

**Foreign Investment
Review Board**

**Annual Report
2005-06**

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ISBN 0 642 74375 4

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Printed by CanPrint Communications Pty Ltd.



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11 December 2006

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 2005-06.

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, appearing to read 'M J Phillips'.

M J Phillips AO
Chairman

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Acronyms and abbreviations

AAT	Administrative Appeals Tribunal
ABS	Australian Bureau of Statistics
AFP	Australian Federal Police
ANCP	Australian National Contact Point
ANZCERTA	Australia New Zealand Closer Economic Relations Trade Agreement
ANZSIC 1993	<i>Australian and New Zealand Standard Industrial Classification (version published in 1993)</i>
APEC	Asia-Pacific Economic Cooperation
APRA	Australian Prudential Regulation Authority
ASEAN	Association of South-East Asian Nations
ATO	Australian Taxation Office
AUSFTA	Australia-United States Free Trade Agreement
AUSTRAC	Australian Transaction Reports and Analysis Centre
DFAT	Department of Foreign Affairs and Trade
EU	European Union
FDI	foreign direct investment
FIMS	Foreign Investment Management System
FIOLA	Foreign Investment Online Application
FIRB (/the Board)	Foreign Investment Review Board
FOI	Freedom of Information
FOI Act	<i>Freedom of Information Act 1982</i>
FSSA	<i>Financial Sector (Shareholdings) Act 1998</i>
FTA	free trade agreement
DIMA	Department of Immigration and Multicultural Affairs
IPPA	investment protection and promotion agreement
MNE	multinational enterprise
NCP	National Contact Point
NGO	non-government organisation

Acronyms and abbreviations (continued)

OECD	Organisation for Economic Co-operation and Development
Privacy Act	<i>Privacy Act 1988</i>
the Act (/the FATA)	<i>Foreign Acquisitions and Takeovers Act 1975</i>
the Banks Taskforce	Report of the Taskforce on Reducing the Regulatory Burden on Business
the Board (/FIRB)	Foreign Investment Review Board
the Committee	OECD Investment Committee
the Declaration	<i>OECD Declaration on International Investment and Multinational Enterprises</i>
the division (/secretariat)	The Treasury's Foreign Investment and Trade Policy Division
the FATA (/the Act)	<i>Foreign Acquisitions and Takeovers Act 1975</i>
the <i>OECD Guidelines</i>	<i>OECD Guidelines for Multinational Enterprises</i>
the PFI	<i>Policy Framework for Investment</i>
the policy	the Government's foreign investment policy
the Regulations	<i>Foreign Acquisitions and Takeovers Regulations 1989</i>
the report	<i>Foreign Investment Review Board Annual Report 2005-06</i>
secretariat (/the division)	The Treasury's Foreign Investment and Trade Policy Division
UK	United Kingdom
US	United States of America
WTO	World Trade Organization

Glossary

Aggregate substantial interest in a corporation	Where two or more persons together with any associate(s), are in a position to control not less than 40 per cent of the voting power or hold interests in not less than 40 per cent of the issued shares, of a corporation (section 9 of the FATA).
Applications approved (/approvals)	Comprises all foreign investment proposals approved either with or without conditions (unless otherwise stated).
Applications considered	Comprises all foreign investment proposals finalised between 1 July 2005 and 30 June 2006 (that is, approved, rejected, withdrawn or exempt).
Applications decided	Comprises all foreign investment proposals approved or rejected between 1 July 2005 and 30 June 2006 (that is, excluding proposals withdrawn or determined exempt).
Applications rejected	Comprises all foreign investment proposals that are either rejected under the policy or subject to a Final Order or a Divestiture Order under the FATA.
Approvals (/applications approved)	Comprises all foreign investment proposals approved either with or without conditions (unless otherwise stated).
Australian urban land corporations and trust estates	A corporation (excluding holding companies) or trust estate where more than half of its assets are in the form of Australian urban land (sections 13D and 13E of the FATA).
Corporate reorganisations	Corporate reorganisations encompass a wide range of transactions including corporate restructures and transfers of assets or shares within a multinational group.
Divestiture Order	An Order that requires an interest already acquired to be disposed of.
FIMS	The Foreign Investment Management System is the division's case management system implemented in December 2005.
Final Order	An Order that prohibits a proposed acquisition.
FIOLA	The Foreign Investment Online Application system for partial online lodgment of applications to purchase Australian real estate.

Glossary (continued)

Foreign Investment Review Board (FIRB or the Board)	A non-statutory body established in 1976 to advise the Treasurer on foreign investment policy and its administration.
Foreign person	<p>(a) A natural person not ordinarily resident in Australia;</p> <p>(b) a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest;</p> <p>(c) 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;</p> <p>(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</p> <p>(e) 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.</p> <p>(Section 5 of the FATA)</p>
Interim Order	An Order that extends the available statutory examination period and prohibits a proposed acquisition for up to a further 90 days.
Manufacturing	Comprises manufacturing industries as per ANZSIC 1993, except: - excludes newspaper, printing and publishing (included within services industry sector).
Offshore takeover	Where an offshore company (/foreign person) that holds Australian assets or conducts a business in Australia is acquired by another foreign person, and the Australian assets or businesses of the target company are valued at less than 50 per cent of its total assets.
Off-the-plan	An acquisition of a dwelling under construction or completed that has not been lived in or previously sold.
Order	An order issued under the <i>Foreign Acquisitions and Takeovers Act 1975</i> (that is, an Interim Order, Final Order, Divestiture Order, or Revocation Order).
Portfolio investment	Passive or non-direct investment.

Glossary (continued)

Proposed investment	Proposed investment associated with foreign investment proposals comprises the aggregate of acquisition costs and development expenditure in the case of existing businesses, and the aggregate of establishment costs and development expenditure in the case of new businesses.
Services	Comprises services-related industries as per ANZSIC 1993, except: <ul style="list-style-type: none">- includes newspaper, printing and publishing; and- excludes tourism (recorded as a separate industry sector).
Specific instance	The formal mechanism that provides for an examination of a multinational enterprise's conduct where that conduct is claimed to be contrary to the <i>OECD Guidelines for Multinational Enterprises</i> .
Substantial interest in a corporation	Where a person, alone or together with any associate(s), is in a position to control not less than 15 per cent of the voting power or holds interests in not less than 15 per cent of the issued shares, of a corporation (section 9 of the FATA).
Threshold	Monetary figure under either the policy or the FATA at which foreign persons are expected or required to notify a proposal to the Treasurer.

Main points

- In 2005-06, the Foreign Investment Review Board (the Board) provided advice on the application of Australia's foreign investment policy to a range of individual proposals and on the reform of and general administration of foreign investment policy.
- In 2005-06, 5,186 proposals received foreign investment approval under Australia's foreign investment policy and the *Foreign Acquisitions and Takeovers Act 1975*. This compares with 4,360 the previous year, representing an increase of 19 per cent. The majority of this increase occurred in the real estate sector, with 4,755 approvals (20 per cent higher than the 3,949 approvals in 2004-05). There were 431 proposals approved in other sectors in 2005-06 compared with 411 in 2004-05, an increase of 5 per cent.¹
- In 2005-06, 25 proposals were rejected by the way of a Final Order, compared with 55 in 2004-05. Five Divestiture Orders (six in 2004-05) required foreign persons to dispose of their interests. All Final and Divestiture Orders related to proposals involving residential real estate. There were 61 Interim Orders (65 in 2004-05), extending the 30-day statutory decision-making period by up to a further 90 days.
- Approvals in 2005-06 involved proposed investment of \$85.8 billion. This represented a 28 per cent decrease on the previous year's approvals of \$119.5 billion (60 per cent of this decrease was attributable to the 2004-05 figures including two large proposals for a single target company).
- The services sector was the largest industry sector by value, with investment approvals in 2005-06 of \$27.1 billion (compared with \$30.5 billion in 2004-05). The other major sectors were: mineral exploration and development, with investment approvals of \$19.7 billion (\$33.5 billion in 2004-05); real estate, with approved investment proposals valued at \$16.2 billion (\$20.9 billion in 2004-05); and manufacturing, with approvals of \$13.7 billion (\$22.1 billion in 2004-05).
- The United States of America was again the largest source country for foreign investment in 2005-06, involving proposed investment of \$23.4 billion representing 27 per cent of total approved proposals. Switzerland, China, the United Kingdom and Germany were the other major sources of proposed investment approved

1 While the introduction in December 2005 of a new case management system has led to improvements in the statistics presented in this report, the Board recommends caution in their use. In relation to the current year, the Board also notes that the inherent difficulties in aligning data sourced from two separate case management systems has resulted in some apparent anomalies when comparing 2005-06 with previous years. For a full discussion on the limitations of this data see Chapter 2.

during 2005-06, accounting for 17 per cent, 8 per cent, 8 per cent and 5 per cent, respectively.

- A number of reforms to foreign investment policy have been implemented (see Appendix C).
- In 2005-06, Australia made progress on the international liberalisation of trade and investment through its engagement in bilateral, regional and multilateral forums. Free trade agreement (FTA) negotiations were progressed with China, Malaysia, and (with New Zealand) ASEAN. Australia also contributed to a joint feasibility study into an FTA with Japan.
- Australia continues to be a net importer of foreign direct investment (FDI), compared 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.
- In 2005-06, the Australian National Contact Point dealt with a specific instance under the *OECD Guidelines for Multinational Enterprises* and adopted a more targeted approach to consulting with government agencies, non-government organisations, 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 (the Board or FIRB) is a non-statutory body established in 1976 to advise the Treasurer on the Government's foreign investment policy (the policy) and its administration. As such, the Board's functions are advisory only. Responsibility for the 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 and advises Treasury ministers on foreign investment matters.

