1) For the purposes of this Act, a corporation is an Australian urban land corporation if:
- (a) where the corporation is not a holding corporation—the value of its eligible land assets exceeds 50% of the value of its total assets; or
 - (b) where the corporation is a holding corporation—the sum of the values of the eligible land assets of the corporation and of each of its subsidiaries exceeds 50% of the sum of the values of the total assets of the corporation and of each of its subsidiaries.
- (2) Where a reasonable value of the eligible land assets or of the total assets of a corporation is:
- (a) shown in the last audited balance-sheet of the corporation; or
 - (b) if not shown in the last audited balance-sheet—shown in the accounting records of the corporation;
- the value of those assets as shown shall be taken to be their value for the purposes of subsection (1).
- (3) For the purposes of determining the values referred to in paragraph (1)(b), any asset of a corporation that consists of shares in any subsidiary of the corporation shall be disregarded.
- (4) In this section:

eligible land assets, in relation to a corporation, means so much of the corporation's total assets as consists of interests in Australian urban land.

13D Australian urban land trust estates

- (1) For the purposes of this Act, a trust estate is an Australian urban land trust estate if it is a unit trust estate and the value of so much of its total assets as consists of interests in Australian urban land exceeds 50% of the value of its total assets.
- (2) Where a reasonable value of the particular assets or of the total assets of a trust estate is given in a valuation, that value shall be taken to be their value at a particular time for the purposes of subsection (1) if:
 - (a) the person giving the valuation was at the time of the valuation a suitably qualified valuer acting at arm's length in relation to the valuation;
 - (b) the valuation was made not more than 12 months before the particular time; and
 - (c) the value of those assets had not increased significantly between the time of the valuation and the particular time.

14 Voting power

In this Act, a reference to the voting power in a corporation is a reference to the maximum number of votes that might be cast at a general meeting of the corporation.

15 Application of Act

This Act does not apply in relation to:

- (a) an acquisition of shares or assets, or an issue of shares, that occurred before the date of commencement of this Act;
- (b) an arrangement that was entered into before that date; or
- (c) an acquisition of shares or assets occurring on or after that date, where notice in writing was issued by the Commonwealth Government before that date to the effect that the Commonwealth Government did not object to the acquisition or, in the case of an acquisition occurring by way of the exercise of an option, that it did not object to the acquisition of the option or to the acquisition of those shares or assets in pursuance of the option.

16 Extra-territorial operation of Act

This Act applies both within and outside Australia and extends to every external Territory other than Papua New Guinea.

17 Persons obliged to comply with Act

The obligation to comply with this Act extends to all natural persons, whether resident in Australia or not and whether Australian citizens or not, and to all corporations, whether incorporated or carrying on business in Australia or not.

Part IA—Exempt foreign investments

17A Exempt foreign investments in prescribed corporations etc.

- (1) Section 18 applies in relation to a prescribed corporation as if neither of the following were a foreign person for the purposes of that section:
 - (a) a prescribed foreign investor that is covered by subsection 17B(1) or (2) in relation to the corporation;
 - (b) a prescribed foreign government investor that is covered by subsection 17C(1) in relation to the corporation.
- (2) Section 20 applies in relation to an Australian corporation as if neither of the following were a foreign person for the purposes of that section:
 - (a) a prescribed foreign investor that is covered by subsection 17B(1) or (2) in relation to the corporation;
 - (b) a prescribed foreign government investor that is covered by subsection 17C(1) in relation to the corporation.
- (3) Sections 19 and 21 apply in relation to a business as if neither of the following were a foreign person for the purposes of those sections:
 - (a) a prescribed foreign investor that is covered by subsection 17B(3) in relation to the business;
 - (b) a prescribed foreign government investor that is covered by subsection 17C(2) in relation to the business.
- (4) Section 26 applies in relation to an Australian corporation as if neither of the following were a person covered by that section:
 - (a) a prescribed foreign investor that is covered by subsection 17B(1) or (2) in relation to the corporation;

- (b) a prescribed foreign government investor that is covered by subsection 17C(1) in relation to the corporation.
- (5) In applying section 18, 19, 20, 21 or 26 in relation to an entity that is neither a prescribed foreign investor nor a prescribed foreign government investor, do not apply subsection (1), (2), (3) or (4) for the purposes of:
 - (a) determining whether 2 or more persons (whether or not those persons are associates) hold an aggregate controlling interest in a corporation; or
 - (b) determining whether 2 or more persons (whether or not those persons are associates) together are in a position to control an amount of the voting power in a corporation; or
 - (c) determining whether 2 or more persons (whether or not those persons are associates) together hold interests in the issued shares in a corporation; or
 - (d) determining whether 2 or more persons (whether or not those persons are associates) together are in a position to determine the policy of a business or corporation.

17B Asset thresholds for exempt foreign investments in prescribed corporations etc.—prescribed foreign investors

- (1) A prescribed foreign investor is covered by this subsection in relation to a corporation if:
 - (a) the corporation, or a subsidiary of the corporation, carries on a business wholly or partly in a prescribed sensitive sector in relation to the prescribed foreign investor; and
 - (b) for a corporation covered by paragraph 13(1)(a), (b), (c), (g) or (h)—the value of the corporation's total assets, determined under section 13B, does not exceed the amount ascertained in accordance with regulations made for the purposes of this paragraph; and
 - (c) for a corporation covered by paragraph 13(1)(d), (e) or (f) because the corporation, or another corporation or other corporations, held certain assets on a particular date—the value of those assets on that date, determined in accordance with section 13, does not exceed the amount ascertained in accordance with regulations made for the purposes of this paragraph.
- (2) A prescribed foreign investor is covered by this subsection in relation to a corporation if:

- (a) neither the corporation, nor a subsidiary of the corporation, carries on a business wholly or partly in a prescribed sensitive sector in relation to the prescribed foreign investor; and
 - (b) for a corporation covered by paragraph 13(1)(a), (b), (c), (g) or (h)—the value of the corporation’s total assets, determined under section 13B, does not exceed the amount ascertained in accordance with regulations made for the purposes of this paragraph; and
 - (c) for a corporation covered by paragraph 13(1)(d), (e) or (f) because the corporation, or another corporation or other corporations, held certain assets on a particular date—the value of those assets on that date, determined in accordance with section 13, does not exceed the amount ascertained in accordance with regulations made for the purposes of this paragraph.
- (3) A prescribed foreign investor is covered by this subsection in relation to a business if:
- (a) both of the following conditions are satisfied:
 - (i) the business is wholly or partly in a prescribed sensitive sector in relation to the prescribed foreign investor;
 - (ii) the value of the total assets of the business, determined under section 13B, does not exceed the amount ascertained in accordance with regulations made for the purposes of this subparagraph; or
 - (b) both of the following conditions are satisfied:
 - (i) the business is neither wholly nor partly in a prescribed sensitive sector in relation to the prescribed foreign investor;
 - (ii) the value of the total assets of the business, determined under section 13B, does not exceed the amount ascertained in accordance with regulations made for the purposes of this subparagraph.
- (4) Regulations made for the purposes of a particular provision of this section may provide for different amounts for different prescribed foreign investors, depending on all or any of the following:
- (a) the kind of prescribed foreign investor concerned;
 - (b) in relation to subsection (1) or paragraph (3)(a)—the kind of prescribed sensitive sector concerned;
 - (c) in relation to subsection (1) or (2)—the kind of corporation concerned;

- (d) in relation to subsection (3)—the kind of business concerned;
 - (e) any other matter.
- (5) Regulations made for the purposes of a particular provision of this section may provide for a method for indexing an amount.
- (6) Subsections (4) and (5) do not limit the regulations that may be made for the purposes of this section.

17C Asset thresholds for exempt foreign investments in prescribed corporations etc.—prescribed foreign government investors

- (1) A prescribed foreign government investor is covered by this subsection in relation to a corporation if:
- (a) for a corporation covered by paragraph 13(1)(a), (b), (c), (g) or (h)—the value of the corporation's total assets, determined under section 13B, does not exceed the amount ascertained in accordance with regulations made for the purposes of this paragraph; and
 - (b) for a corporation covered by paragraph 13(1)(d), (e) or (f) because the corporation, or another corporation or other corporations, held certain assets on a particular date—the value of those assets on that date, determined in accordance with section 13, does not exceed the amount ascertained in accordance with regulations made for the purposes of this paragraph.
- (2) A prescribed foreign government investor is covered by this subsection in relation to a business if the value of the total assets of the business, determined under section 13B, does not exceed the amount ascertained in accordance with regulations made for the purposes of this subsection.
- (3) Regulations made for the purposes of a particular provision of this section may provide for different amounts for different prescribed foreign government investors, depending on all or any of the following:
- (a) the kind of prescribed foreign government investor concerned;
 - (b) in relation to subsection (1)—the kind of corporation concerned;
 - (c) in relation to subsection (2)—the kind of business concerned;
 - (d) any other matter.

- (4) Regulations made for the purposes of a particular provision of this section may provide for a method for indexing an amount.
- (5) Subsections (3) and (4) do not limit the regulations that may be made for the purposes of this section.

17D Exempt foreign investments in financial sector companies etc.

- (1) Section 18 applies in relation to a financial sector company as if a prescribed foreign investor covered by subsection (3) were not a foreign person for the purposes of that section.
- (2) Section 26 applies in relation to a financial sector company as if a prescribed foreign investor covered by subsection (3) were not a person covered by that section.
- (3) A prescribed foreign investor is covered by this subsection if the conditions specified in the regulations are satisfied in relation to the prescribed foreign investor.
- (4) In applying section 18 or 26 in relation to an entity that is not a prescribed foreign investor covered by subsection (3), do not apply subsection (1) or (2) for the purposes of:
 - (a) determining whether 2 or more persons (whether or not those persons are associates) hold an aggregate controlling interest in a corporation; or
 - (b) determining whether 2 or more persons (whether or not those persons are associates) together are in a position to control an amount of the voting power in a corporation; or
 - (c) determining whether 2 or more persons (whether or not those persons are associates) together hold interests in the issued shares in a corporation; or
 - (d) determining whether 2 or more persons (whether or not those persons are associates) together are in a position to determine the policy of a business or corporation.
- (5) In this section:

financial sector company has the same meaning as in the *Financial Sector (Shareholdings) Act 1998*.

17E Prescribed foreign investor

- (1) An entity is a *prescribed foreign investor* if:
 - (a) the conditions specified in the regulations are satisfied in relation to the entity; and

- (b) the entity is not a foreign government investor.
- (2) The conditions specified in the regulations for the purposes of subsection (1) may include any or all of the following kinds of conditions:
 - (a) a condition that the entity be a national of a specified foreign country;
 - (b) a condition that the entity be incorporated under the law of a specified foreign country, or a specified part of a foreign country;
 - (c) a condition that the entity be constituted or organised under the law of a specified foreign country, or a specified part of a foreign country.

Note: For specification by class, see subsection 13(3) of the *Legislative Instruments Act 2003*.

- (3) Subsection (2) does not limit the regulations that may be made for the purposes of subsection (1).

- (4) In this section:

entity includes an individual.

17F Foreign government investor

An entity is a *foreign government investor* if:

- (a) the entity is:
 - (i) a body politic of a foreign country; or
 - (ii) a body politic of part of a foreign country; or
 - (iii) a part of a body politic mentioned in subparagraph (i) or (ii); or
- (b) the entity is controlled by an entity mentioned in paragraph (a); or
- (c) an entity mentioned in paragraph (a) holds an interest in the entity that satisfies the conditions specified in the regulations.

17G Prescribed foreign government investor

An entity is a *prescribed foreign government investor* if:

- (a) the entity is a foreign government investor; and
- (b) the conditions specified in the regulations are satisfied in relation to the entity.

17H Prescribed sensitive sector

A kind of business activity is a *prescribed sensitive sector* in relation to a prescribed foreign investor if:

- (a) the conditions specified in the regulations are satisfied in relation to the prescribed foreign investor; and
- (b) the conditions specified in the regulations are satisfied in relation to the kind of business activity.