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

- examine proposals by foreign persons for acquisitions and new investment projects in Australia and, against the background of the policy and supporting legislation, to make recommendations to the Treasurer on those proposals;
- advise the Treasurer on the operation of the policy and the *Foreign Acquisitions and Takeovers Act 1975* (the FATA or the Act), and on significant applications for foreign investment approval made under these;
- foster an awareness and understanding, both in Australia and abroad, of the policy and the Act;
- provide guidance to foreign persons and their representatives/agents so that proposals conform with the policy and the Act; and
- monitor and ensure compliance with the policy and the Act.

Information on the operation of the FATA is provided in Chapter 3 and in the *Summary of Australia's Foreign Investment Policy* provided at Appendix A to this report. A copy of the FATA and the regulations made under it are provided at Appendix D and E respectively.

Board membership

As at 30 June 2006, the Board comprised three part-time members and a full-time Executive Member. In November 2006, Mr Patrick Colmer replaced Mr Gerry Antioch as the Executive Member.

Mr John Phillips AO was first appointed Chairman of the Board on 16 April 1997 and reappointed for a further term of five years on 24 April 2002. He has extensive high-level experience in the public, finance and business sectors including the position of Deputy Governor of the Reserve Bank of Australia. His present responsibilities include: Chancellor, University of Western Sydney, and Member, Organising Committee, World Youth Day 2008.

Ms Lynn Wood has been a Board member since April 1995 and was reappointed on 3 April 2005 for a further term of five years. She has extensive experience as a director and is currently on the Boards of HSBC Bank Australia Limited, GPT Funds Management Limited, MS Australia Limited and Noni B Limited. She is also a compliance committee member of two major fund managers and Chairman of the Audit Committee of the NSW Government Department of Natural Resources. She was awarded the Centenary Medal in 2003 for service to Australian society through business and finance.

The Hon Chris Miles was appointed to the Board on 8 June 1999 and was reappointed for a further term of five years on 8 June 2004. Between 1984 and 1998 Mr Miles represented the seat of Braddon, Tasmania, in the House of Representatives where from 1996 to 1998 he was the Parliamentary Secretary (Cabinet) to the Prime Minister. In that capacity, he had special responsibility for tax legislation in the House of Representatives. Prior to his distinguished parliamentary career, Mr Miles taught in the education systems of Tasmania, the ACT and NSW. Mr Miles is currently a director of two private companies.

Mr Gerry Antioch was the Executive Member of the Board between March 2005 and October 2006. 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 Treasury's Business Tax Division. During late 2001 to March 2002, Mr Antioch was seconded as senior taxation adviser to the then Minister for Revenue and Assistant Treasurer, Senator the Hon Helen Coonan.

Mr Patrick Colmer commenced his appointment as Executive Member of the Board on 20 November 2006. Mr Colmer has an extensive background as a public policy adviser in a variety of government agencies. Prior to this, from 2002 he was the General Manager of Treasury's Indirect Tax Division. He was an Assistant Commissioner in the Australian Taxation Office from 1999 to 2002 and earlier, a manager in the Commonwealth health department with responsibility for general practice standards and health workforce policy.

Relationship of the division to the Board

As the Executive Member of the Board the General Manager of the division, currently Mr Colmer (previously, Mr Antioch), provides the link between the Board and the Treasury. Under the Board's guidance, the division is responsible for the initial

examination of proposals received under the policy and the Act, and for preparing draft and final recommendations to Treasury ministers or officers in the division authorised by the Treasurer to make decisions under the Act. It also provides a point of contact for interested parties, including potential foreign investors and their representatives/agents.

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

The division performs other roles beyond providing secretariat services to the Board and examining foreign investment proposals. It also advises the Treasurer on broader investment and trade-related policy matters. This includes providing advice on and being a party in the work of 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 agreements (FTAs) and investment protection and promotion agreements (IPPAs). Chapter 4 elaborates on these activities.

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

Administration of foreign investment policy

Advice and education

In keeping with the Board's role of fostering awareness and understanding of the policy, the division regularly engages with potential foreign investors, their representatives/agents and Australian businesses to provide information on the operation of the policy and the Act and their application, including to specific proposals. The division has also provided the Human Rights and Equal Opportunity Commission (HREOC) with information on the operation of the FATA for its national inquiry into members of same-sex relationships' access to financial and work-related benefits and entitlements, and for a complaint lodged with HREOC which it subsequently decided not to pursue.

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 Australian, state and territory 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, an email address, firb@treasury.gov.au, and a website, www.firb.gov.au, for people seeking information or advice on the policy and legislation.

Consideration timeframe

The FATA provides a 30-day statutory period for a decision to be made on proposals lodged under the Act, with up to a further 10 days to advise the parties. The statutory period commences upon receipt of a completed section 25, 26 or 26A notice. The Act also provides for the issue of an Interim Order, which extends the available examination period and prohibits the proposal for 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 policy and are not subject to statutory deadlines imposed by the FATA.

The Treasurer has provided an authorisation (effectively a delegation) to the Executive Member and other senior division staff permitting 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. These are predominantly in the real estate sector.

These arrangements, along with the use of application forms for residential real estate (R3 Form and C1 Form), the advanced 'off-the-plan' application form (D2 Form), and the introduction in December 2005 of the Foreign Investment Online Application (FIOLA) system for real estate purchases, assist in streamlining the application and approval process. The forms and online applications, once completed, signed and submitted together with a statutory notice where required (section 26A notice) and additional information (such as passport/visa/sale contract details), facilitate a timely decision on proposals.

Examination and approval process

Proposals are initially examined by the division's Domestic Investment Unit with Board input on recommendations on significant applications. The division's International Investment and Compliance Unit undertakes associated compliance work. Proposals are examined as to whether they conform with the requirements of the policy and the FATA, including the proponent's fulfilment of 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 contrary to the national interest or to raise no objections to them subject to conditions that are considered necessary to ameliorate national interest concerns (see the *Summary of Australia's Foreign Investment Policy* at Appendix A). Decisions are advised in writing to the applicants or their representatives/agents. Where the Treasurer makes a decision on a significant proposal, he may also issue a media release.

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 the more significant proposals (for example, in terms of their size, complexity or the policy issues raised), the Board becomes involved early in the examination process and contributes to advice ultimately received by the Treasurer or his Parliamentary Secretary.

Consultation arrangements

In examining large or otherwise significant proposals, consultations are undertaken by the Board's secretariat with Australian, state and territory government departments and authorities with responsibilities relevant to the proposal. Advice and comments provided by such agencies are 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. The Board regards this liaison with key stakeholders as an integral part of the administration of the policy.

Where major proposals are in the public domain, the Board 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 the Act 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 documents available on the Board's website at www.firb.gov.au. These set out guidelines on national interest matters, including in relation to real estate and other sectors with specific requirements. 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, appropriate procedures are in place to ensure that confidentiality is protected.

Moreover, the Government is required to respect the privacy and sensitivity of personal and commercial information that is provided by applicants to the Board, in accordance with the requirements of the relevant legislation, including the *Privacy Act 1988* (Privacy Act) and the *Freedom of Information Act 1982* (FOI Act). However, in accordance with the Privacy Act, 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 (DIMA), the Australian Taxation Office (ATO) and/or the Australian Federal Police (AFP).

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

In 2005-06, the division dealt with five applications under the FOI Act (compared with eight in 2004-05) seeking information concerning foreign investment matters. The FOI Act provides criteria to determine whether particular documents or parts of documents are exempt from release. The criteria include that the document contains commercially sensitive information where its release would cause harm to its provider. In line with the provisions of the FOI Act, the division 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.

An application was heard by the Administrative Appeals Tribunal (AAT) for review of a decision by Treasury to partially withhold information in response to a request

under the FOI Act, for material in relation to an application for foreign investment approval. The Treasury decision that two documents were exempt and should not be released under the FOI Act was affirmed by the AAT. The AAT found that the documents' release 'would reveal confidential material provided in confidence to the Foreign Investment Review Board'. The Deputy President of the AAT, Professor G D Walker, noted that 'disclosure would limit the flow and quality of information that [the applicant] would be willing to provide voluntarily to FIRB on future occasions'.¹

A second application has been made to the AAT for a review of a decision by Treasury regarding partial withholding of information in response to a request under the FOI Act, for material in relation to investments in Australia by the applicants, considered by the Board. The main issues in the case are, firstly, whether the documents to which access has been refused are exempt under a number of sections of the FOI Act and, secondly, whether Treasury has taken all reasonable steps to find further documents requested by the applicant and whether such documents cannot be found or do not exist. The case has not yet been heard.²

2005-06 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 2005-06 were \$119,367 (\$110,396 in 2004-05). Remuneration of Board members was around 92 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 2005-06 were \$2.79 million (\$2.22 million in 2004-05). These expenses mainly comprised employee salary (including superannuation and accruing leave entitlements) and administrative costs. Over the course of 2005-06, the division employed an average of 28 staff, 4 more than the average for 2004-05.

Consideration of proposals and enquiries

In 2005-06, 5,781 applications for foreign investment approval were considered, comprising 5,186 approved, 37 rejected and 373 withdrawn by the parties with the remaining 185 determined as exempt or not subject to the policy or the Act. In 2005-06, 5,024 cases were decided within the division under the Treasurer's authorisation and 199 were decided by a Treasury minister, in most cases by the Treasurer's Parliamentary Secretary.

1 *Michael Mangan and The Treasury* [2005] AATA 898 (15 September 2005) at 3 and 17.

2 *Baronsun Pty Ltd and The Treasury*.

Additionally, the division handled approximately 32,000 telephone enquiries³ and 4,580 items of correspondence⁴ in relation to potential proposals, compliance with conditional approvals and the policy and the Act.

In 2005-06, 61 Interim Orders, 25 Final Orders and 5 Divestiture Orders were made and published in the Commonwealth of Australia *Gazette*.⁵ 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 has already occurred and is subsequently assessed, in terms of the policy, as being contrary to the national interest.

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

In 2005-06, 92 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 application involved significant complexity or sensitivity.

Policy review

Arising from a commitment made by Australia under the Australia-United States Free Trade Agreement (AUSFTA), the division with input from the Board conducted a review in 2006 of the treatment of three aspects of the operation of the Act: portfolio investment, internal corporate reorganisations and foreign-to-foreign takeovers.

Following this review a number of reforms to Australia's foreign investment screening arrangements were implemented (see Appendix C). These reforms also respond to Recommendation 5.58 of the *Report of the Taskforce on Reducing the Regulatory Burden on Business* (the Banks Taskforce) which recommended an increase in the threshold for non-real estate foreign investment proposals.

3 The figure provided for telephone enquiries has been extrapolated from a three-month sample of calls to the foreign investment general enquiries line (02 6263 3795).

4 This figure excludes all correspondence in relation to proposals that were yet to be finalised when the correspondence was received. No comparison has been made with the previous year's data due to differing data sets following the mid-period implementation of a new case management system.

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

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 FATA.

Furthermore, provisions of the *Crimes Act 1914* and the *Criminal Code Act 1995* make it an offence to provide false or misleading information, or to enter into any schemes for the purpose of avoiding the provisions of the Act.

In examining proposals, the applicant's compliance with any conditions relating to past proposals is taken into account. Instances of lack of compliance with conditions may result in future proposals being rejected. It is general policy to report serious breaches of the Act to DIMA, the AFP and other government agencies as appropriate.

The division's International 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 2005-06, the unit examined in excess of 3,500 higher risk 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 Australian, state and territory government agencies.

The unit's compliance and monitoring procedures and documentation processes are subject to ongoing review 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 DIMA and other government agencies as appropriate. The application of these processes has in some cases resulted in further investigations by DIMA prior to issuing visas or in refusal to issue a visa to those who have breached approvals with conditions.

Links with the AFP, DIMA, the 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.

Following a referral to the Commonwealth Director of Public Prosecutions (the DPP) for consideration of prosecution, a Bangladeshi citizen was prosecuted successfully in the Melbourne Magistrates Court during December 2005 for three offences against the provisions of the FATA.

A matter concerning a Swiss citizen not complying with a Divestiture Order issued under subsection 21A(4) of the FATA was referred to the DPP for consideration. This matter was due to be heard in the Adelaide Magistrates Court during 2005-06 and has been delayed pending appeals concerning the decision making process and constitutional issues under the provisions of the *Judiciary Act 1903* in the Federal Court. The Federal Court heard the case on 6 and 7 June 2006 and judgment has not yet been handed down.⁶

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 2005-06, 137 such cases were referred to the ATO.

⁶ *Marie Madeline Wight v The Honorable Chris Pearce MP.*

Chapter 2

Foreign investment proposals

Foreign investment proposals

This chapter provides an overview and statistical information on applications considered in 2005-06.

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 policy and data capture and reporting methodologies change over time. 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* (the FATA or the Act) and the Government's foreign investment policy (the policy). In particular, the data relates to proposals that receive foreign investment approval during the year. The monetary value attributed to these approved proposals is the amount advised by the applicants. It represents an estimate of the expected total investment in that and subsequent years that would result in the event that the proposal is in fact implemented. In addition:

- The data does not cover foreign investments below the thresholds that apply under the Act and the 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). See Appendix A for the current thresholds.
- The figures are based on the assumption that investment funds will be 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.
- The data does 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.

- Acquisitions of diversified company groups are classified into a single industry sub-code according to 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.¹

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

- they include proposals that are approved in any given year but which may not actually be implemented, or could be implemented in a later year, or over a number of years;
- they include approvals for multiple potential acquirers for the same target company or asset;
- they are inherently irregular and can be skewed due to very large investment proposals; and
- major liberalisations of the policy that have occurred since the mid-1980s limit comparability over time.
 - For example, the increase in the general asset threshold from \$5 million to \$50 million in 1999 has acted to reduce the number of proposals.
 - The introduction of thresholds of \$800 million and \$50 million (indexed annually) for United States (US) investors from 1 January 2005 only affected the data involving US proposed investment for half of the 2004-05 Annual Report period, whereas the thresholds have applied throughout the 2005-06 period.

Several improvements were initiated in 2005-06 which affect the statistics included in this report.

- The implementation of a new case management system (known as FIMS) in December 2005 has significantly improved data collection accuracy. FIMS allows a more detailed analysis of proposed foreign investment, as reflected in improvements to the statistics presented in this report. As part of a post-implementation review of FIMS, a detailed data validation process was undertaken for the purpose of preparing the 2005-06 Annual Report. While the data

¹ Data has been compiled by reference to the *Australian and New Zealand Standard Industrial Classification* (ANZSIC 1993), except: newspaper printing and publishing are allocated to the services industry sector (ANZSIC 1993 classifies these under manufacturing); and tourism is recorded as a separate industry sector rather than being included with the other service industries.

in this report is consequently more accurate, this process was not able to be applied to previous years' data and hence some caution is necessary in making inter-year comparisons.

- Reporting procedures for proposals involving financing arrangements have been amended. Although they continue to be included in the statistics (in the number of approvals), the proposed acquisition cost and development expenditure are not recorded in FIMS for proposals such as lending arrangements where there is not expected to be an investment flow into Australia.² This has affected the value attributed to proposed investment in the finance and insurance industry.
- Previously, proposals involving share acquisitions were recorded as conditionally approved on the basis that the proposed acquisition was to proceed within 12 months. In FIMS, such proposals are no longer recorded as conditionally approved.³ This has not significantly affected the proportion of approvals that are subject to conditions (73 per cent of total approvals in 2005-06 compared with 74 per cent in 2004-05). However, the value of proposed investment reported as being associated with the conditional approval category has significantly decreased due to the very large investment amounts involved with such 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.

2 This is similar to the existing practice for corporate reorganisations.

3 Applicants are required to re-apply if the transaction has not taken place and they wish to proceed after 12 months has passed.

Applications considered in 2005-06

Applications considered comprises **all** proposals finalised during 2005-06 (approved, rejected, withdrawn or exempt), irrespective of the date proposals were submitted.⁴ Corporate reorganisations are included here (85 in 2005-06), whereas they are excluded from the analysis of approved investment provided later in this chapter.⁵

The number of applications considered during 2005-06 was 5,781, around 18 per cent higher than the 4,884 processed in 2004-05. Table 2.1 provides a breakdown of the number of applications considered over the last six years, according to the outcome of proposals.

Of the 5,186 applications **approved** in 2005-06, 3,800 were approved subject to conditions and 1,386 without conditions being imposed. All but 10 of the conditional approvals were in the real estate sector, where 82 per cent of all approvals were subject to conditions. Real estate conditions include those relating to the period during which development must commence (usually 12 months), requiring temporary residents to reside in and then sell established dwellings when they cease to reside in them, and the imposition of reporting requirements. Only 2 per cent of all non-real estate approvals were subject to conditions.

A total of 37 proposals were **rejected** in 2005-06, representing less than 1 per cent of all proposals considered. All rejected proposals involved the acquisition of residential real estate. Thirty of these were the subject of either a Final Order or a Divestiture Order made under the Act, with the balance involving formal rejection under policy.

In 2005-06, 373 proposals were **withdrawn** by the applicants. 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 other reasons.

During 2005-06, 185 proposals were determined to be **exempt**. Under the policy, foreign investors are required to submit proposals where any doubt exists as to whether they are notifiable. In some cases, the Board's secretariat determines proposals to be exempt under the Act or the policy. In other cases, proposals are determined exempt as they are not subject to the Act.

4 Since proposals determined exempt were not previously included, the figures shown for prior years have been amended from those previously published to include these proposals.

5 The proposed acquisition cost and development expenditure is not recorded for corporate reorganisations.

Table 2.1: Applications considered 2000-01 to 2005-06 – number of proposals

Outcome	2000-01	2001-02	2002-03	2003-04	2004-05	2005-06
	No.	No.	No.	No.	No.	No.
Approved unconditionally	1,003	1,041	1,105	995	1,127	1,386
Approved with conditions	2,298	3,405	3,562	3,452	3,233	3,800
Total approved	3,301	4,446	4,667	4,447	4,360	5,186
Rejected	46	77	80	64	55	37
Total decided	3,347	4,523	4,747	4,511	4,415	5,223
Withdrawn	318	402	365	319	287	373
Exempt	193	172	203	206	182	185
Total considered	3,858	5,097	5,315	5,036	4,884	5,781

Note: Includes corporate reorganisations (85 in 2005-06).