Part II—Control of takeovers and other transactions

18 Acquisitions of shares

- (1) In this section, *corporation* means:
 - (a) a prescribed corporation that carries on an Australian business, whether alone or together with any other person or persons; or
 - (b) a holding corporation (other than a foreign corporation that is not a prescribed corporation) of such a prescribed corporation.
- (2) Where the Treasurer is satisfied that:
 - (a) a person proposes, or persons propose, to acquire shares in a corporation or a corporation proposes to issue shares;
 - (b) the proposed acquisition or acquisitions or the proposed issue would have the result that:
 - (i) in the case of a corporation not controlled by foreign persons—the corporation would be controlled by foreign persons; or
 - (ii) in the case of a corporation controlled by foreign persons—the corporation would continue to be controlled by foreign persons, but those persons would include a person who is not, or would not include a person who is, one of the foreign persons first referred to in this subparagraph; and
 - (c) that result would be contrary to the national interest;the Treasurer may make an order prohibiting the proposed acquisition or all or any of the proposed acquisitions, or the proposed issue, as the case may be.
- (3) Where the Treasurer makes an order under subsection (2) prohibiting a proposed acquisition of shares in a corporation, he may also make an order in relation to a specified foreign person, or in relation to a specified foreign person and specified associates, or the persons included in a specified class of associates, of that

person, directing that that person shall not, or none of those persons shall, whether alone or together with any other or others of them:

- (a) be in a position to control more of the total voting power in the corporation than:
 - (i) such proportion of the total voting power in the corporation as is equal to the proportion of the total voting power in the corporation at the time of the coming into operation of the first-mentioned order that that foreign person, together with any associate or associates of that person, was in a position to control at that time; or
 - (ii) such greater proportion (if any) of the total voting power in the corporation as is specified in the order;
- (b) hold interests in a number of issued shares in the corporation exceeding:
 - (i) the number that bears to the total number of issued shares in the corporation the same proportion as the number of issued shares in the corporation in which that foreign person, together with any associate or associates of that person, held interests at the time of the coming into operation of the first-mentioned order bears to the total number of issued shares in the corporation at that time; or
 - (ii) such greater number (if any) as is specified in the order.

(4) Where a person has acquired shares in a corporation, and the Treasurer is satisfied that:

- (a) the acquisition has had the result that:
 - (i) in the case of a corporation that, before the acquisition, was not controlled by foreign persons—the corporation is controlled by foreign persons; or
 - (ii) in the case of a corporation that, before the acquisition, was controlled by foreign persons—the corporation continues to be controlled by foreign persons, but those persons include a person who is not, or do not include a person who is, one of the foreign persons first referred to in this subparagraph; and
- (b) that result is contrary to the national interest;

the Treasurer may make an order directing the person who acquired the shares to dispose of those shares within a specified time to any person or persons approved in writing by the Treasurer.

(5) Before the expiration of the time specified in an order made under subsection (4) or of that time as extended under this subsection, the

Treasurer may, by writing signed by him, extend or further extend that time or that time as so extended, and in that event the order has effect as if the time as so extended or further extended had been specified in the order.

- (6) The Treasurer shall not refuse to approve a person for the purposes of subsection (4) unless he is satisfied that the person is a foreign person and that it would be contrary to the national interest for that person to acquire the shares concerned.
- (7) For the purposes of this section:
 - (a) a corporation shall be taken to be controlled by foreign persons if, and only if, a foreign person holds a controlling interest in the corporation or 2 or more foreign persons hold an aggregate controlling interest in the corporation;
 - (b) where, by virtue of paragraph (a), a corporation is taken to be controlled by foreign persons by reason that a foreign person, together with an associate or associates, is in a position to control not less than 15 per centum of the voting power in the corporation or holds interests in not less than 15 per centum of the issued shares in the corporation, references to the foreign persons who control the corporation include references to that associate or those associates, whether or not that associate is, or those associates are, in fact foreign persons; and
 - (c) where, by virtue of paragraph (a), a corporation is taken to be controlled by foreign persons by reason that 2 or more foreign persons, together with an associate or associates of any of them, are in a position to control not less than 40 per centum of the voting power in the corporation or hold interests in not less than 40 per centum of the issued shares in the corporation, references to the foreign persons who control the corporation are references to any foreign persons, and any associates of foreign persons (whether or not those associates are in fact foreign persons), each of whom is in a position to control any of the voting power in the corporation or holds interests in any of the issued shares in the corporation.

19 Acquisitions of assets

- (1) In this section, *foreign person* means:
 - (a) a foreign corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest; or

- (b) a foreign corporation in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest.
- (2) Where the Treasurer is satisfied that:
- (a) a person proposes, or persons propose, to acquire assets of an Australian business carried on solely by a prescribed corporation or prescribed corporations;
 - (b) the proposed acquisition or acquisitions would have the result that:
 - (i) in the case of a business not controlled by foreign persons—the business would be controlled by foreign persons; or
 - (ii) in the case of a business controlled by foreign persons—the business would continue to be controlled by foreign persons, but those persons would include a person who is not, or would not include a person who is, one of the foreign persons first referred to in this subparagraph; and
 - (c) that result would be contrary to the national interest;
- the Treasurer may make an order prohibiting the proposed acquisition or all or any of the proposed acquisitions, as the case may be.
- (3) Where the Treasurer makes an order under subsection (2) prohibiting a proposed acquisition of assets of an Australian business, he may also make an order in relation to a specified foreign person, or in relation to a specified foreign person and specified associates, or the persons included in a specified class of associates, of that person, directing that that person shall not, or none of those persons shall, whether alone or together with any other or others of them, acquire any interests in assets of that business, or acquire any such interests except to a specified extent.
- (4) Where a person has acquired assets of an Australian business carried on solely by a prescribed corporation or prescribed corporations, and the Treasurer is satisfied that:
- (a) the acquisition has had the result that:
 - (i) in the case of a business that, before the acquisition, was not controlled by foreign persons—the business is controlled by foreign persons; or

- (ii) in the case of a business that, before the acquisition, was controlled by foreign persons—the business continues to be controlled by foreign persons, but those persons include a person who is not, or do not include a person who is, one of the foreign persons first referred to in this subparagraph; and
 - (b) that result is contrary to the national interest;
- the Treasurer may make an order directing the person who acquired the assets to dispose of those assets within a specified time to any person or persons approved in writing by the Treasurer.
- (5) Before the expiration of the time specified in an order made under subsection (4) or of that time as extended under this subsection, the Treasurer may, by writing signed by him, extend or further extend that time or that time as so extended, and in that event the order has effect as if the time as so extended or further extended had been specified in the order.
 - (6) The Treasurer shall not refuse to approve a person for the purposes of subsection (4) unless he is satisfied that the person is a foreign person and that it would be contrary to the national interest for that person to acquire the assets concerned.
 - (7) For the purposes of this section:
 - (a) an Australian business shall be taken to be controlled by foreign persons if, and only if, the Treasurer is satisfied that a foreign person or foreign persons, alone or together with an associate or associates of that foreign person or of any of those foreign persons, is or are in a position to determine the policy of the business; and
 - (b) where an Australian business is so taken to be controlled by foreign persons by reason that a foreign person or foreign persons, together with an associate or associates, are in a position to determine the policy of the business, references to the foreign persons who control the business include references to that associate or those associates, whether or not that associate is, or those associates are, in fact foreign persons.

20 Arrangements relating to directorate of corporations

- (1) In this section, *corporation* means:
 - (a) an Australian corporation that carries on an Australian business, whether alone or together with any other person or persons; or
 - (b) a holding corporation (other than a foreign corporation) of such an Australian corporation.
- (2) Where the Treasurer is satisfied that:
 - (a) a person proposes to enter into an agreement in relation to the affairs of a corporation or it is proposed to alter a constituent document of a corporation;
 - (b) under the proposed agreement or in consequence of the proposed alteration, a director or directors of the corporation will be under an obligation to act in accordance with the directions, instructions or wishes of a foreign person who holds a substantial interest in the corporation or of an associate of such a foreign person;
 - (c) the proposed agreement or alteration would have the result that:
 - (i) in the case of a corporation not controlled by foreign persons—the corporation would be controlled by foreign persons; or
 - (ii) in the case of a corporation controlled by foreign persons—the corporation would continue to be controlled by foreign persons, but those persons would include a person who is not, or would not include a person who is, one of the foreign persons first referred to in this subparagraph; and
 - (d) that result would be contrary to the national interest;the Treasurer may make an order prohibiting the entering into of the proposed agreement or prohibiting the proposed alteration, as the case may be.
- (3) Where an agreement has been entered into in relation to the affairs of a corporation, or an alteration has been made to a constituent document of a corporation, and the Treasurer is satisfied that:
 - (a) the agreement or alteration has had, or will have, the result that:
 - (i) in the case of a corporation that, before the agreement was entered into or the alteration was made, was not

controlled by foreign persons—the corporation is or will be controlled by foreign persons; or

- (ii) in the case of a corporation that, before the agreement was entered into or the alteration was made, was controlled by foreign persons—the corporation continues or will continue to be controlled by foreign persons, but those persons include or will include a person who is not, or do not or will not include a person who is, one of the foreign persons first referred to in this subparagraph; and

- (b) that result is or will be contrary to the national interest;

the Treasurer may, for the purpose of restoring the control of the corporation as closely as possible to the position in which it was before the agreement was entered into or the alteration was made or for the purpose of preventing the occurrence of a change in the control of the corporation of a kind mentioned in paragraph (a), as the case may be, make orders directing specified persons to do within a specified time, or refrain from doing, specified acts or acts of a specified kind.

- (4) Where a time is specified in an order made under subsection (3), the Treasurer may, before the expiration of that time or of that time as extended under this subsection, by writing signed by him, extend or further extend that time or that time as so extended, and in that event the order has effect as if the time as so extended or further extended had been specified in the order.

- (5) For the purposes of this section:

- (a) a corporation shall be taken to be controlled by foreign persons if, and only if, the Treasurer is satisfied that a foreign person or foreign persons, alone or together with an associate or associates of that foreign person or of any of those foreign persons, is or are in a position to determine the policy of the corporation; and

- (b) where an Australian business is so taken to be controlled by foreign persons by reason that a foreign person or foreign persons, together with an associate or associates, are in a position to determine the policy of the corporation, references to the foreign persons who control the corporation include references to that associate or those associates, whether or not that associate is, or those associates are, in fact foreign persons.

21 Arrangements relating to control of Australian businesses

(1) In this section:

arrangement, in relation to an Australian business, means an arrangement relating to the leasing or letting on hire of, or the granting of other rights to use, assets of such a business or relating to the participation by a person in the profits or management of such a business;

foreign person means:

- (a) a foreign corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest; or
- (b) a foreign corporation in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest.

(2) Where the Treasurer is satisfied that:

- (a) a person proposes to enter into an arrangement in relation to an Australian business carried on solely by a prescribed corporation or prescribed corporations or proposes to terminate an arrangement that exists in relation to such an Australian business;
- (b) the proposal, if carried out, would have the result that:
 - (i) in the case of a business not controlled by foreign persons—the business would be controlled by foreign persons; or
 - (ii) in the case of a business controlled by foreign persons—the business would continue to be controlled by foreign persons, but those persons would include a person who is not, or would not include a person who is, one of the foreign persons first referred to in this subparagraph; and
- (c) that result would be contrary to the national interest;

the Treasurer may make an order prohibiting the entering into of the proposed arrangement or prohibiting the termination of the existing arrangement, as the case may be.

(3) Where an arrangement has been entered into in relation to an Australian business carried on solely by a prescribed corporation or prescribed corporations or an arrangement that existed in relation to

such an Australian business has been terminated, and the Treasurer is satisfied that:

- (a) the entering into or the termination of the arrangement has had, or will have, the result that:
 - (i) in the case of a business that, before the entering into or termination of the arrangement, was not controlled by foreign persons—the business is or will be controlled by foreign persons; or
 - (ii) in the case of a business that, before the entering into or termination of the arrangement, was controlled by foreign persons—the business continues or will continue to be controlled by foreign persons, but those persons include or will include a person who is not, or do not or will not include a person who is, one of the foreign persons first referred to in this subparagraph; and
- (b) that result is or will be contrary to the national interest;

the Treasurer may, for the purpose of restoring the control of the business as closely as possible to the position in which it was before the arrangement was entered into or terminated or for the purpose of preventing the occurrence of a change in the control of the business of a kind referred to in paragraph (a), as the case may be, make orders directing specified persons to do within a specified time, or refrain from doing, specified acts or acts of a specified kind.

- (4) Where a time is specified in an order made under subsection (3), the Treasurer may, before the expiration of that time or of that time as extended under this subsection, by writing signed by him, extend or further extend that time or that time as so extended, and in that event the order has effect as if the time as so extended or further extended had been specified in the order.
- (5) For the purposes of this section:
 - (a) an Australian business shall be taken to be controlled by foreign persons if, and only if, the Treasurer is satisfied that a foreign person or foreign persons, alone or together with an associate or associates of that foreign person or of any of those foreign persons, is or are in a position to determine the policy of the business; and
 - (b) where an Australian business is so taken to be controlled by foreign persons by reason that a foreign person or foreign persons, together with an associate or associates, are in a position to determine the policy of the business, references to

the foreign persons who control that business include references to that associate or those associates, whether or not that associate is, or those associates are, in fact foreign persons.

21A Acquisitions of interests in Australian urban land

(1) In this section:

foreign person means:

- (a) a foreign corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or
- (b) a foreign corporation in which 2 or more persons, each of whom is a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.

(2) Where the Treasurer is satisfied that:

- (a) a foreign person proposes to acquire an interest in Australian urban land; and
- (b) the proposed acquisition would be contrary to the national interest;

the Treasurer may make an order prohibiting the proposed acquisition.

(3) Where the Treasurer makes such an order in relation to an interest in Australian urban land, he or she may also make an order in relation to:

- (a) a specified foreign person; or
- (b) a specified foreign person and specified associates, or the persons included in a specified class of associates, of that person;

directing that that person shall not, or none of those persons shall, whether alone or together with any other or others of them, acquire:

- (c) any interest in the land or other thing concerned; or
- (d) any such interest except to a specified extent.

(4) Where a foreign person has acquired an interest in Australian urban land and the Treasurer is satisfied that the acquisition is contrary to the national interest, the Treasurer may make an order directing the foreign person to dispose of that interest within a specified period to any person or persons approved in writing by the Treasurer.

- (5) Before the end of the period specified in the order or of that period as extended under this subsection, the Treasurer may, by writing signed by the Treasurer, extend or further extend that period or that period as so extended, and in that event the order has effect as if the period as so extended or further extended had been specified in the order.
- (6) For the purposes of subsection (4), but without limiting the generality of that subsection:
 - (a) a foreign person shall be taken to have acquired an interest in Australian urban land if the person becomes, with or without the knowledge of the person, a beneficiary in a trust estate (other than a deceased estate) that consists of or includes an interest in Australian urban land; and
 - (b) where paragraph (a) applies and the trust estate is a discretionary trust estate—a reference to the disposal of the interest of the foreign person is a reference to the disposal of such assignable benefits in relation to that trust estate as may ultimately vest in that foreign person.
- (7) The Treasurer shall not refuse to approve a person for the purposes of subsection (4) unless the Treasurer is satisfied that the person is a foreign person and that it would be contrary to the national interest for that person to acquire the interest concerned.

22 Interim orders

- (1) For the purpose of enabling due consideration to be given to the question whether an order should be made under subsection 18(2), 19(2), 20(2), 21(2) or 21A(2), the Treasurer may make an order of the kind that he would be empowered to make under that subsection if it were applicable.
- (2) An order made under this section has effect for such period, not exceeding 90 days after the coming into operation of the order, as is specified in the order.

23 Revocation of orders

The Treasurer may at any time make an order revoking an order made under section 18, 19, 20, 21, 21A or 22 or an order referred to in subsection 3(4).

24 Publication of orders

An order made by the Treasurer under this Part shall be made in writing signed by him, shall be published in the *Gazette* within 10 days after the date on which it is made, and comes into operation:

- (a) except in a case to which paragraph (b) applies—on the date of publication; or
- (b) in the case of an order under subsection 18(3) or (4), 19(4), 20(3), 21(3) or 21A(3) or (4)—on such date as is specified in the order, being a date not earlier than 30 days after the date of publication.

25 Effect of notification of transactions

- (1) This section has effect where the Treasurer receives:
 - (a) a notice from a person stating that the person proposes to acquire shares, assets or interests or to enter into an agreement or enter into or terminate an arrangement;
 - (b) a notice from a corporation stating that the corporation proposes to issue shares; or
 - (c) a notice from a corporation stating that it is proposed to alter a constituent document of the corporation.
- (1A) Where the Treasurer is empowered to make an order under subsection 18(2), 19(2), 20(2), 21(2) or 21A(2) in relation to the acquisition, agreement, arrangement, issue or alteration specified in the notice, the Treasurer may, instead of making such an order, decide that the Commonwealth Government has no objection to the proposal specified in the notice, provided that the person or corporation complies with conditions that the Treasurer, when making the decision, considers necessary in order that the proposal, if carried out, will not be contrary to the national interest.
- (1B) Where the Treasurer makes a decision under subsection (1A), the person or corporation shall be given advice in writing of the decision, being advice that includes a statement of the conditions to be complied with, before the end of 10 days after the day on which the decision is made.
- (1C) If the person or corporation:
 - (a) is given an advice under subsection (1B) of a decision; and
 - (b) carries out the proposal to which the decision relates; and
 - (c) does or fails to do an act, resulting in a contravention of a condition set out in the advice;

the person or corporation is guilty of an offence punishable on conviction, by:

- (d) in the case of a natural person—a fine not exceeding 500 penalty units, or imprisonment for a period not exceeding 2 years, or both; or
- (e) in the case of a corporation—a fine not exceeding 2,500 penalty units.

(1D) If the person or corporation:

- (a) is given advice under subsection (1B) of a decision; and
- (b) carries out the proposal to which the decision relates:

the Treasurer may only make an order under subsection 18(4), 19(4), 20(3), 21(3) or 21A(4) in relation to the acquisition, agreement, arrangement, issue or alteration specified in the notice if:

- (c) the person or corporation is convicted of an offence against subsection (1C) in relation to a condition; or
- (d) an order is made under section 19B of the *Crimes Act 1914* in relation to the person or corporation in respect of such an offence.

(2) If 30 days pass after the day on which the Treasurer receives the notice and by the end of that period:

- (a) the Treasurer has not:
 - (i) made a decision under subsection (1A) in relation to the proposal specified in the notice, being a decision of which advice is given in writing to the person or corporation before the end of 10 days after the day on which the decision is made; or
 - (ii) made an order under this Part in relation to the acquisition, agreement, arrangement, issue or alteration specified in the notice, being an order published in the *Gazette* before the end of 10 days after the day on which the order is made; and
- (b) the person or corporation has not carried out the proposal; the Treasurer is not empowered:
- (c) to make an order under this Part in relation to the acquisition, agreement, arrangement, issue or alteration; or
- (d) to make a decision under subsection (1A) in relation to the proposal.

- (3) If:
- (a) before the end of 30 days after the day on which the Treasurer receives the notice, the Treasurer makes an order under section 22 in relation to the acquisition, agreement, arrangement, issue or alteration specified in the notice;
 - (b) the order is published in the *Gazette* before the end of 10 days after the day on which the order is made; and
 - (c) 90 days pass after the day on which the order is published and by the end of that period:
 - (i) the Treasurer has not:
 - (A) made a decision under subsection (1A) in relation to the proposal specified in the notice, being a decision of which advice is given in writing to the person or corporation before the end of 10 days after the day on which the decision is made; or
 - (B) made any other order under this Part in relation to the acquisition, agreement, arrangement, issue or alteration, being an order published in the *Gazette* before the end of 10 days after the day on which the order is made; and
 - (ii) the person or corporation has not carried out the proposal; the Treasurer is not empowered:
 - (d) to make a further order under this Part in relation to the acquisition, agreement, arrangement, issue or alteration; or
 - (e) to make a decision under subsection (1A) in relation to the proposal.
- (4) For the purposes of this section, a notice stating that a person has an option to acquire shares or assets shall be taken to be a statement that the person proposes to acquire the shares or assets, and references in this section to the proposal and to the acquisition shall be construed accordingly.
- (4A) For the purposes of this section but without limiting its generality, a person or corporation may be given advice in writing of a decision of the Treasurer in relation to a proposal if that advice in writing is given to the person or corporation at an address specified, in the notice containing the proposal, as the address for service of notices in relation to the proposal.
- (5) In this section, *notice* includes a notice furnished under section 26 or 26A.

26 Compulsory notification of certain section 18 transactions

- (1) In this section, *person to whom this section applies* means:
 - (a) a natural person not ordinarily resident in Australia;
 - (b) a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest;
 - (c) a corporation in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest;
 - (d) the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or
 - (e) the trustee of a trust estate in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.

- (2) Where a person to whom this section applies:
 - (a) enters into an agreement by virtue of which he acquires a substantial shareholding in an Australian corporation and did not, before entering into the agreement, furnish to the Treasurer a notice stating his intention to enter into that agreement; or
 - (b) having furnished a notice to the Treasurer stating his intention to enter into an agreement by virtue of which he is to acquire a substantial shareholding in an Australian corporation, enters into that agreement before:
 - (i) the expiration of 40 days after the date on which the notice was received by the Treasurer; or
 - (ii) the date on which advice is given that the Commonwealth Government does not object to the person entering into that agreement (whether or not the advice is subject to conditions imposed under subsection 25(1A));whichever first occurs;the person is guilty of an offence and is punishable, on conviction, by a fine not exceeding 500 penalty units or imprisonment for a period not exceeding 2 years, or both.

- (3) Where:
 - (a) a person enters into an agreement of a kind mentioned in subsection (2); and

- (b) the provisions of the agreement that relate to the acquisition of the interests in the shares concerned do not become binding until the fulfilment of a condition or conditions set out in the agreement;

the person shall not be taken, for the purposes of that subsection, to have entered into the agreement until the time when those provisions become binding.

- (4) Without affecting the operation of section 25, this section does not apply in relation to a shareholder of a corporation subscribing for shares in the corporation if:
 - (a) the shares were subscribed for in pursuance of a resolution by the corporation or the directors of the corporation agreeing to make available a number of shares specified in, or ascertained in accordance with, the resolution for allotment to persons who were registered as the holders of shares in the corporation on a date specified in the resolution; and
 - (b) the number of shares for which the shareholder so subscribed bears to the total number of shares made available for allotment in pursuance of the resolution as nearly as practicable the same proportion as the number of issued shares in the corporation held by him immediately before the date specified in the resolution bears to the total number of issued shares in the corporation immediately before that date.
- (5) For the purposes of subsection (4), it is immaterial that the shares in the corporation comprise 2 or more classes of shares to which different rights are attached.
- (5A) Without affecting the operation of section 25, this section does not apply in relation to the acquisition of a substantial shareholding in an Australian corporation if that acquisition is also an acquisition of an interest in Australian urban land.
- (6) In this section, a reference to an agreement by virtue of which a person acquires a substantial shareholding in a corporation is a reference to an agreement by virtue of which the person acquires any interests in any shares in the corporation where:
 - (a) he already holds a substantial interest in the corporation; or
 - (b) upon the acquisition by him of those interests, or of those interests and of any interests in other shares in the corporation, being interests that he has offered to acquire, he would hold a substantial interest in the corporation.

- (7) For the purposes of subsection (6), a reference to a person offering to acquire interests in shares includes a reference to a person making or publishing a statement, however expressed, that expressly or impliedly invites a holder of interests in shares to offer to dispose of interests in shares.