Applications decided in 2005-06

Applications decided comprises all proposals approved (conditionally or unconditionally) or rejected during 2005-06, irrespective of the date proposals were submitted. Corporate reorganisations are also included here, whereas they are excluded from the analysis of approved investment provided later in this chapter.

The number of applications decided during 2005-06 was 5,223, around 18 per cent higher than in 2004-05 (see Table 2.1). The value of proposed investment associated with decided applications was \$85.8 billion, approximately 28 per cent lower than in 2004-05. Table 2.2 provides a breakdown of proposed investment according to the outcome of decided applications, for the corresponding period provided in Table 2.1.

Table 2.2: Applications decided 2000-01 to 2005-06 – proposed investment

Outcome	2000-01	2001-02	2002-03	2003-04	2004-05	2005-06
	\$b	\$b	\$b	\$b	\$b	\$b
Approved unconditionally	80.0	70.2	53.5	58.9	60.4	72.5
Approved with conditions	26.3	47.7	32.2	40.1	59.1	13.3
Total approved	106.3	117.9	85.7	99.0	119.5	85.8
Rejected	9.7	0.1	0.0	0.1	0.0	0.0
Total decided	116.0	118.0	85.8	99.1	119.5	85.8

Note: Totals may not add due to rounding.
 '0.0' indicates a figure of less than \$50 million.
 Includes corporate reorganisations (85 in 2005-06).

Charts 2.1 and 2.2 show the difference between applications decided within the real estate and non-real estate sectors,⁶ by number of proposals and value of proposed investment.

As can be seen in Chart 2.1, most of the applications decided were within the real estate sector, correlating with the large number of proposals conditionally approved shown in Table 2.1. Chart 2.2 shows that most of the proposed investment occurred in non-real estate sectors, correlating with the large value of proposed investment approved unconditionally shown in Table 2.2.

Charts 2.1 and 2.2 also show that during 2005-06, the majority of the increase in the number of applications decided was within the real estate sector, whereas the majority of the decrease in proposed investment occurred in the non-real estate sectors.

⁶ Analysis of approvals by industry sector is provided from page 24.

Chart 2.1: Applications decided 2000-01 to 2005-06 — number of proposals

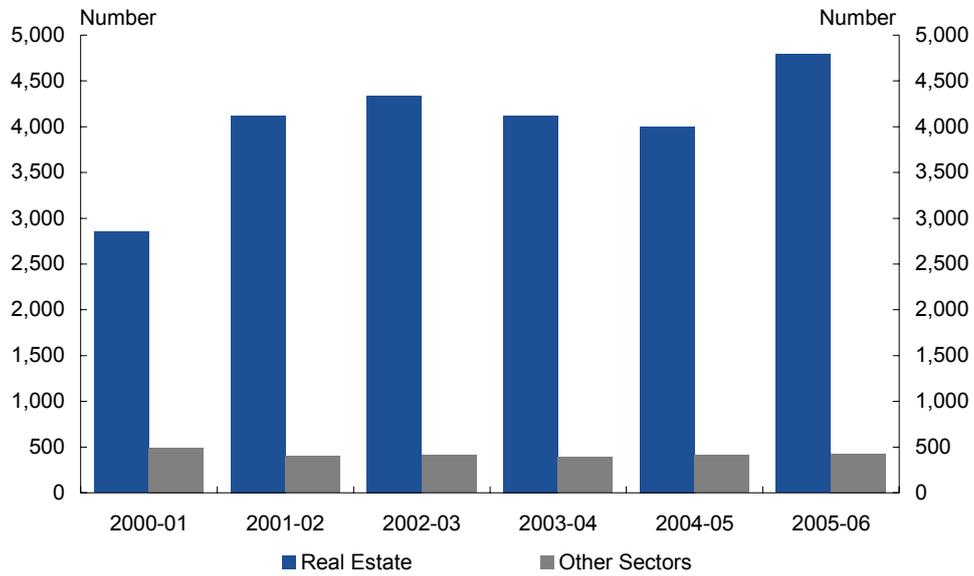
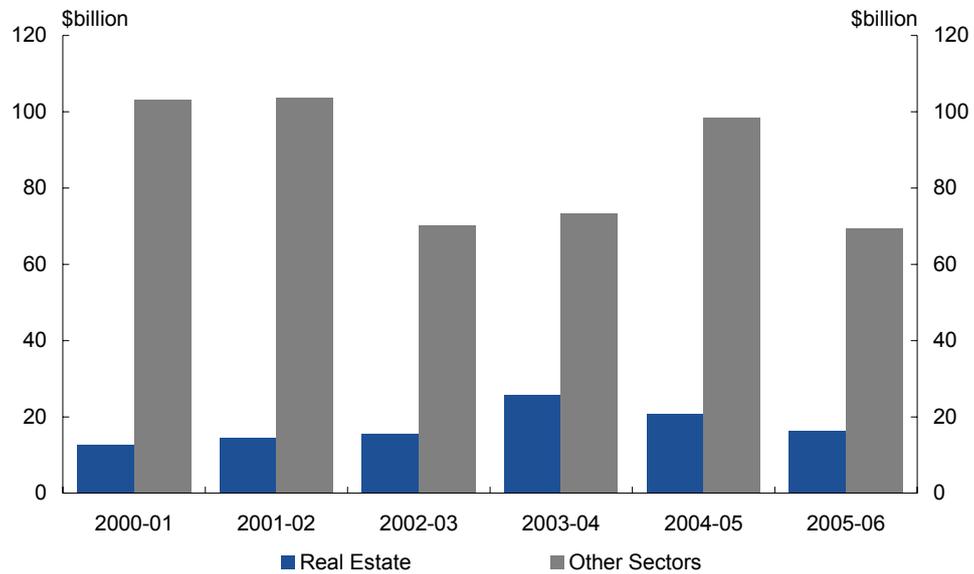


Chart 2.2: Applications decided 2000-01 to 2005-06 — proposed investment



Approvals by value

The remainder of this Chapter analyses applications approved during 2005-06 (excluding corporate reorganisations). Table 2.3 provides approvals for the last four years, by the value of the proposal. Generally, there was an increase in smaller approvals and a decrease in larger approvals during 2005-06. There was a significant increase in approvals involving proposed investment of less than \$1 million, with 21 per cent more proposals and 29 per cent higher proposed investment than 2004-05. There was a significant decrease in approvals involving proposed investment of \$1 billion or more during 2005-06, with 39 per cent fewer proposals and 58 per cent lower proposed investment than 2004-05.

Table 2.3: Total approvals by value 2002-03 to 2005-06

Value of proposal	2002-03		2003-04		2004-05		2005-06	
	No.	\$b	No.	\$b	No.	\$b	No.	\$b
< \$1 million	3,532	1.4	3,335	1.4	3,269	1.4	3,955	1.8
≥ \$1 million & < \$50 million	800	7.7	784	7.1	776	7.9	892	7.4
≥ \$50 million & < \$100 million	73	5.0	87	6.0	92	6.3	105	7.3
≥ \$100 million & < \$500 million	112	22.5	113	23.2	97	21.2	112	25.5
≥ \$500 million & < \$1 billion	17	11.6	25	15.2	26	17.8	23	16.4
≥ \$1 billion	13	37.6	19	46.1	23	64.9	14	27.2
Total	4,547	85.7	4,363	99.0	4,283	119.5	5,101	85.8

Note: Totals may not add due to rounding.
Excludes corporate reorganisations (85 in 2005-06).

Charts 2.3 and 2.4 depict total approvals by value using the data provided in Table 2.3. The large increase in the number of approvals involving proposed investment of less than \$1 million can be seen in Chart 2.3, correlating with the increase in real estate proposals shown in Chart 2.1. The large decrease in proposed investment of \$1 billion or more can be seen in Chart 2.4, correlating with the fall in proposed investment in non-real estate proposals shown in Chart 2.2.