26A Compulsory notification of certain section 21A transactions

- (1) In this section, *person to whom this section applies* means:
- (a) a natural person not ordinarily resident in Australia;
 - (b) a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest;
 - (c) a corporation in which 2 or more persons, each of whom is a natural person not ordinarily resident in Australia or a foreign corporation hold an aggregate substantial interest;
 - (d) the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or
 - (e) the trustee of a trust estate in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.
- (2) Where a person to whom this section applies:
- (a) enters into an agreement by virtue of which he or she acquires an interest in Australian urban land and did not, before entering into the agreement, furnish to the Treasurer a notice stating his or her intention to enter into that agreement; or
 - (b) having furnished a notice to the Treasurer stating his or her intention to enter into an agreement by virtue of which he or she is to acquire an interest in Australian urban land, enters into that agreement before:
 - (i) the end of 40 days after the day on which the notice was received by the Treasurer; or

- (ii) the day on which advice is given that the Commonwealth Government does not object to the person entering into that agreement (whether or not the advice is subject to conditions imposed under subsection 25(1A));
whichever first occurs;
the person is guilty of an offence and is punishable, on conviction, by a fine not exceeding 500 penalty units or imprisonment for a period not exceeding 2 years, or both.
- (3) Where:
 - (a) a person enters into an agreement by virtue of which he or she acquires an interest in Australian urban land; and
 - (b) the provisions of the agreement that relate to the acquisition of the interest do not become binding until the fulfilment of a condition or conditions set out in the agreement;
the person shall not be taken, for the purposes of subsection (2), to have entered into the agreement until the time when those provisions become binding.
- (4) Without affecting the operation of section 25, this section does not apply to an acquisition of an interest in Australian urban land if:
 - (a) that interest is an interest in a share in a corporation;
 - (b) the acquisition occurs because of a shareholder subscribing for shares in the corporation;
 - (c) the shares were subscribed for in pursuance of a resolution by the corporation or the directors of the corporation agreeing to make available a number of shares specified in, or ascertained in accordance with, the resolution for allotment to persons who were registered as the holders of shares in the corporation on a day specified in the resolution; and
 - (d) the proportion of the total shares made available for allotment represented by the shares for which the shareholder so subscribed is as near as practicable to the proportion of the issued shares in the corporation, immediately before the day specified in the resolution, that were held by the shareholder immediately before that day.
- (5) For the purposes of subsection (4), it is immaterial that the shares in the corporation comprise 2 or more classes of shares to which different rights are attached.

27 Form of notification

A notice does not have effect for the purposes of section 25, 26 or 26A unless it is in accordance with the prescribed form and complies with the directions set out in the form.

28 Notification of options

A notice furnished in accordance with section 25 stating that a person proposes to acquire an option to acquire a share or asset has effect as if it included a statement that the person proposes to exercise that option.

Part III—Miscellaneous

30 Offences

- (1) A person who contravenes or fails to comply with an order made under Part II is guilty of an offence against this section.
- (2) Where a person has been convicted of an offence consisting of a contravention, or failure to comply with, an order made under Part II and the contravention or failure continues after he has been so convicted, the person is guilty of a further offence against this section.
- (3) Where an order made under Part II requires a person to do anything within a particular time and the person fails to do that thing within that time, the person shall be deemed to continue to fail to comply with the order until he does that thing.
- (4) A person who is convicted of an offence against this section is punishable by a fine not exceeding 500 penalty units or imprisonment for a period not exceeding 2 years, or both.

31 Offences by officers of corporations

- (1) Where an offence against a provision of this Act is committed by a corporation, an officer of the corporation who is in default is guilty of an offence against this section and is punishable on conviction by the penalty provided in that provision.
- (2) A reference in subsection (1) to an officer who is in default, in relation to an offence committed by a corporation, includes a reference to an officer who authorizes or permits the commission of the offence.

35 Powers of court to enforce Treasurer's orders

- (1) Where a person (in this section referred to as *the offender*) has contravened or failed to comply with an order in force under Part II, the Supreme Court of a State or Territory may, on the application of the Treasurer, whether or not that contravention or failure still continues, and whether or not other proceedings in respect of that contravention or failure have been or are to be instituted, make such order or orders as it thinks fit for the attainment of the purpose for which the order was made by the Treasurer.
- (2) The orders that may be made under subsection (1) in relation to a change in the control of a corporation other than a foreign corporation (in this section referred to as *the corporation concerned*) or a change in the control of an Australian business (in this section referred to as *the business concerned*) include, but are not limited to:
 - (a) an order restraining the exercise of any rights attached to shares or assets held by the offender;
 - (b) an order prohibiting or deferring the payment of any sums due to the offender in respect of shares or assets held by the offender;
 - (c) an order directing the disposal of shares or assets held by the offender;
 - (d) an order that any exercise of rights attached to shares or assets held by the offender be disregarded;
 - (e) an order prohibiting a person from acting as a director of the corporation concerned or from being involved in the management of the corporation or business concerned; and
 - (f) an order directing the corporation concerned to make such alterations of any of its constituent documents as are specified in the order.
- (3) For the purpose of subsection (2):
 - (a) a reference to shares is a reference to shares in the corporation concerned; and
 - (b) a reference to assets is a reference to assets of the corporation or business concerned.
- (4) The orders that may be made under subsection (1) in relation to a change in the control of a foreign corporation include, but are not limited to:

- (a) an order restraining the exercise of any rights attached to shares held by the foreign corporation in an Australian subsidiary;
 - (b) an order prohibiting or deferring the payment of any sums due to the foreign corporation in respect of shares held by it in an Australian subsidiary;
 - (c) an order directing the disposal of shares in, or assets of, an Australian subsidiary of the foreign corporation;
 - (d) an order directing the disposal of assets of the foreign corporation that consist of assets of an Australian business carried on by the foreign corporation (whether alone or together with any other person or persons) or prohibiting or deferring the payment of any sums due to the foreign corporation in respect of any such assets;
 - (e) an order that any exercise of rights attached to shares held by the foreign corporation in an Australian subsidiary be disregarded;
 - (f) an order that any exercise of rights attached to assets of the foreign corporation of a kind referred to in paragraph (d) be disregarded;
 - (g) an order prohibiting a person from acting as a director of, or from being concerned in the management of, an Australian subsidiary of the foreign corporation; and
 - (h) an order directing an Australian subsidiary of the foreign corporation to make such alterations of any of its constituent documents as are specified in the order.
- (4A) The orders that may be made under subsection (1) in relation to the acquisition of an interest in Australian urban land include, but are not limited to:
- (a) an order restraining the exercise of any rights attached to any interest held by the offender in the land or other thing concerned;
 - (b) an order prohibiting or deferring the payment of any sums due to the offender in respect of any such interest held by the offender;
 - (c) an order directing the disposal of any such interest held by the offender; and
 - (d) an order that any exercise of rights attached to any such interest held by the offender be disregarded.

- (5) In addition to the powers conferred on a Court by subsections (1), (2), (4) and (4A), the Court:
 - (a) has power, for the purpose of securing compliance with any other order made under this section, to make an order directing any person to do or refrain from doing a specified act; and
 - (b) has power to make an order containing such ancillary or consequential provisions as the Court thinks just.
- (6) The Court may, before making an order under this section, direct that notice of the application be given to such persons as it thinks fit or be published in such manner as it thinks fit, or both.
- (7) The Court may, by order, rescind, vary or discharge an order made by it under this section or suspend the operation of such an order.
- (10) In this section, *Australian subsidiary*, in relation to a foreign corporation, means a corporation incorporated in Australia that is a subsidiary of that foreign corporation.

36 Treasurer may require information

- (1) Where the Treasurer has reason to believe that a person is capable of giving information or producing documents relating to matters that are relevant to the exercise by the Treasurer of his powers under this Act, he may, by notice in writing served on that person, require that person:
 - (a) to furnish, within the time and in the manner specified in the notice, any such information to him by writing signed by that person or, in the case of a corporation, by a competent officer of the corporation; or
 - (b) to produce, in accordance with the notice, any such documents to him or to a person specified in the notice acting on his behalf.
- (2) A person who does not comply with a notice under subsection (1) is guilty of an offence punishable, on conviction, by a fine not exceeding 20 penalty units or imprisonment for 12 months, or both.
- (2A) Subsection (2) does not apply if the person complies with the notice to the extent to which the person is capable of complying with it.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2A), (see subsection 13.3(3) of the *Criminal Code*).
- (3) A person is not excused from furnishing information or producing a document in pursuance of this section on the ground that the

information or document might tend to incriminate him, but his answer to any question asked in the notice, or his furnishing of any other information in pursuance of the notice, is not admissible in evidence against him in any criminal proceedings other than proceedings under this Act.

37 Effect of Act on other laws

It is the intention of the Parliament that this Act shall not apply to the exclusion of any law of a State or Territory to the extent that that law is capable of operating concurrently with this Act.

38 Validity of acts done in contravention of Act

An act is not invalidated by the fact that it constitutes an offence against this Act.

38A Anti-avoidance

- (1) In this section, *scheme* means:
 - (a) any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings; and
 - (b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.
- (2) Where:
 - (a) a person or persons enter into, commence to carry out or carry out a scheme (other than a scheme entered into before the commencement of this section);
 - (b) it would be concluded that the person, or any of the persons, who entered into, commenced to carry out or carried out the scheme or any part of the scheme did so for the sole or dominant purpose of avoiding the application of any provision of this Act in relation to any person or persons (whether or not a person or persons who entered into, commenced to carry out or carried out the scheme or any part of the scheme); and
 - (c) the scheme or the part of the scheme has achieved, or apart from this section, would achieve, that purpose;the Treasurer may make any order under this Act that the Treasurer would have been able to make if the scheme or the part of the scheme had not achieved that purpose.

- (3) Subsection (2) does not authorise the making of an order prohibiting a person from doing any thing that has already been done by the person before the order is made.

39 Regulations

The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters required or permitted by this Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Appendix E

Foreign Acquisitions and Takeovers Regulations



Foreign Acquisitions and Takeovers Regulations 1989

Statutory Rules 1989 No. 177 as amended

made under the

Foreign Acquisitions and Takeovers Act 1975

This compilation was prepared on 29 November 2004
taking into account amendments up to SR 2004 No. 316

Prepared by the Office of Legislative Drafting,
Attorney-General's Department, Canberra

Contents

- 1 Name of Regulations [see Note 1]
- 2 Definitions
- 2AA References to *United States of America*
- 2AB Meaning of *US enterprise*
 - 2A Prescribed interests in shares
 - 2B Kind of interest
 - 2C Certificate of exemption in respect of an interest
- 3 Exempt acquisitions of interests in Australian urban land
- 4 Prescribed corporations — value of assets of foreign corporation
- 5 Exempt dealings — value of assets
- 6 Asset thresholds for exempt foreign investments in prescribed corporations etc — prescribed foreign investors
- 7 Asset thresholds for exempt foreign investments in prescribed corporations etc — prescribed foreign government investors
- 8 Condition relating to exempt foreign investments in financial sector companies etc
- 9 Condition relating to prescribed foreign investor
- 10 Condition relating to foreign government investor
- 11 Conditions relating to prescribed foreign government investor
- 12 Conditions relating to prescribed sensitive sector
- 13 Indexation of amounts

1 **Name of Regulations** [see Note 1]

These regulations are the *Foreign Acquisitions and Takeovers Regulations 1989*.

2 **Definitions**

In these regulations, unless the contrary intention appears:

accommodation facility means premises used, or suitable for use, as accommodation of persons on either a long-term or short-term basis, including, in particular, hotels, motels, hostels, guesthouses, serviced apartments and holiday units.

Act means the *Foreign Acquisitions and Takeovers Act 1975*.

charitable institution means:

- (a) any charitable, religious, scientific or educational institution (including an institution providing residential accommodation wholly or principally for full-time students attending an educational institution);
- (b) any institution being, or carrying on, a hospital; and
- (c) any institution the sole or principal purpose of which is to assist in the saving of life, or the prevention of loss or damage to property, whether at sea or otherwise;

being an institution which is not carried on for the purpose of profit or gain to its individual members and which is not empowered to make any distribution, whether in money, property or otherwise, to its members.

entity includes an individual.

foreign person includes a person to whom section 26A of the Act applies.

spouse, in relation to a person, includes another person who, although not legally married to the person, lives with the person on a *bona fide* domestic basis as the husband or wife of the person.

US enterprise has the meaning given by regulation 2AB.

US national means:

- (a) a national of the United States of America, as defined in Title III of the *Immigration and Nationality Act* of the United States of America; or
- (b) a permanent resident of the United States of America.

2AA References to *United States of America*

In these Regulations:

- (a) a reference to the territory of the United States of America includes Puerto Rico and the District of Columbia; and
- (b) a reference to a law of the United States of America includes a law that applies in a State of the United States of America or in any part of the territory of the United States of America.

2AB Meaning of *US enterprise*

- (1) A *US enterprise* is:
 - (a) an entity of a kind described in subregulations (2) to (4); or

- (b) a branch of an entity (other than an entity that is a US enterprise under paragraph (a)) that satisfies subregulation (5);

that is not disqualified under subregulation (6).