Chart 2.3: Total approvals by value 2002-03 to 2005-06 – number of proposals

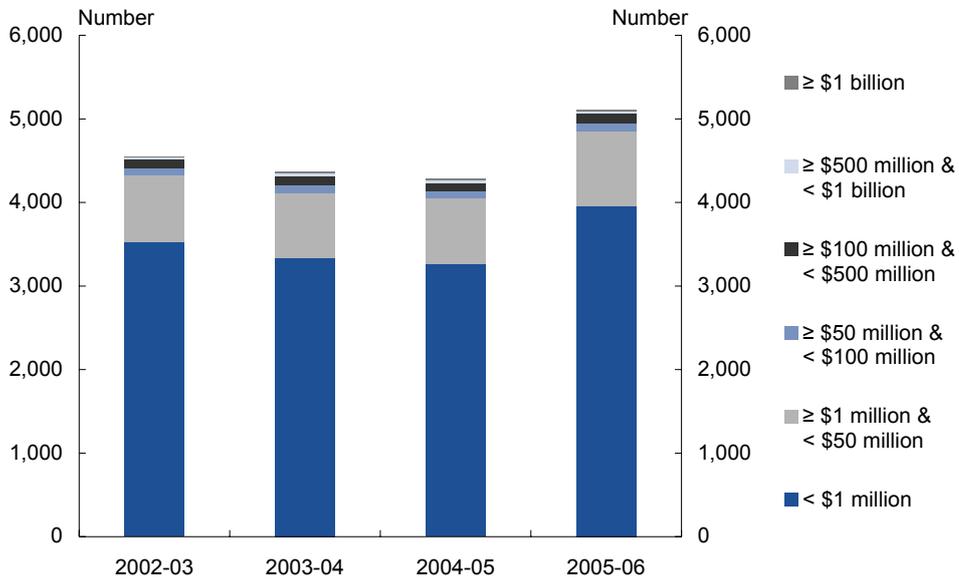
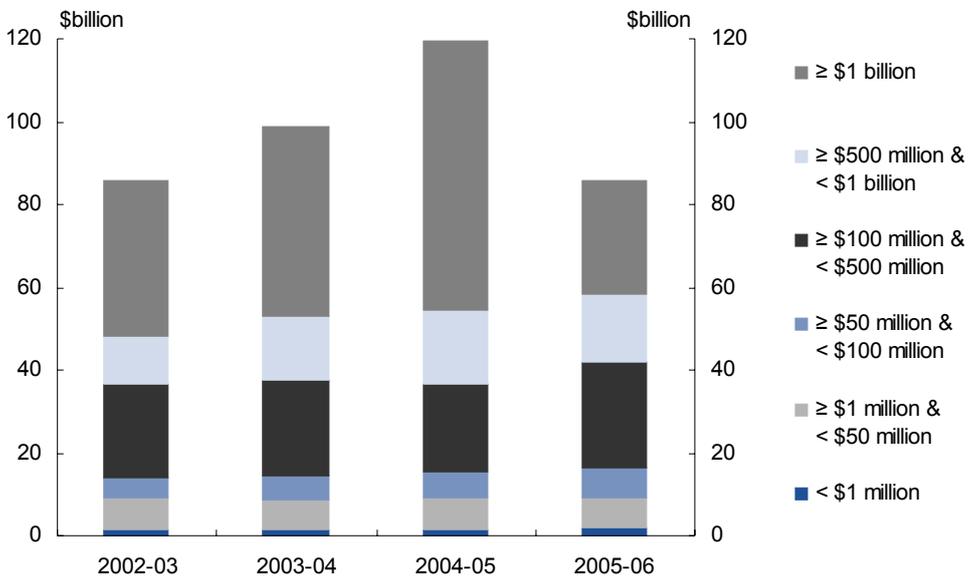


Chart 2.4: Total approvals by value 2002-03 to 2005-06 – proposed investment



Approvals by sector

Table 2.4 provides applications approved during 2005-06 by industry sector. Chart 2.5 depicts approved investment in each sector on a proportional basis by value. The majority of the 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 2005-06:

- the services sector was the largest industry sector by value, with approvals totalling \$27.1 billion (\$30.5 billion in 2004-05); and
- other significant sectors by value of proposed investment were mineral exploration and development \$19.7 billion (\$33.5 billion in 2004-05), real estate \$16.2 billion (\$20.9 billion in 2004-05) and manufacturing \$13.7 billion (\$22.1 billion in 2004-05).

Table 2.4: Total approvals by industry sector in 2005-06

Industry sector(a)	Number of approvals	Acquisition cost \$b	Development expenditure \$b	Proposed investment \$b
Agriculture, forestry & fishing	2	0.01	-	0.01
Finance & insurance	39	6.05	0.15	6.20
Manufacturing	61	13.50	0.19	13.69
Mineral exploration & development	76	12.52	7.23	19.75
Services	111	23.67	3.47	27.14
Tourism	57	2.64	0.13	2.77
Real estate(b)	4,755	13.85	2.36	16.21
Total	5,101	72.23	13.52	85.75

(a) Resource processing has been omitted since there were no applications approved in this industry sector in 2005-06.

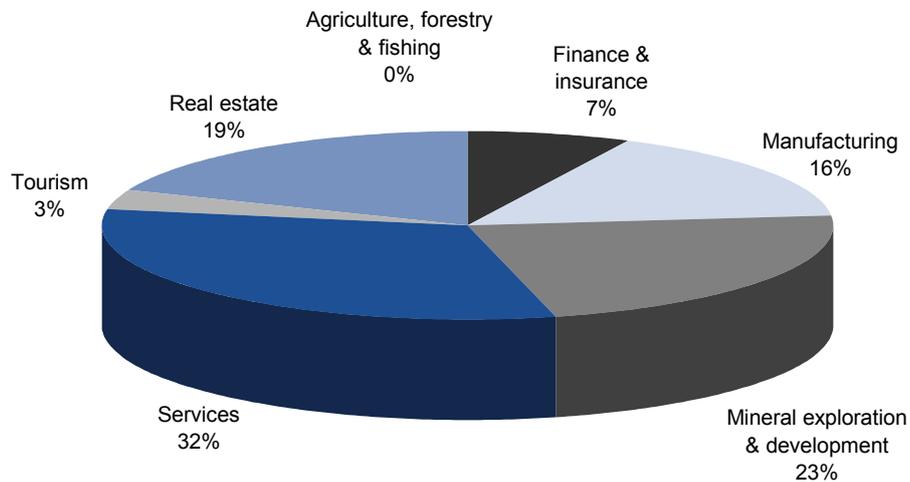
(b) Proposed investment in the real estate sector may be overstated as it includes off-the-plan approvals provided to real estate developers and approvals for annual programmes. Further details provided in section on real estate from page 29.

Note: Totals may not add due to rounding.

'-' indicates a figure of zero.

Excludes corporate reorganisations (85 in 2005-06).

Chart 2.5: Total approvals by industry sector in 2005-06 — proposed investment value



Note: Totals may not add due to rounding.
'0%' indicates a figure of less than 0.5%.

Agriculture, forestry and fishing

Proposed investment in the agriculture, forestry and fishing sector decreased significantly in 2005-06. Only two proposals were approved with a total value of \$7.9 million, compared with 11 approvals in 2004-05 with a total value of \$543.7 million (including two proposals involving a combined approved amount of \$300 million).

Finance and insurance

During 2005-06, 39 proposals were approved in the finance and insurance sector with proposed investment of \$6.2 billion, around 45 per cent lower than 2004-05 (\$11.2 billion). The number of proposals involving investment of \$100 million or more remained similar at 13 approvals (15 in 2004-05). However, only one proposal involved \$1 billion or more in 2005-06, compared with 10 proposals involving a combined approved amount of approximately \$10 billion during the previous year.

As discussed at the beginning of this chapter, the proposed acquisition cost and development expenditure is not recorded in FIMS for proposals such as lending arrangements where there is not expected to be an investment flow into Australia.

Manufacturing

Proposed investment in the manufacturing sector decreased from \$22.1 billion in 2004-05 to \$13.7 billion in 2005-06. Although the number of proposals approved increased from 54 in 2004-05 to 61 in 2005-06, the number of large proposals decreased. Only one proposal involved \$1 billion or more in 2005-06, compared with seven proposals involving a total approved amount in excess of \$13 billion during the previous year. Proposed investment in manufacturing was primarily in food, beverages and tobacco, accounting for 39 per cent (\$5.3 billion) of the proposed investment in this sector.

Table 2.5: Manufacturing sector approvals in 2005-06

Industry code	Number of approvals	Acquisition cost \$b	Development expenditure \$b	Proposed investment \$b
Chemical, petroleum & coal products	5	1.49	-	1.49
Electricity & gas	16	2.57	0.07	2.64
Food, beverages & tobacco	14	5.31	-	5.31
Machinery & equipment	13	1.45	0.12	1.57
Metal products	6	0.78	-	0.78
Non-metallic mineral products	2	1.33	-	1.33
Other(a)	5	0.56	-	0.56
Total	61	13.50	0.19	13.69

(a) Comprises: wood, wood products and furniture; textiles; and miscellaneous manufacturing.

Note: Totals may not add due to rounding.

'-' indicates a figure of zero.

Mineral exploration and development

Proposed investment in the mineral exploration and development sector decreased from \$33.5 billion in 2004-05 to \$19.7 billion in 2005-06. The decrease was attributed to two unusually large proposals approved in 2004-05: Xstrata Plc's proposed takeover and BHP Billiton's successful takeover of WMC Resources Limited, which involved a combined approved amount in excess of \$17 billion. Excluding these two proposals results in a 24 per cent increase in proposed investment in this sector from 2004-05.

During 2005-06, 76 proposals were approved, comprising 14 to establish new businesses and 62 to acquire an interest in existing businesses. There were 26 proposals involving total investment of \$100 million or more, including four for \$1 billion or more. The latter four involved combined proposed investment in excess of \$13 billion. Proposals in the iron ore industry accounted for 51 per cent of total approved investment in this sector.

Table 2.6: Mineral exploration and development sector approvals 2004-05 to 2005-06

Industry code	Acquisitions				New businesses			
	2004-05		2005-06		2004-05		2005-06	
	No.	\$b	No.	\$b	No.	\$b	No.	\$b
Metallic minerals								
- Copper-gold(a)	10	1.55	24	1.30	-	-	1	2.19
- Iron ore	4	3.72	7	6.68	2	0.11	3	3.36
- Other	9	19.13	7	0.22	-	-	4	3.65
Coal	22	1.15	9	0.21	5	6.47	3	0.05
Oil & gas	10	0.74	10	1.25	3	0.51	2	0.23
Other(b)	4	0.12	5	0.41	-	-	1	0.22
Total	59	26.40	62	10.06	10	7.10	14	9.69

(a) In previous years, gold was reported separately. Since copper and gold are often mined together, from now on they shall be reported jointly. The figures shown for 2004-05 have been amended from those previously published to reflect this.

(b) Comprises: non-metallic minerals; and services to mining and exploration.

Note: Totals may not add due to rounding.

'-' indicates a figure of zero.

Services

Proposed investment in the services industry sector remained relatively stable. During 2005-06, 112 proposals were approved (119 in 2004-05) with proposed investment of \$27.1 billion (\$30.5 billion in 2004-05). Proposals in the retail industry accounted for around 20 per cent (\$5.2 billion) of total approved investment. There were 45 proposals involving proposed investment of \$100 million or more, including seven of \$1 billion or more. The data includes three separate occasions where multiple large proposals were approved for the same target company, involving a total approved amount in excess of \$11 billion.

Table 2.7: Services sector approvals in 2005-06

Industry code	Number of approvals	Acquisition cost \$b	Development expenditure \$b	Proposed investment \$b
Construction	7	0.49	2.60	3.08
Communications	22	4.01	0.23	4.23
Health	5	0.90	-	0.90
Other community services	5	5.68	-	5.68
Property & business services	22	1.08	-	1.08
Trade				
- Retail	12	5.19	-	5.19
- Wholesale	9	1.21	-	1.21
Transport				
- Air	6	1.85	-	1.85
- Rail	3	0.84	0.33	1.18
- Road	7	0.41	0.04	0.45
- Water	2	0.56	-	0.56
- Services to transport	3	0.82	0.20	1.02
Other(a)	8	0.66	0.06	0.72
Total	111	23.67	3.46	27.14

(a) Comprises: defence; education, museum and library services; entertainment and recreational services; storage; and personal services.

Note: Totals may not add due to rounding.
'-' indicates a figure of zero.

Tourism

Total approved foreign investment in the tourism sector increased significantly from \$716 million in 2004-05 to \$2.8 billion in 2005-06. There were 57 proposals approved, of which four involved investment of \$100 million or more, including one for more than \$1 billion. Proposed investment in accommodation facilities (hotels, resorts, motels and caravan parks) accounted for 83 per cent (86 per cent in 2004-05) of the proposed investment in this sector.

Real estate

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 Australian urban land⁷ must be submitted for examination, unless explicitly exempted by the *Foreign Acquisitions and Takeovers Regulations 1989* (the Regulations, see Appendices A and E).

The number of approvals in the real estate sector increased significantly from 3,949 in 2004-05 to 4,755 in 2005-06. Proposed investment associated with these proposals decreased from \$20.9 billion in 2004-05 to \$16.2 billion in 2005-06. Table 2.8 on page 33 provides a breakdown of approved investment in real estate in 2005-06.

Residential real estate

Developed

During 2005-06, 2,406 proposals were approved for the acquisition of developed residential real estate, a significant increase from the 1,840 that were approved in 2004-05. Proposed investment approved was \$1.5 billion compared with \$1.2 billion in 2004-05. **Existing residential property** (excluding annual programmes) accounts for 95 per cent of the proposed investment. This consists primarily of temporary residents acquiring an established dwelling as their principal place of residence.⁸

There were 21 **rejections** of proposed acquisitions of **developed residential property** by temporary residents in 2005-06 (32 in 2004-05). The proposed investment involved in these rejected proposals was \$10.8 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 unreasonably exceeded the \$300,000 general limit applicable to student visa holders.

7 Australian 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.

8 Includes a small number of approvals relating to foreign companies acquiring existing residential property for company employees to reside in.

For development

In 2005-06, 2,242 proposals were approved for acquisitions of residential real estate for development (including eligible redevelopment) compared with 2,008 in 2004-05.⁹ Proposed investment approved was \$10.1 billion compared with \$13.3 billion in 2004-05. Proposed development expenditure decreased from \$3.2 billion in 2004-05 to \$1.6 billion in 2005-06.

Vacant land includes the purchase of individual blocks of land and broadacre land for residential subdivision. Development of vacant land consists primarily of single dwelling construction, and to a lesser extent integrated residential developments (such as townhouses and units). In 2005-06, 1,120 such proposals (1,079 in 2004-05) were approved, with proposed investment of \$2.3 billion (\$4.3 billion in 2004-05). 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 (see section on monitoring and compliance activity in Chapter 1).

In 2005-06, 785 proposals from *individuals* were approved under the **off-the-plan** arrangements, involving proposed investment of \$431 million (compared with 644 and \$351 million in 2004-05). These involve applicants who propose to purchase a newly constructed dwelling directly from a developer. There were also 270 proposals approved from *real estate developers* seeking advance approval (compared with 275 in 2004-05). Such approvals enable 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 on completed sales. The value of such developments fell from \$7.0 billion in 2004-05 to \$6.4 billion in 2005-06.

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 an 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.

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

Developed property for **redevelopment** involves the acquisition of existing residential property for the purpose of demolition and construction of new residential dwellings. During 2005-06, 57 proposals were approved with a total value of \$289.7 million, compared with 55 approvals in 2004-05 with a total value of \$763.9 million (including one large proposal in excess of \$500 million). Applications for redevelopment primarily involve construction of integrated residential developments (such as townhouses and units), since the policy requires such proposals to provide for an increase in the housing stock, unless the existing dwelling is at the end of its economic life (derelict or uninhabitable).

There was a decrease in the number of **rejections** relating to the proposed acquisition of **residential property for development** (including redevelopment) from 20 in 2004-05 to 16 in 2005-06. 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 the 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 commences within 12 months;
- the property proposed to be acquired for the purpose of redevelopment (involving construction of a single dwelling) was not considered to be uninhabitable, or at the end of its economic life, and consequently the proposed redevelopment would not result in an increase in 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 2005-06, there were 62 approvals to purchase developed commercial real estate (for example, shopping centres, office buildings and warehouses) involving proposed investment of \$3.6 billion (compared with 36 approvals and an investment value of \$4.5 billion in 2004-05). This data represents only part of the total foreign investment

that would have occurred in commercial real estate as there are a number of exemptions under the Regulations.

For development

During 2005-06, there were 45 approvals to purchase land for commercial development involving proposed investment of \$1.0 billion, compared with 57 proposals and proposed investment of \$1.8 billion in 2004-05.

Annual programmes

The **annual programme** arrangements allow foreign persons to apply for annual approvals for a programme of land acquisition up to a specified monetary limit, on condition that they subsequently report on the actual acquisitions and associated development. While the granting of such an approval relieves the foreign person of the requirement to seek approval for individual land acquisitions, it does not relieve them of their responsibility to comply with the requirements of the policy and the conditions of their approval, for example, purchases not exceeding the approved amount.

In 2005-06, a total of 19 annual programmes were approved with proposed investment of \$763.9 million, compared with 18 approvals and proposed investment of \$1.7 billion in 2004-05 (including two proposals with a total value of \$900 million). The majority of approvals involved the acquisition of residential real estate for development, accounting for 85 per cent of all annual programmes with proposed investment of \$648.1 million (96 per cent and \$1.6 billion in 2004-05).

During 2005-06, three annual programmes were approved to purchase land for commercial development involving proposed investment of \$23.0 million, compared with eight proposals and proposed investment of \$71.9 million in 2004-05.

A small number of annual programmes involving acquisitions of developed real estate were approved in 2005-06, six for residential and one for commercial property, with proposed investment of \$82.6 million and \$10.0 million respectively. Annual programmes for developed residential real estate primarily involve foreign companies acquiring properties to house their employees. No annual programmes for developed real estate (residential or commercial) were recorded in 2004-05.¹⁰

As with off-the-plan approvals for developers, the Board's figures for annual programmes overstate the likely extent of actual foreign purchases since the value of proposed investment associated with annual programme approvals represents the maximum amount the foreign person may acquire.

¹⁰ The previous case management system did not record annual programmes separately within the developed real estate categories.

Table 2.8: Real estate sector approvals in 2005-06

	Number of approvals	Acquisition cost \$b	Development expenditure \$b	Proposed investment \$b
Residential				
Developed(a)				
- existing residential property	2,400	1.45	-	1.45
- annual programmes	6	0.08	-	0.08
<i>Sub-total 'Developed'</i>	<i>2,406</i>	<i>1.53</i>	<i>-</i>	<i>1.53</i>
For development				
- vacant land	1,120	0.99	1.34	2.34
- off-the-plan				
individual	785	0.43	-	0.43
developer	270	6.36	-	6.36
<i>Sub-total 'off-the-plan'</i>	<i>1,055</i>	<i>6.79</i>	<i>-</i>	<i>6.79</i>
- redevelopment	57	0.09	0.20	0.29
- annual programmes	10	0.61	0.04	0.64
<i>Sub-total 'For development'</i>	<i>2,242</i>	<i>8.49</i>	<i>1.58</i>	<i>10.07</i>
Total residential	4,648	10.01	1.58	11.60
Commercial				
Developed				
- existing commercial property	61	3.60	-	3.60
- annual programmes	1	0.01	-	0.01
<i>Sub-total 'Developed'</i>	<i>62</i>	<i>3.61</i>	<i>-</i>	<i>3.61</i>
For development				
- vacant commercial property	43	0.22	0.76	0.98
- annual programmes	2	0.01	0.01	0.02
<i>Sub-total 'For development'</i>	<i>45</i>	<i>0.23</i>	<i>0.77</i>	<i>1.00</i>
Total commercial	107	3.84	0.77	4.61
Total residential & commercial	4,755	13.85	2.36	16.21

(a) Developed property for redevelopment is included as residential real estate for development.