- (2) The entity is constituted or organised under a law of the United States of America.
- (3) The form in which the entity may be constituted or organised may be, but is not limited to, any of the following forms:
 - (a) a corporation;
 - (b) a trust;
 - (c) a partnership;
 - (d) a sole proprietorship;
 - (e) a joint venture;
 - (f) an unincorporated association.
- (4) It is immaterial whether the entity:
 - (a) is carried on for profit; or
 - (b) is owned or controlled privately.
- (5) If an entity is not described in subregulations (2) to (4), a branch of that entity is a US enterprise if the branch:
 - (a) is located in the United States of America; and
 - (b) is carrying on business activities in the United States of America:
 - (i) in a way other than being solely a representative office; and
 - (ii) in a way other than being engaged solely in agency activities, including the sale of goods or services that cannot reasonably be regarded as undertaken in the United States of America; and
 - (iii) by having its administration in the United States of America.
- (6) However, an entity or a branch of an entity is not a US enterprise if the Treasurer decides that this subregulation should apply to the entity or branch because:
 - (a) it is owned or controlled by a person or persons of a country other than the United States of America, and:
 - (i) Australia does not maintain diplomatic relations with that country; or
 - (ii) Australia adopts or maintains measures in relation to that country or a person of that country that have the effect of prohibiting transactions with the entity or branch; or

- (b) it is owned or controlled by a person or persons of a country other than the United States of America (including Australia) and the entity or branch has no substantial business activities in the United States of America.

2A Prescribed interests in shares

For paragraph 11 (5) (c) of the Act, an interest in a share is prescribed if:

- (a) the interest is of the kind described in regulation 2B; and
- (b) the interest is held by a corporation (a *foreign custodian company*) that:
 - (i) is a foreign person; and
 - (ii) is the holder of an Australian financial services licence under Chapter 7 of the *Corporations Act 2001*; and
 - (iii) is in the business of providing custodian services to other persons in relation to the ownership of shares; and
 - (iv) holds a certificate mentioned in regulation 2C in respect of the interest.

2B Kind of interest

- (1) For paragraph 2A (a), the interest is an interest in a share:
 - (a) in an Australian corporation; and
 - (b) in which the equitable interest is held by a person mentioned in subregulation (2); and
 - (c) in which the holder of the legal interest exercises voting rights associated with the interest only at the direction of the holder of the equitable interest in the share.
- (2) For paragraph (1) (b), the person who holds the equitable interest in the share:
 - (a) must not be:
 - (i) the holder of the legal interest in the share; or
 - (ii) an associate of the holder of the legal interest in the share; and
 - (b) must be:
 - (i) a person who is not a foreign person; or
 - (ii) a person mentioned in subregulation (3).

- (3) For subparagraph (2) (b) (ii), the person must be a foreign person who:
- (a) does not hold a substantial interest in the Australian corporation mentioned in paragraph (1) (a); and
 - (b) is:
 - (i) a charitable institution operating in Australia primarily for the benefit of persons ordinarily resident in Australia; or
 - (ii) a trustee of a foreign-controlled trust established for charitable or benevolent purposes, where the beneficiaries of the trust are persons ordinarily resident in Australia; or
 - (iii) a life insurance company that operates in Australia and invests the assets of its statutory funds (within the meaning of the *Life Insurance Act 1995*) primarily for the benefit of policy holders ordinarily resident in Australia; or
 - (iv) an insurance company (other than a life insurance company) that operates in Australia and makes investments:
 - (A) from the reserves of the company; and
 - (B) consistent with the company's obligations under the *Insurance Act 1973*; or
 - (v) a corporation that operates in Australia and maintains a superannuation fund for its employees (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) for the benefit of the members of the fund or their dependents, being persons ordinarily resident in Australia, and makes investments of all or part of the assets of that fund; or
 - (vi) the responsible entity of a managed investment scheme registered under section 601EB of the *Corporations Act 2001* that makes investments primarily for the benefit of scheme members ordinarily resident in Australia.

2C Certificate of exemption in respect of an interest

- (1) A foreign custodian company may apply to the Treasurer for a certificate under subregulation (3).
- (2) An application must be in writing.
- (3) The Treasurer may certify that a foreign custodian company is exempt from the operation of the Act with respect to an interest in a share of the kind described in regulation 2B only if the Treasurer is satisfied that the certification is not contrary to the national interest.

- (4) The Treasurer may make the certificate subject to conditions that are:
 - (a) necessary to ensure that the acquisition of an interest in a share of the kind described in regulation 2B will not be contrary to the national interest; and
 - (b) set out in the certificate.

3 Exempt acquisitions of interests in Australian urban land

For subsection 12A (8) of the Act, the Act does not apply in relation to an acquisition of an interest in Australian urban land of each of the following kinds, namely, the acquisition of such an interest by a foreign person:

- (a) that is:
 - (i) a charitable institution operating in Australia primarily for the benefit of persons ordinarily resident in Australia; or
 - (ii) a trustee of a foreign-controlled trust established for charitable or benevolent purposes, where the beneficiaries of the trust are persons ordinarily resident in Australia;
- (b) that is a life insurance company operating in Australia and the acquisition is made by way of investment of its statutory funds (within the meaning of the *Life Insurance Act 1995*) primarily for the benefit of policy holders ordinarily resident in Australia;
- (c) that is an insurance company (other than a life insurance company) operating in Australia and the acquisition:
 - (i) is made from the reserves of the company; and
 - (ii) is consistent with the company's obligations under the *Insurance Act 1973*;
- (d) that is a corporation operating in Australia that maintains a superannuation fund for its employees, (within the meaning of the *Superannuation Industry (Supervision) Act 1993*), for the benefit of the members of the fund or their dependents, being persons ordinarily resident in Australia, and the acquisition is made as an investment of all or part of the assets of that fund;
- (e) where:
 - (i) the acquisition is of an interest in land on which a dwelling will be or is being constructed; and
 - (ii) the Treasurer has certified that the sale of that interest, (whether or not the certificate also refers to other interests) by a specified real estate developer to foreign persons is not contrary to the national interest; and
 - (iii) the conditions (if any) set out in the certificate are satisfied; and

- (iii) the real estate developer provides the foreign person with a copy of that certificate;
- (f) where:
 - (i) the land is being used, or is able to be used immediately and in its present state, for industrial or non-residential commercial purposes; and
 - (ii) the acquisition is wholly incidental to the conduct of the existing or proposed business activities of the foreign person (other than business activities that include acquisitions of land or the development of, or investment in, land or the development or operation of any form of accommodation facility);
- (g) where the acquisition is of an interest in a time share scheme and the entitlement of the foreign person and any of that person's associates is not in the aggregate greater than 4 weeks in any year;
- (h) where:
 - (i) the Treasurer has certified that a programme of land acquisitions by a foreign person in respect of a year is not contrary to the national interest; and
 - (ii) the acquisition is an acquisition referred to in that certificate;
- (i) where the acquisition is of shares as a consequence of which the foreign person holds less than a substantial interest in an Australian urban land corporation less than 10 per cent of the real estate assets of which are in the form of developed residential real estate that the corporation has not developed itself, being an Australian urban land corporation that is:
 - (i) publicly listed on an Australian Stock Exchange; and
 - (ii) primarily involved in the development of land;
- (j) where the acquisition is of shares as a consequence of which the foreign person holds less than a substantial interest in an Australian urban land corporation less than 10 per cent of the real estate assets of which are in the form of developed residential real estate, being an Australian urban land corporation that is publicly listed on an Australian Stock Exchange, or, where 2 or more foreign persons hold interests in the Australian urban land corporation, those foreign persons hold less than an aggregate substantial interest in that corporation;
- (k) who is an Australian citizen not ordinarily resident in Australia;
- (l) that is a corporation in which the government of an overseas country within the meaning of the Diplomatic Privileges and

Immunities Act 1967 holds a substantial interest and the acquisition is of an interest in land where the land is to be used exclusively for the purposes of the diplomatic mission of that country or as a diplomatic residence;

- (m) that is an Australian corporation that is a foreign person only because of direct interests held in it by Australian citizens not ordinarily resident in Australia;
 - (n) that is a trustee of a trust estate, where the trustee is a foreign person only because of direct interests held in the trust estate by Australian citizens not ordinarily resident in Australia;
 - (o) where the acquisition is of units in a unit trust as a consequence of which:
 - (i) the foreign person holds less than a substantial interest in an Australian urban land trust estate:
 - (A) that is a unit trust that accepts funds from the public on the basis of a prospectus approved by the Corporate Affairs Commission of a State or Territory;
 - (B) that has at least 100 unit holders;
 - (C) that is primarily engaged in the development of land; and
 - (D) that has less than 10 per cent of its real estate assets in the form of developed residential real estate that the trust has not developed itself; or
 - (ii) the foreign person holds less than a substantial interest in an Australian urban land trust estate:
 - (A) that is a unit trust that accepts funds from the public on the basis of a prospectus approved by the Corporate Affairs Commission of a State or Territory;
 - (B) that has at least 100 unit holders; and
 - (C) that has less than 10 per cent of its real estate assets in the form of developed residential real estate;
- or, where 2 or more foreign persons hold interests in the Australian urban land trust estate, those foreign persons hold less than an aggregate substantial interest in that trust estate;
- (p) if:
 - (i) the land is non-residential commercial land valued at:
 - (A) for land which is being acquired by a prescribed foreign investor — less than:

- (I) for the calendar year 2005 — \$800 000 000; or
 - (II) for any other calendar year — the amount worked out under regulation 13; and
 - (B) for land the whole or part of which is entered in the Register of the National Estate and the interest in which is being acquired by a foreign person other than a prescribed foreign investor — less than \$5 000 000; and
 - (C) in any other case — less than \$50 000 000; and
- (ii) the land is not:
 - (A) vacant land; or
 - (B) land the whole or part of which comprises an accommodation facility;
- (q) where the acquisition is of an interest in land that is zoned as residential property and the person:
 - (i) is, at the time of acquisition, the holder of a permanent visa (within the meaning of the *Migration Act 1958*); or
 - (ii) is, at the time of acquisition, the holder of a special category visa (within the meaning of that Act); or
 - (iii) if he or she had entered Australia lawfully immediately before the time of acquisition, would have been entitled to the grant, on presentation of a passport, of a special category visa (within the meaning of that Act); or
 - (iv) is an Australian corporation that is a foreign person only because of a direct interest held in it by a person to whom subparagraph (i), (ii) or (iii) applies; or
 - (v) is the trustee of a trust estate, where the trustee is a foreign person only because of a direct interest held in the trust estate by a person to whom subparagraph (i), (ii) or (iii) applies;
- (r) if:
 - (i) the acquisition is of an interest in land on which a dwelling exists that is, or may be, used for residential purposes, other than land that is part of a subdivided building in which hotel services are provided; and
 - (ii) the Treasurer has certified that the sale of an interest of that kind to foreign persons is not contrary to the national interest; and
 - (iii) the conditions (if any) set out in the certificate are satisfied; and

- (iv) the person who intends to dispose of the interest gives the foreign person a copy of the certificate;
- (s) if:
 - (i) the acquisition is of an interest in land that is, or would be, part of a subdivided building:
 - (A) that exists or may be constructed; and
 - (B) in which hotel services are, or would be, provided; and
 - (ii) the Treasurer has certified that the sale of an interest of that kind to foreign persons is not contrary to the national interest; and
 - (iii) the conditions (if any) set out in the certificate are satisfied; and
 - (iv) the person who intends to dispose of the interest gives the foreign person a copy of the certificate;
- (t) where the acquisition is of an interest in land that is zoned as residential property and:
 - (i) the person is the spouse of an Australian citizen; and
 - (ii) the interest is held by the person and his or her spouse as joint tenants;
- (u) that is the responsible entity of a managed investment scheme registered under section 601EB of the *Corporations Act 2001* and the acquisition is primarily for the benefit of scheme members ordinarily resident in Australia.

4 Prescribed corporations — value of assets of foreign corporation

- (1) For paragraph 13 (1) (d) of the Act, the amount of \$50,000,000 is prescribed.
- (2) For paragraph 13 (1) (e) of the Act, the amount of \$50,000,000 is prescribed.

5 Exempt dealings — value of assets

- (1) For subparagraph (b) (i) of the definition of *exempt corporation* in subsection 13A (4) of the Act, the amount of \$50,000,000 is prescribed.
- (2) For subparagraph (b) (ii) of the definition of *exempt corporation* in subsection 13A (4) of the Act, the amount of \$50,000,000 is prescribed.

- (3) For paragraph (a) of the definition of *exempt business* in subsection 13A (4) of the Act, the amount of \$50,000,000 is prescribed.
- (4) For paragraph (b) of the definition of *exempt business* in subsection 13A (4) of the Act, the amount of \$50,000,000 is prescribed.

6 Asset thresholds for exempt foreign investments in prescribed corporations etc — prescribed foreign investors

For a provision of section 17B of the Act mentioned in the following table, the amount is set out in the table:

Item	Provision	Amount
1	paragraph 17B (1) (b)	<ul style="list-style-type: none"> (a) For the calendar year 2005 — \$50 000 000; or (b) For any other calendar year — the amount worked out under regulation 13
2	paragraph 17B (1) (c)	<ul style="list-style-type: none"> (a) For the calendar year 2005 — \$50 000 000; or (b) For any other calendar year — the amount worked out under regulation 13
3	paragraph 17B (2) (b)	<ul style="list-style-type: none"> (a) For the calendar year 2005 — \$800 000 000; or (b) For any other calendar year — the amount worked out under regulation 13
4	paragraph 17B (2) (c)	<ul style="list-style-type: none"> (a) For the calendar year 2005 — \$800 000 000; or (b) For any other calendar year — the amount worked out under regulation 13

Appendix E: Foreign Acquisitions and Takeovers Regulations

Item	Provision	Amount
5	subparagraph 17B (3) (a) (ii)	(a) For the calendar year 2005 — \$50 000 000; or (b) For any other calendar year — the amount worked out under regulation 13
6	subparagraph 17B (3) (b) (ii)	(a) For the calendar year 2005 — \$800 000 000; or (b) For any other calendar year — the amount worked out under regulation 13

7 Asset thresholds for exempt foreign investments in prescribed corporations etc — prescribed foreign government investors

For a provision of section 17C of the Act mentioned in the following table, the amount is set out in the table:

Item	Provision	Amount
1	paragraph 17C (1) (a)	(a) For the calendar year 2005 — \$50 000 000; or (b) For any other calendar year — the amount worked out under regulation 13
2	paragraph 17C (1) (b)	(a) For the calendar year 2005 — \$50 000 000; or (b) For any other calendar year — the amount worked out under regulation 13

Item	Provision	Amount
3	subsection 17C (2)	(a) For the calendar year 2005 — \$50 000 000; or (b) For any other calendar year — the amount worked out under regulation 13

8 Condition relating to exempt foreign investments in financial sector companies etc

For subsection 17D (3) of the Act, the condition is that the investor is a prescribed foreign investor.

9 Condition relating to prescribed foreign investor

For paragraph 17E (1) (a) of the Act, the condition to be satisfied by an entity is that the entity is:

- (a) a US national; or
- (b) a US enterprise.

10 Condition relating to foreign government investor

For paragraph 17F (c) of the Act, it is a condition that the interest is greater than 15%.

11 Conditions relating to prescribed foreign government investor

- (1) For paragraph 17G (b) of the Act, the conditions are that:
 - (a) the entity mentioned in section 17G of the Act (*entity 1*) is not:
 - (i) a body politic of a foreign country; or
 - (ii) a body politic of part of a foreign country; or
 - (iii) a part of a body politic of a foreign country or part of a relevant foreign country; and
 - (b) either:
 - (i) entity 1 is controlled by another entity (*entity 2*); or
 - (ii) an entity (*entity 2*) holds an interest in entity 1 that satisfies the condition specified in regulation 10 for paragraph 17F (c) of the Act; and
 - (c) entity 2 is:

- (i) a body politic of a relevant foreign country; or
- (ii) a body politic of part of a relevant foreign country; or
- (iii) a part of a body politic of a relevant foreign country or part of a foreign country.

(2) In subregulation (1):

relevant foreign country means the United States of America.

12 Conditions relating to prescribed sensitive sector

- (1) For paragraph 17H (a) of the Act, the condition is that the investor is a prescribed foreign investor.
- (2) For paragraph 17H (b) of the Act, the condition is that the business activity is any of the following:
 - (a) media;
 - (b) telecommunications;
 - (c) transport (including airports, port facilities, rail infrastructure, international and domestic aviation and shipping services provided within, or to or from, Australia);
 - (d) the supply of training or human resources, or the manufacture or supply of military goods or equipment or technology, to the Australian Defence Force or other defence forces;
 - (e) the manufacture or supply of goods, equipment or technology able to be used for a military purpose;
 - (f) the development, manufacture or supply of, or the provision of services relating to, encryption and security technologies and communications systems;
 - (g) the extraction of (or the holding of rights to extract) uranium or plutonium or the operation of nuclear facilities.

13 Indexation of amounts

- (1) This regulation explains how to work out an amount for a provision of regulation 3, 6 or 7.
- (2) In this regulation:
 - earlier GDP implicit price deflator value*, for a relevant year, means the GDP implicit price deflator value for the calendar year that ended immediately before the relevant year.
 - existing amount*, for a calendar year, means:
 - (a) if an indexed amount has not been previously worked out under this regulation — the original amount; or

(b) the indexed amount for the year before the relevant year.

GDP implicit price deflator value, for a calendar year, means the GDP implicit price deflator value that was published by the Australian Bureau of Statistics in the publication *Australian System of National Accounts (cat. 5204.0)* (Table 7, Expenditure on GDP, Implicit Price Deflators), for the last financial year that ended before the calendar year.

indexed amount means an amount mentioned in subregulation (1).

latest GDP implicit price deflator value, for a relevant year, means the GDP implicit price deflator value for that year.

original amount means an amount that is replaceable under this regulation by an indexed amount.

relevant year means the calendar year for which an indexed amount is worked out.

- (3) The indexed amount for a relevant year is worked out in accordance with the formula:

$$\frac{\text{existing amount} \times \text{latest GDP implicit price deflator value}}{\text{earlier GDP implicit price deflator value.}}$$

- (4) If, apart from this subregulation, an indexed amount that is worked out under this regulation would not be a multiple of \$1 000 000, the indexed amount is rounded to the nearest multiple of \$1 000 000 (rounding up if the indexed amount ends in \$500 000).
- (5) However, if the amount worked out under subregulation (3) (after any rounding under subregulation (4)) is less than the existing amount, the indexed amount for the relevant year is taken to be the existing amount.
- (6) If, at any time, whether before or after the commencement of these Regulations, the Australian Statistician publishes a GDP implicit price deflator value for a financial year in substitution for a GDP implicit price deflator value previously published for the financial year, the publication of the later GDP implicit price deflator value is to be disregarded for this regulation.
- (7) However, if, at any time, whether before or after the commencement of these Regulations, the Australian Statistician changes the reference base for the GDP implicit price deflator value, then, in applying this regulation after the change is made, regard is to be had only to values published in terms of the new reference base.



Foreign Acquisitions and Takeovers (Notices) Regulations

Statutory Rules 1975 No. 226 as amended

made under the

Foreign Acquisitions and Takeovers Act 1975

This compilation was prepared on 20 November 2000
taking into account amendments up to SR 1989 No. 197

Prepared by the Office of Legislative Drafting,
Attorney-General's Department, Canberra

Contents

- 1 Citation [see Note 1]
- 2 Commencement [see Note 1]
- 3 Interpretation
- 4 Prescribed forms of notice
- 5 Balance sheet and profit and loss account to be furnished
by corporation
- 6 Documents relating to agreement or arrangement
- 7 Constituent document
- 8 Person signing notice

1 Citation [see Note 1]

These Regulations may be cited as the Foreign Acquisitions and Takeovers (Notices) Regulations.

2 Commencement [see Note 1]

These Regulations shall come into operation on the date of commencement of the Act.

3 Interpretation

In these Regulations, *the Act* means the *Foreign Acquisitions and Takeovers Act 1975*.

4 Prescribed forms of notice

- (1) The prescribed form of notice under section 25 of the Act is Form 1 in the Schedule.
- (2) The prescribed form of notice under section 26 of the Act is Form 2 in the Schedule.
- (3) The prescribed form of notice under section 26A of the Act is Form 3 in the Schedule.

5 Balance sheet and profit and loss account to be furnished by corporation

Where a corporation furnishes a notice under section 25 of the Act stating that:

- (a) the corporation proposes to enter into an agreement, being an agreement in relation to the affairs of the corporation;
- (b) the corporation proposes to enter into or terminate an arrangement, being an arrangement in relation to an Australian business of the corporation;
- (c) the corporation proposes issue shares; or
- (d) it is proposed to alter a constituent document of the corporation;

the corporation shall annex to the notice a copy of the balance sheet and a copy of the profit and loss account of the corporation for each period in relation to which a profit and loss account of the corporation has been laid before it in general meeting during the preceding four years.

6 Documents relating to agreement or arrangement

Where a person furnishes:

- (a) a notice under section 25 of the Act stating that the person proposes to enter into an agreement, being an agreement of the kind referred to in section 20 of the Act, or to enter into or terminate an arrangement, being an arrangement of the kind referred to in section 21 of the Act; or
- (b) a notice under section 26 or 26A of the Act;

the person shall annex to the notice copies of all documents and other papers in the person's possession or control relating to or evidencing the agreement or arrangement to which the notice relates.

7 Constituent document

Where a corporation furnishes a notice under section 25 of the Act stating that it is proposed to alter a constituent document of the corporation, the corporation shall annex to the notice a copy of that constituent document.

8 Person signing notice

- (1) A notice under section 25, 26 or 26A of the Act furnished by a natural person shall be signed:
 - (a) if the person is not ordinarily resident in Australia — by that person or by his Australian agent; or
 - (b) in any other case — by the person furnishing the notice.
- (2) A notice under section 25, 26 or 26A of the Act furnished by a corporation shall be signed by a person authorized in writing by the corporation to sign the notice for and on behalf of the corporation.

Appendix F

**OECD Guidelines for
Multinational Enterprises**

OECD Guidelines for Multinational Enterprises

OECD Declaration on international investment and multinational enterprises

Australia has associated itself with a declaration and a number of procedural decisions made by the member countries of the Organisation for Economic Co-operation and Development (OECD) in June 1976, on international investment and multinational enterprises. The text of the 1976 Declaration as amended is as follows:

The Governments of OECD Member Countries

CONSIDERING:

- That international investment has assumed increased importance in the world economy and has considerably contributed to the development of their countries;
- That multinational enterprises play an important role in the investment process;
- That co-operation by Member economies can improve the foreign investment climate, encourage the positive contribution which multinational enterprises can make to economic and social progress, and minimise and resolve difficulties which may arise from their various operations;
- That, while continuing endeavours within the OECD may lead to further international arrangements and agreements in this field, it seems appropriate at this stage to intensify their co-operation and consultation on issues relating to international investment and multinational enterprises through inter-related instruments each of which deals with a different aspect of the matter and together constitute a framework within which the OECD will consider these issues;

DECLARE:

Guidelines for Multinational Enterprises

- I. That they jointly recommend to multinational enterprises operating in their territories the observance of the Guidelines as set forth in Annex 1 hereto having regard to the considerations and understandings which introduce the Guidelines and are an integral part of them;

National Treatment

- II.1. That Member countries should, consistent with their needs to maintain public order, to protect their essential security interests and to fulfil commitments relating to international peace and security, accord to enterprises operating in their territories and owned and controlled directly or indirectly by nationals of another Member country (hereinafter referred to as 'Foreign Controlled Enterprises') treatment under their laws, regulations and administrative practices, consistent with international law and no less favourable treatment than that is accorded in like situations to domestic enterprises (hereinafter referred to as 'National Treatment');
2. That Member countries will consider applying 'National Treatment' in respect of countries other than Member countries;
3. That Member countries will endeavour to ensure that their territorial subdivisions apply 'National Treatment';
4. That this Declaration does not deal with the right of Member countries to regulate the entry of foreign investment or the conditions of established foreign enterprises;

Conflicting Requirements

- III. That they will co-operate with a view to avoiding or minimising the imposition of conflicting requirements in multinational enterprises and that they will take into account the general considerations and practical approaches as set forth in Annex 2 hereto.