Note: Totals may not add due to rounding.

'-' indicates a figure of zero.

Real estate by location of investment

Table 2.9 provides details of proposed investment in the the real estate sector, according to location of investment. Queensland and New South Wales were the main locations of proposed investment in real estate with 28 per cent and 27 per cent respectively of the total approved (compared with 35 per cent and 26 per cent in 2004-05). The value of proposed investment increased in Victoria and Western Australia, accounting for 14 per cent and 10 per cent respectively (compared with 8 per cent and 6 per cent in 2004-05).

There was a decrease in the value of the proposals approved that involved land acquisitions in more than one state or territory, from 22 per cent of the total value in 2004-05 to 13 per cent in 2005-06.

During 2005-06, approximately 2 per cent of approvals in the real estate sector involved the acquisition of real estate located offshore.¹¹ This reflects proposed foreign investment in Australian listed property trusts or funds, whose principal activities are to invest in foreign real estate (primarily commercial properties located in the US).

Table 2.9: Real estate sector approvals in 2005-06 – location of investment

Location	Residential		Commercial		Total
	Developed	For development	Developed	For development	
	\$b	\$b	\$b	\$b	
NSW	0.44	3.07	0.78	0.14	4.44
VIC	0.26	1.24	0.58	0.17	2.25
QLD	0.26	3.77	0.32	0.20	4.55
WA	0.34	1.08	0.23	0.01	1.66
SA	0.12	0.18	-	-	0.30
TAS	0.01	0.02	-	-	0.03
ACT	0.01	0.06	0.01	-	0.07
NT	0.00	0.00	-	0.45	0.46
Various(a)	0.08	0.65	1.38	0.02	2.13
Offshore	-	-	0.31	-	0.31
Total	1.53	10.07	3.61	1.00	16.21
Number of approvals	2,406	2,242	62	45	4,755

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

Note: Totals may not add due to rounding.

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

11 Not to be confused with offshore takeover (see section on foreign-to-foreign transactions in Chapter 3).

Approvals by country of investor

Data on proposed investment associated with approvals in 2005-06 are shown by selected country, aggregated by location of investment in Table 2.10 and by industry sector in Table 2.11. The US was once again the largest source of proposed foreign investment in Australia. The other major sources of foreign investment were Switzerland, China, the United Kingdom (UK) and Germany. Chapter 4 provides information on foreign investment stocks and flows by country.

Approved proposed investment from the US decreased from \$37.2 billion in 2004-05 to \$23.4 billion in 2005-06. This decrease was partially attributed to the higher thresholds applicable to US investors throughout the 2005-06 period – introduced on 1 January 2005, these thresholds only affected US proposed investment for half of the 2004-05 Annual Report period. Proposed investment was primarily in the services sector, accounting for 62 per cent of total US investment. Refer to Chapter 4 for further discussion on the Australia/US investment relationship.

Switzerland is recorded as a significant source of approved proposed investment in 2005-06, accounting for a total of \$14.4 billion. Ninety per cent of Swiss approvals (\$13.0 billion) involved applications from a single nominee company for targets in multiple industry sectors.

China emerged as a significant investor in 2005-06 with approvals to the value of \$7.3 billion. This proposed investment was primarily in the mineral exploration and development sector, accounting for 93 per cent of total Chinese investment, including two proposals with a total approved amount in excess of \$6 billion.

Approved proposed investment from the UK decreased significantly from \$18.1 billion in 2004-05 to \$7.1 billion in 2005-06. The majority of UK proposed investment was in the real estate, manufacturing and services sectors, together accounting for 77 per cent of total proposed UK investment. The UK was the leading source of foreign investment in real estate, providing 11 per cent of proposed investment in that sector.

Germany continued as a major foreign investor in 2005-06 accounting for \$4.3 billion of proposed investment, mainly within the services and manufacturing sectors.

Table 2.10: Approvals by country of investor in 2005-06 – location of investment

Country(a)	NSW \$m	VIC \$m	QLD \$m	WA \$m	SA \$m	TAS \$m	ACT \$m	NT \$m	Various(b) \$m	Offshore \$m	Total \$m
US	685	592	320	448	5	1	45	2	21,135	168	23,400
Switzerland	3	205	83	95	-	-	-	5	13,697	362	14,449
China(c)	84	91	2,975	3,786	51	0	4	-	223	45	7,259
UK	698	194	573	908	77	15	21	2	3,749	847	7,083
Germany	355	516	1,418	222	502	1	17	-	1,210	9	4,251
Singapore	959	71	362	260	69	1	-	21	1,438	20	3,200
Canada	62	5	13	26	2	2	1	61	2,385	50	2,607
Japan	81	33	324	221	552	-	-	-	1,161	100	2,472
Netherlands	164	56	1,321	21	12	0	6	-	372	63	2,014
South Africa	55	838	53	156	4	12	1	-	369	97	1,585
France	549	16	13	3	0	-	-	-	1,000	-	1,580
New Zealand	3	39	98	1	-	0	-	-	872	415	1,427
Hong Kong	62	44	479	44	1	110	-	-	122	11	874
Other EU	147	117	70	34	4	0	0	475	1,562	-	2,412
Other ASEAN	43	49	18	75	7	130	1	0	425	-	748
Not allocated(d)	2,167	843	2,998	397	-	-	-	-	-	-	6,404
Other(e)	284	93	165	790	14	4	5	2	558	249	2,159
<i>Sub-total</i>	<i>6,400</i>	<i>3,802</i>	<i>11,282</i>	<i>7,486</i>	<i>1,300</i>	<i>276</i>	<i>100</i>	<i>568</i>	<i>50,279</i>	<i>2,435</i>	<i>83,925</i>
Australia(f)	226	13	208	226	-	-	18	-	1,030	105	1,826
Total	6,594	3,815	11,417	7,705	1,300	277	118	568	51,420	2,539	85,751

(a) Includes overseas territories.

(b) Comprises approved proposals where the investment is to be undertaken in more than one state or territory.

(c) China excludes Special Administrative Regions and Taiwan.

(d) Off-the-plan approvals to real estate developers have been recorded as not allocated to a country because the country of investors is not known in advance.

(e) Comprises all other countries excluding Australia.

(f) 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.

Note: Totals may not add due to rounding.

‘-’ indicates a figure of zero and ‘0’ indicates a figure of less than \$0.5 million.

Table 2.11: Approvals by country of investor in 2005-06 – industry sector

Country(a)	Number of approvals(b)	Agriculture forestry & fishing		Finance & insurance		Manufacturing		Mineral exploration & development		Real estate		Services		Tourism		Total
		\$m	\$m	\$m	\$m	\$m	\$m	\$m	\$m	\$m	\$m	\$m	\$m	\$m	\$m	
US	307	-	1,036	4,299	1,236	1,201	14,047	1,581	23,400							
Switzerland	69	-	3,386	1,063	6,290	1,243	2,468	-	14,449							
China(c)	437	-	-	223	6,758	279	-	-	7,259							
UK	2,204	8	945	1,822	703	1,851	1,747	7	7,083							
Germany	109	-	51	1,103	215	766	1,741	375	4,251							
Singapore	213	-	217	36	81	1,545	1,132	189	3,200							
Canada	114	-	35	-	2,411	114	47	-	2,607							
Japan	86	-	103	1,639	254	441	22	14	2,472							
Netherlands	81	-	199	-	0	166	1,569	80	2,014							
South Africa	278	-	19	157	308	259	843	-	1,585							
France	54	-	25	5	-	71	1,475	4	1,580							
New Zealand	45	-	145	1,101	-	104	39	39	1,427							
Hong Kong	30	-	-	650	51	127	46	-	874							
Other EU	228	-	35	877	154	750	590	7	2,412							
Other ASEAN	318	-	-	300	-	388	58	2	748							
Not allocated(d)	272	-	-	-	-	6,252	-	152	6,404							
Other(e)	527	-	-	-	1,021	472	514	154	2,159							
Sub-total	5,372	8	6,196	13,273	19,482	16,026	26,337	2,603	83,925							
Australia(f)	77	-	-	414	266	183	799	164	1,826							
Total	5,449	8	6,196	13,687	19,749	16,209	27,136	2,768	85,751							

(a) Includes overseas territories.

(b) 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.

(c) China excludes Special Administrative Regions and Taiwan.

(d) Off-the-plan approvals to real estate developers have been recorded as not allocated to a country because the country of investors is not known in advance.

(e) Comprises all other countries excluding Australia.

(f) 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.

Note: Totals may not add due to rounding.

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

Chapter 3

Overview of the *Foreign Acquisitions
and Takeovers Act 1975*

Overview of the *Foreign Acquisitions and Takeovers Act 1975*

This Chapter provides an overview of the main provisions of the *Foreign Acquisitions and Takeovers Act 1975* (FATA or the Act) as at December 2006. The Act and the *Foreign Acquisitions and Takeovers Regulations 1989* (the Regulations) provide legislative support for the Government's foreign investment policy (the policy). A copy of the Act is at Appendix D, the Regulations at Appendix E and a summary of the policy at Appendix A.

Introduction

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

- acquire, or increase, a substantial shareholding¹ in, or acquire a controlling interest in the assets of, a prescribed Australian corporation valued above the relevant thresholds;² or
- acquire an interest in Australian urban land.³

The Act does not provide the Treasurer with a power to 'approve' investment proposals. Rather, it 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 raise no objections subject to conditions considered necessary to remove 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.