International Enterprises Incentives and Disincentives

- IV.1. That they recognise the need to strengthen their co-operation in the Field of international direct investment;
2. That they thus recognise the need to give due weight to the interests of Member countries affected by specific laws, regulations and administrative practices in this field (hereinafter called 'measures') providing official incentives and disincentives to international direct investment;
3. That Member countries will endeavour to make such measures as transparent as possible, so that their importance and purpose can be ascertained and that information on them can be readily available;

Consultation Procedures

- V. That they are prepared to consult one another on the above matters in conformity with the Decisions of the Council on the Guidelines for Multinational Enterprises, on National Treatment and on International Investment Incentives and Disincentives;

Review

- VI. That they will review the above matters within three years with a view to improving the effectiveness of international economic co-operation among Member countries on issues relating to international investment and multinational enterprises.

Annex 1: Guidelines for Multinational Enterprises

Revised in 2000

Preface

1. The *OECD Guidelines for Multinational Enterprises* (the *Guidelines*) were revised in 2000. The *Guidelines* are recommendations addressed by governments to multinational enterprises. They provide voluntary principles and standards for responsible business conduct consistent with applicable laws. The *Guidelines* aim to ensure that the operations of these enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by multinational enterprises. The *Guidelines* are part of the *OECD Declaration on International Investment and Multinational Enterprises* the other elements of which relate to national treatment, conflicting requirements on enterprises, and international investment incentives and disincentives.
2. International business has experienced far-reaching structural change and the *Guidelines* themselves have evolved to reflect these changes. With the rise of service and knowledge-intensive industries, service and technology enterprises have entered the international marketplace. Large enterprises still account for a major share of international investment, and there is a trend toward large-scale international mergers. At the same time, foreign investment by small-and medium-sized enterprises has also increased and these enterprises now play a significant role on the international scene. Multinational enterprises, like their domestic counterparts, have evolved to encompass a broader range of business arrangements and organisational forms. Strategic alliances and closer relations with suppliers and contractors tend to blur the boundaries of the enterprise.

3. The rapid evolution in the structure of multinational enterprises is also reflected in their operations in the developing world, where foreign direct investment has grown rapidly. In developing countries, multinational enterprises have diversified beyond primary production and extractive industries into manufacturing, assembly, domestic market development and services.
4. The activities of multinational enterprises, through international trade and investment, have strengthened and deepened the ties that join OECD economies to each other and to the rest of the world. These activities bring substantial benefits to home and host countries. These benefits accrue when multinational enterprises supply the products and services that consumers want to buy at competitive prices and when they provide fair returns to suppliers of capital. Their trade and investment activities contribute to the efficient use of capital, technology and human and natural resources. They facilitate the transfer of technology among the regions of the world and the development of technologies that reflect local conditions. Through both formal training and on-the-job learning enterprises also promote the development of human capital in host countries.
5. The nature, scope and speed of economic changes have presented new strategic challenges for enterprises and their stakeholders. Multinational enterprises have the opportunity to implement best practice policies for sustainable development that seek to ensure coherence between social, economic and environmental objectives. The ability of multinational enterprises to promote sustainable development is greatly enhanced when trade and investment are conducted in a context of open, competitive and appropriately regulated markets.
6. Many multinational enterprises have demonstrated that respect for high standards of business conduct can enhance growth. Today's competitive forces are intense and multinational enterprises face a variety of legal, social and regulatory settings. In this context, some enterprises may be tempted to neglect appropriate standards and principles of conduct in an attempt to gain undue competitive advantage. Such practices by the few may call into question the reputation of the many and may give rise to public concerns.
7. Many enterprises have responded to these public concerns by developing internal programmes, guidance and management systems that underpin their commitment to good corporate citizenship, good practices and good business and employee conduct. Some of them have called upon consulting, auditing and certification services, contributing to the accumulation of expertise in these areas. These efforts have also promoted social dialogue on what constitutes good business conduct. The *Guidelines* clarify the shared expectations for business conduct of the governments adhering to them and provide a point of reference for enterprises. Thus, the *Guidelines* both complement and reinforce private efforts to define and implement responsible business conduct.

8. Governments are co-operating with each other and with other actors to strengthen the international legal and policy framework in which business is conducted. The post-war period has seen the development of this framework, starting with the adoption in 1948 of the Universal Declaration of Human Rights. Recent instruments include the ILO Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and Agenda 21 and the Copenhagen Declaration for Social Development.
9. The OECD has also been contributing to the international policy framework. Recent developments include the adoption of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and of the OECD Principles of Corporate Governance, the OECD *Guidelines* for Consumer Protection in the Context of Electronic Commerce, and ongoing work on the OECD *Guidelines* on Transfer Pricing for Multinational Enterprises and Tax Administrations.
10. The common aim of the governments adhering to the *Guidelines* is to encourage the positive contributions that multinational enterprises can make to economic, environmental and social progress and to minimise the difficulties to which their various operations may give rise. In working towards this goal, governments find themselves in partnership with the many businesses, trade unions and other non-governmental organisations that are working in their own ways toward the same end. Governments can help by providing effective domestic policy frameworks that include stable macroeconomic policy, non-discriminatory treatment of firms, appropriate regulation and prudential supervision, an impartial system of courts and law enforcement and efficient and honest public administration. Governments can also help by maintaining and promoting appropriate standards and policies in support of sustainable development and by engaging in ongoing reforms to ensure that public sector activity is efficient and effective. Governments adhering to the *Guidelines* are committed to continual improvement of both domestic and international policies with a view to improving the welfare and living standards of all people.

I. Concepts and principles

1. The *Guidelines* are recommendations jointly addressed by governments to multinational enterprises. They provide principles and standards of good practice consistent with applicable laws. Observance of the *Guidelines* by enterprises is voluntary and not legally enforceable.
2. Since the operations of multinational enterprises extend throughout the world, international co-operation in this field should extend to all countries. Governments adhering to the *Guidelines* encourage the enterprises operating on their territories to observe the *Guidelines* wherever they operate, while taking into account the particular circumstances of each host country.

3. A precise definition of multinational enterprises is not required for the purposes of the *Guidelines*. These usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed. The *Guidelines* are addressed to all the entities within the multinational enterprise (parent companies and/or local entities). According to the actual distribution of responsibilities among them, the different entities are expected to co-operate and to assist one another to facilitate observance of the *Guidelines*.
4. The *Guidelines* are not aimed at introducing differences of treatment between multinational and domestic enterprises; they reflect good practice for all. Accordingly, multinational and domestic enterprises are subject to the same expectations in respect of their conduct wherever the *Guidelines* are relevant to both.
5. Governments wish to encourage the widest possible observance of the *Guidelines*. While it is acknowledged that small- and medium-sized enterprises may not have the same capacities as larger enterprises, governments adhering to the *Guidelines* nevertheless encourage them to observe the *Guidelines* recommendations to the fullest extent possible.
6. Governments adhering to the *Guidelines* should not use them for protectionist purposes nor use them in a way that calls into question the comparative advantage of any country where multinational enterprises invest.
7. Governments have the right to prescribe the conditions under which multinational enterprises operate within their jurisdictions, subject to international law. The entities of a multinational enterprise located in various countries are subject to the laws applicable in these countries. When multinational enterprises are subject to conflicting requirements by adhering countries, the governments concerned will co-operate in good faith with a view to resolving problems that may arise.
8. Governments adhering to the *Guidelines* set them forth with the understanding that they will fulfil their responsibilities to treat enterprises equitably and in accordance with international law and with their contractual obligations.
9. The use of appropriate international dispute settlement mechanisms, including arbitration, is encouraged as a means of facilitating the resolution of legal problems arising between enterprises and host country governments.

10. Governments adhering to the *Guidelines* will promote them and encourage their use. They will establish National Contact Points that promote the *Guidelines* and act as a forum for discussion of all matters relating to the *Guidelines*. The adhering Governments will also participate in appropriate review and consultation procedures to address issues concerning interpretation of the *Guidelines* in a changing world.

II. General policies

Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard, enterprises should:

1. Contribute to economic, social and environmental progress with a view to achieving sustainable development.
2. Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.
3. Encourage local capacity building through close co-operation with the local community, including business interests, as well as developing the enterprise's activities in domestic and foreign markets, consistent with the need for sound commercial practice.
4. Encourage human capital formation, in particular by creating employment opportunities and facilitating training opportunities for employees.
5. Refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to environmental, health, safety, labour, taxation, financial incentives, or other issues.
6. Support and uphold good corporate governance principles and develop and apply good corporate governance practices.
7. Develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.
8. Promote employee awareness of, and compliance with, company policies through appropriate dissemination of these policies, including through training programmes.
9. Refrain from discriminatory or disciplinary action against employees who make *bona fide* reports to management or, as appropriate, to the competent public authorities, on practices that contravene the law, the *Guidelines* or the enterprise's policies.

10. Encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the *Guidelines*.
11. Abstain from any improper involvement in local political activities.

III. Disclosure

1. Enterprises should ensure that timely, regular, reliable and relevant information is disclosed regarding their activities, structure, financial situation and performance. This information should be disclosed for the enterprise as a whole and, where appropriate, along business lines or geographic areas. Disclosure policies of enterprises should be tailored to the nature, size and location of the enterprise, with due regard taken of costs, business confidentiality and other competitive concerns.
2. Enterprises should apply high quality standards for disclosure, accounting, and audit. Enterprises are also encouraged to apply high quality standards for non-financial information including environmental and social reporting where they exist. The standards or policies under which both financial and non-financial information are compiled and published should be reported.
3. Enterprises should disclose basic information showing their name, location, and structure, the name, address and telephone number of the parent enterprise and its main affiliates, its percentage ownership, direct and indirect in these affiliates, including shareholdings between them.
4. Enterprises should also disclose material information on:
 - (a) The financial and operating results of the company;
 - (b) Company objectives;
 - (c) Major share ownership and voting rights;
 - (d) Members of the board and key executives, and their remuneration;
 - (e) Material foreseeable risk factors;
 - (f) Material issues regarding employees and other stakeholders; and
 - (g) Governance structures and policies.

5. Enterprises are encouraged to communicate additional information that could include:
 - (a) Value statements or statements of business conduct intended for public disclosure including information on the social, ethical and environmental policies of the enterprise and other codes of conduct to which the company subscribes. In addition, the date of adoption, the countries and entities to which such statements apply and its performance in relation to these statements may be communicated;
 - (b) Information on systems for managing risks and complying with laws, and on statements or codes of business conduct; and
 - (c) Information on relationships with employees and other stakeholders.

IV. Employment and industrial relations

1. Enterprises should, within the framework of applicable law, regulations and prevailing labour relations and employment practices:
 - (a) Respect the right of their employees to be represented by trade unions and other bona fide representatives of employees, and engage in constructive negotiations, either individually or through employers' associations, with such representatives with a view to reaching agreements on employment conditions;
 - (b) Contribute to the effective abolition of child labour;
 - (c) Contribute to the elimination of all forms of forced or compulsory labour; and
 - (d) Not discriminate against their employees with respect to employment or occupation on such grounds as race, colour, sex, religion, political opinion, national extraction or social origin, unless selectivity concerning employee characteristics furthers established governmental policies which specifically promote greater equality of employment opportunity or relates to the inherent requirements of a job.
2.
 - (a) Provide facilities to employee representatives as may be necessary to assist in the development of effective collective agreements;
 - (b) Provide information to employee representatives which is needed for meaningful negotiations on conditions of employment; and
 - (c) Promote consultation and co-operation between employers and employees and their representatives on matters of mutual concern.

3. Provide information to employees and their representatives which enables them to obtain a true and fair view of the performance of the entity or, where appropriate, the enterprise as a whole.
4.
 - (a) Observe standards of employment and industrial relations not less favourable than those observed by comparable employers in the host country; and
 - (b) Take adequate steps to ensure occupational health and safety in their operations.
5. In their operations, to the greatest extent practicable, employ local personnel and provide training with a view to improving skill levels, in co-operation with employee representatives and, where appropriate, relevant governmental authorities.
6. In considering changes in their operations which would have major effects upon the livelihood of their employees, in particular in the case of the closure of an entity involving collective lay-offs or dismissals, provide reasonable notice of such changes to representatives of their employees, and, where appropriate, to the relevant governmental authorities, and co-operate with the employee representatives and appropriate governmental authorities so as to mitigate to the maximum extent practicable adverse effects. In light of the specific circumstances of each case, it would be appropriate if management were able to give such notice prior to the final decision being taken. Other means may also be employed to provide meaningful co-operation to mitigate the effects of such decisions.
7. In the context of bona fide negotiations with representatives of employees on conditions of employment, or while employees are exercising a right to organise, not threaten to transfer the whole or part of an operating unit from the country concerned nor transfer employees from the enterprises' component entities in other countries in order to influence unfairly those negotiations or to hinder the exercise of a right to organise.
8. Enable authorised representatives of their employees to negotiate on collective bargaining or labour-management relations issues and allow the parties to consult on matters of mutual concern with representatives of management who are authorised to take decisions on these matters.

V. Environment

Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct

their activities in a manner contributing to the wider goal of sustainable development. In particular, enterprises should:

1. Establish and maintain a system of environmental management appropriate to the enterprise, including:
 - (a) Collection and evaluation of adequate and timely information regarding the environmental, health, and safety impacts of their activities;
 - (b) Establishment of measurable objectives and, where appropriate, targets for improved environmental performance, including periodically reviewing the continuing relevance of these objectives; and
 - (c) Regular monitoring and verification of progress toward environmental, health, and safety objectives or targets.
2. Taking into account concerns about cost, business confidentiality, and the protection of intellectual property rights:
 - (a) Provide the public and employees with adequate and timely information on the potential environment, health and safety impacts of the activities of the enterprise, which could include reporting on progress in improving environmental performance; and
 - (b) Engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation.
3. Assess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle. Where these proposed activities may have significant environmental, health, or safety impacts, and where they are subject to a decision of a competent authority, prepare an appropriate environmental impact assessment.
4. Consistent with the scientific and technical understanding of the risks, where there are threats of serious damage to the environment, taking also into account human health and safety, not use the lack of full scientific certainty as a reason for postponing cost-effective measures to prevent or minimise such damage.
5. Maintain contingency plans for preventing, mitigating, and controlling serious environmental and health damage from their operations, including accidents and emergencies; and mechanisms for immediate reporting to the competent authorities.

6. Continually seek to improve corporate environmental performance, by encouraging, where appropriate, such activities as:
 - (a) Adoption of technologies and operating procedures in all parts of the enterprise that reflect standards concerning environmental performance in the best performing part of the enterprise;
 - (b) Development and provision of products or services that have no undue environmental impacts; are safe in their intended use; are efficient in their consumption of energy and natural resources; can be reused, recycled, or disposed of safely;
 - (c) Promoting higher levels of awareness among customers of the environmental implications of using the products and services of the enterprise; and
 - (d) Research on ways of improving the environmental performance of the enterprise over the longer term.
7. Provide adequate education and training to employees in environmental health and safety matters, including the handling of hazardous materials and the prevention of environmental accidents, as well as more general environmental management areas, such as environmental impact assessment procedures, public relations, and environmental technologies.
8. Contribute to the development of environmentally meaningful and economically efficient public policy, for example, by means of partnerships or initiatives that will enhance environmental awareness and protection.

VI. Combating bribery

Enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage. Nor should enterprises be solicited or expected to render a bribe or other undue advantage. In particular, enterprises should:

1. Not offer, nor give in to demands, to pay public officials or the employees of business partners any portion of a contract payment. They should not use subcontracts, purchase orders or consulting agreements as means of channelling payments to public officials, to employees of business partners or to their relatives or business associates.
2. Ensure that remuneration of agents is appropriate and for legitimate services only. Where relevant, a list of agents employed in connection with transactions with public bodies and state-owned enterprises should be kept and made available to competent authorities.

3. Enhance the transparency of their activities in the fight against bribery and extortion. Measures could include making public commitments against bribery and extortion and disclosing the management systems the company has adopted in order to honour these commitments. The enterprise should also foster openness and dialogue with the public so as to promote its awareness of and co-operation with the fight against bribery and extortion.
4. Promote employee awareness of and compliance with company policies against bribery and extortion through appropriate dissemination of these policies and through training programmes and disciplinary procedures.
5. Adopt management control systems that discourage bribery and corrupt practices, and adopt financial and tax accounting and auditing practices that prevent the establishment of 'off the books' or secret accounts or the creation of documents which do not properly and fairly record the transactions to which they relate.
6. Not make illegal contributions to candidates for public office or to political parties or to other political organisations. Contributions should fully comply with public disclosure requirements and should be reported to senior management.

VII. Consumer interests

When dealing with consumers, enterprises should act in accordance with fair business, marketing and advertising practices and should take all reasonable steps to ensure the safety and quality of the goods or services they provide. In particular, they should:

1. Ensure that the goods or services they provide meet all agreed or legally required standards for consumer health and safety, including health warnings and product safety and information labels.
2. As appropriate to the goods or services, provide accurate and clear information regarding their content, safe use, maintenance, storage, and disposal sufficient to enable consumers to make informed decisions.
3. Provide transparent and effective procedures that address consumer complaints and contribute to fair and timely resolution of consumer disputes without undue cost or burden.
4. Not make representations or omissions, nor engage in any other practices, that are deceptive, misleading, fraudulent, or unfair.
5. Respect consumer privacy and provide protection for personal data.

6. Co-operate fully and in a transparent manner with public authorities in the prevention or removal of serious threats to public health and safety deriving from the consumption or use of their products.

VIII. Science and technology

Enterprises should:

1. Endeavour to ensure that their activities are compatible with the science and technology (S&T) policies and plans of the countries in which they operate and as appropriate contribute to the development of local and national innovative capacity.
2. Adopt, where practicable in the course of their business activities, practices that permit the transfer and rapid diffusion of technologies and know-how, with due regard to the protection of intellectual property rights.
3. When appropriate, perform science and technology development work in host countries to address local market needs, as well as employ host country personnel in an S&T capacity and encourage their training, taking into account commercial needs.
4. When granting licenses for the use of intellectual property rights or when otherwise transferring technology, do so on reasonable terms and conditions and in a manner that contributes to the long term development prospects of the host country.
5. Where relevant to commercial objectives, develop ties with local universities, public research institutions, and participate in co-operative research projects with local industry or industry associations.

IX. Competition

Enterprises should, within the framework of applicable laws and regulations, conduct their activities in a competitive manner. In particular, enterprises should:

1. Refrain from entering into or carrying out anti-competitive agreements among competitors:
 - (a) To fix prices;
 - (b) To make rigged bids (collusive tenders);
 - (c) To establish output restrictions or quotas; or
 - (d) To share or divide markets by allocating customers, suppliers, territories or lines of commerce;

2. Conduct all of their activities in a manner consistent with all applicable competition laws, taking into account the applicability of the competition laws of jurisdictions whose economies would be likely to be harmed by anti-competitive activity on their part.
3. Co-operate with the competition authorities of such jurisdictions by, among other things and subject to applicable law and appropriate safeguards, providing as prompt and complete responses as practicable to requests for information.
4. Promote employee awareness of the importance of compliance with all applicable competition laws and policies.

X. Taxation

It is important that enterprises contribute to the public finances of host countries by making timely payment of their tax liabilities. In particular, enterprises should comply with the tax laws and regulations in all countries in which they operate and should exert every effort to act in accordance with both the letter and spirit of those laws and regulations. This would include such measures as providing to the relevant authorities the information necessary for the correct determination of taxes to be assessed in connection with their operations and conforming transfer pricing practices to the arm's length principle.

Annex 2: Conflicting requirements imposed on multinational enterprises: General considerations and practical approaches

These considerations and approaches are embodied in Annex 2 to the Declaration on International Investment and Multinational Enterprises, adopted by the Governments of the OECD Member countries in 1976. They were adopted with the aim of avoiding or minimising the imposition of conflicting requirements on multinational enterprises by governments. In view of this objective, the OECD Council has adopted a procedural decision seeking to promote co-operation among Member countries.

General considerations

1. In contemplating new legislation, action under existing legislation or other exercise of jurisdiction which may conflict with the legal requirements or established policies of another Member country and lead to conflicting requirements being imposed on multinational enterprises, the Member countries concerned should:
 - (a) Have regard to relevant principles of international law;
 - (b) Endeavour to avoid or minimise such conflicts and the problems to which they give rise by following an approach of moderation and restraint, respecting and accommodating the interests of other Member countries*;
 - (c) Take fully into account the sovereignty and legitimate economic, law enforcement and other interests of other Member countries;
 - (d) Bear in mind the importance of permitting the observance of contractual obligations and the possible adverse impact of measures having a retroactive effect.
2. Member countries should endeavour to promote co-operation as an alternative to unilateral action to avoid or minimise conflicting requirements and problems arising therefrom. Member countries should on request consult one another and endeavour to arrive at mutually acceptable solutions to such problems.

Practical approaches

3. Member countries recognised that in the majority of circumstances, effective co-operation may best be pursued on a bilateral basis. On the other hand, there may be cases where the multilateral approach could be more effective.

4. Member countries should therefore be prepared to:
- (a) Develop mutually beneficial, practical and appropriately safeguarded bilateral arrangements, formal or informal, for notification to and consultation with other Member countries;
 - (b) Give prompt and sympathetic consideration to requests for notification and bilateral consultation on an ad hoc basis made by any Member country which considers that its interests may be affected by a measure of the type referred to under paragraph 1 above, taken by another Member country with which it does not have such bilateral arrangements;
 - (c) Inform the other concerned Member countries as soon as practicable of new legislation or regulations proposed by their Governments for adoption which have significant potential for conflict with the legal requirements or established policies of other Member countries and for giving rise to conflicting requirements being imposed on multinational enterprises;
 - (d) Give prompt and sympathetic consideration to requests by other Member countries for consultation in the Committee on International Investment and Multinational Enterprises or through other mutually acceptable arrangements. Such consultations would be facilitated by notification at the earliest stage practicable;
 - (e) Give prompt and full consideration to proposals which may be by other Member countries in any such consultations that would lessen or eliminate conflicts.

These procedures do not apply to those aspects of restrictive business practices or other matters, which are the subject of existing OECD arrangements.

Appendix G

Contact details

Contact details

Foreign investment proposals

Applications

Applications for foreign investment approval should be addressed to:

The Executive Member
Foreign Investment Review Board
c/- The Treasury
Langton Crescent
CANBERRA ACT 2600

Executive Member — Mr Gerry Antioch
Tel: (02) 6263 3763

General enquiries

General enquiries: (02) 6263 3795
Overseas: +61 (2) 6263 3795
Fax: (02) 6263 2940
Internet: www.firb.gov.au
E-mail address: firb@treasury.gov.au

Special enquiries

The Investment and Compliance Unit is responsible for international investment policy matters and for foreign investment compliance issues.

Mr Roy Nixon
Manager
Tel: (02) 6263 3764

The Trade Policy Unit is responsible for coordinating and providing a focus for Treasury's involvement in trade policy matters.

Dr Ian Beckett
Manager
Tel: (02) 6263 3212

The Primary and Secondary Industries Unit is responsible for the management of foreign investment applications, including those in the Real Estate, Agriculture, Manufacturing and Mining sectors.

Mr John Hill
Manager
Tel: (02) 6263 3072

The Tertiary Industries Unit is responsible for the management of foreign investment applications, including those in the Real Estate, Finance, Services, Media and Tourism sectors.

Mr Michael Rosser
Manager
Tel: (02) 6263 3834

Australian National Contact Point for the OECD Guidelines for Multinational Enterprises

Suggestions, comments, questions and complaints

Suggestions, comments, questions and complaints in relation to the OECD Guidelines for Multinational Enterprises should be addressed to:

The Executive Member

Foreign Investment Review Board
c/- The Treasury
Langton Crescent
CANBERRA ACT 2600

Executive Member — Mr Gerry Antioch
Tel: (02) 6263 3763
Fax: (02) 6263 2940
Internet: www.ausncp.gov.au
E-mail address: ANCP@treasury.gov.au

Singapore Help Desk

This service is for Singaporean investors and their agents only. All correspondence should be sent to:

Singapore Help Desk
Foreign Investment Review Board
c/- The Treasury
Langton Crescent
CANBERRA ACT 2600
AUSTRALIA

Telephone Inquiries: +61 (2) 6263 3755
Fax: +61 (2) 6263 2940
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