1 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), are in a position to control not less than 40 per centum of the voting power or hold interests in not less than 40 per centum of the issued shares, of a corporation.

2 The thresholds were increased in late 2006 following a review arising from the Australia-United States Free Trade Agreement. Information on this review is in Chapter 1 and Appendix C. US investors are subject to different thresholds which are indexed annually. For current thresholds see Appendix A.

3 Australian urban land is defined as any land on which a primary production business is not being conducted.

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 industry sectors regarded as sensitive. Ordinarily a proposal that does not meet the requirements set out in the policy would be regarded as being *prima facie*, contrary to the national interest and hence subject to rejection.

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).

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 thresholds set under the Regulations.

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 (currently \$110 per unit) or imprisonment for a period not exceeding two years, or both. A corporation may be subject to a fine not exceeding 500 penalty units.

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 the policy, but which are not subject to compulsory notification under the Act. These include offshore takeovers, acquisitions of business assets, acquisitions of shares in prescribed Australian corporations that are less than a substantial shareholding, the establishment of a new business involving an investment of \$10 million or more, and investments by a sovereign government or its entity.

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). Receipt of a valid notice activates the commencement of the 30-day statutory examination period. If the Treasurer does not take action (under sections 18, 19, 20, 21A, 22 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 issue of an Interim Order (section 22 and subsection 25(3)) which prohibits the proposal for that period.

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, irrespective of the nationality of the current owner or controller.

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 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 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.

The Act applies to acquisitions, or proposed acquisitions of, interests in 'Australian urban land' (see section 12A). Consequently, section 21A applies not only to direct purchases of Australian urban land, but also interests in such land, for example mortgage interests. It also applies to the purchase of shares in companies and units in trusts (Australian urban land corporations and trust estates), where more than half of its assets are in the form of Australian urban land, and participation in profit sharing agreements in relation to 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. All acquisitions of interests in Australian urban land must be notified under the Act, unless exempt under the Regulations.

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

Section 25 allows conditions to be applied which are considered necessary to remove 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 Australian assets or businesses which are already foreign-owned or controlled are subject to examination and action under the Act. This includes offshore takeovers. Under the Act, a transaction is considered an offshore takeover where an offshore company that holds Australian assets or conducts a business in Australia is acquired by another foreign person, and the Australian assets or businesses of the target company are valued at less than 50 per cent of its total assets.

For the Act to apply to foreign-to-foreign transactions, the Australian assets or businesses of the target company must be valued above the relevant 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 might make the transaction contrary to the national interest.

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 such transactions should ensure that the relevant agreements are conditional on foreign investment approval, or alternatively ensure they seek prior approval. This applies to underwriting arrangements, 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 acquirer 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 simply 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 holdings; 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 subsection 25(1C) of the Act. 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 the *Crimes Act 1914* and 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 or 'direct' 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 or trust are in the form of Australian urban land (that is, it is an Australian urban land corporation or trust estate), any proposed acquisition by foreign persons are subject to the Act.

Foreign government investment in Australia

Special considerations can arise in respect to proposals by foreign governments or their agencies to invest in Australia. Where such investments are not subject to the Act, the parties are still required under the 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.

Taxation

Consistent with its general welcoming view on foreign investment, Australia's tax laws are designed to ensure they do not provide an unjustifiable disincentive to investing in Australia. However, this is necessarily balanced by tax measures to prevent cross-border tax avoidance and evasion and to ensure that financing arrangements associated with foreign investment reflect normal commercial practice.

Further information regarding the application of Australia's tax laws is available on the Australian Taxation Office website, which can be accessed at www.ato.gov.au.

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 policy involving complementary multilateral, regional and bilateral engagement.

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 mechanisms, such as free trade agreements (FTAs) and investment protection and promotion agreements (IPPAs).

The division also supports the Executive Member of the Board in his role as the Australian National Contact Point (the 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 improves the wellbeing of the Australian people. 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 also 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 foreign investment has begun to emerge. The division's role in negotiating international investment agreements and the investment chapters in Australia's FTAs 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 (the 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 (MNEs) 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 WTO and APEC. The division provides advice and briefings on foreign investment issues to the Treasurer and DFAT.

OECD Investment Committee

The division represents Australia on international investment issues in the Committee. The 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.

The Committee facilitates discussion on the policy challenges facing OECD and non-OECD countries as they seek to attract investment and maximise its benefits to host societies. It represents the community of policy makers, including treaty negotiators and National Contact Point (NCP) 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 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 MNEs. 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 MNEs to sustainable development; cooperating with non-Members to mobilise investment for development; monitoring developments in international investment agreements; and monitoring FDI trends.

The Committee concluded two major projects in 2006:

- The *Policy Framework for Investment* (the PFI) was adopted by the OECD Ministerial Council on 24 May 2006. The PFI provides a checklist of policy issues for consideration by governments interested in creating an attractive investment environment. The checklist encourages policy makers to focus on ten policy areas in reaching judgments about the appropriateness of their policy settings. These are: investment policy; investment promotion and facilitation; trade policy; competition policy; tax policy; corporate governance; responsible business conduct; human resource development; infrastructure and financial sector development; and public governance.
- The OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones (WGZs) was adopted by the OECD Executive Council on 8 June 2006. The Risk Awareness Tool aims to assist investing companies from developed countries to better assess the risks they face when investing in WGZs. It provides a checklist of questions that companies may use to self-assess their procedures and practices.

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 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 *OECD Guidelines* apply to the activities of MNEs 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 Australian Government has established a NCP known as the ANCP to implement and promote the *OECD Guidelines* to Australian businesses and other interested parties. The 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 MNE's conduct where that conduct is claimed to be contrary to the *OECD Guidelines*. Such an examination is termed a specific instance and it is conducted by the relevant NCP. In accordance with the OECD's *Procedural Guidance* for NCPs, the ANCP has committed to contribute to the resolution of issues relating to the implementation of the *OECD Guidelines* in any such specific instances.

During 2005-06 the ANCP conducted a review of a specific instance lodged in June 2005 by a consortium of five Australian and overseas non-government organisations (NGOs). The specific instance alleged that, through its provision of immigration detention services to the Australian Government, GSL (Australia) Pty Ltd (a UK-controlled MNE) had breached the human rights and consumer interest provisions of the *OECD Guidelines*. The review process culminated in a mediation session through which the ANCP was able to facilitate conciliation on many of the issues raised in the submission. The ANCP successfully concluded the proceedings and released a public final statement on 6 April 2006. This statement is available on the ANCP website at www.ausncp.gov.au.

The promotional activities of the ANCP during the period have included:

- Conducting a combined business and community consultation in May 2006. The consultation focused on the Australian textiles, clothing and footwear (TCF) industry, but was attended by participants from a diverse range of organisations including representatives from business, industry groups, trade unions, NGOs and other interested parties. This was the first ANCP consultation to target a specific industry sector. Consultations provide a forum for the ANCP to promote the *OECD Guidelines*, and for interested parties to provide ideas and assistance with their promotion and raise issues relevant to the Guidelines with the ANCP. Consultations are also used to facilitate discussion on OECD working papers.

- Attending regular interdepartmental committee meetings chaired by the Attorney-General's Department on the OECD Convention against Bribery of Foreign Public Officials in International Business Transactions.
- Continuing efforts to promote the *OECD Guidelines* through embassy and consular networks. This has included the ANCP personally briefing senior DFAT officials prior to them taking up postings.
- Attending corporate social responsibility conferences hosted by other organisations (for example, the bi-annual DFAT 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

In July 2004, negotiations on multilateral rules on investment were discontinued as part of the current Doha Round of WTO trade negotiations. As a consequence, the WTO-related work of the division was largely confined to advising DFAT on investment issues relating to negotiations covering trade in services.

Asia-Pacific Economic Cooperation

Australia continues to participate actively in the work of APEC, including in relation to foreign investment. Australia's main investment interest in APEC is to encourage APEC Members to enhance the environment for investment in their economies and to improve transparency.

In the lead-up to Australia hosting APEC in 2007, the division has taken on a more active role in APEC's work by accepting the convenorship of the Investment Experts Group (IEG). Under Australia's convenorship, the IEG has developed a range of work programmes focused on promoting investment liberalisation and improving the transparency of investment regimes in the APEC region. Work projects undertaken by IEG in the last year have included:

- promoting increased coherence and convergence in the FTA investment chapters of APEC Members;
- introducing the OECD's PFI to APEC Members;
- cooperating with the United Nations Conference on Trade and Development (UNCTAD) in the area of investor-state dispute settlement; and
- commencing work on the updating and publication of the sixth APEC Investment Guidebook.

Business is an active contributor to IEG in sharing its ideas on how to improve the regional investment environment, with particular focus on behind the border impediments to investment and the need for improved investment policy coherence.

Bilateral investment negotiations

With the slow rate of progress in multilateral trade negotiations and the decision not to negotiate multilateral rules on investment in the current Doha Round, Australia has significantly increased its participation in bilateral trade and investment agreements.

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. 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 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 provide momentum to our wider multilateral trade objectives. However, they can also introduce complexity and hence new compliance costs where each agreement contains slightly different provisions and thresholds or triggers.

Free trade agreements

The coverage of modern FTAs has extended beyond trade in goods, with non-trade provisions such as investment, services, government procurement and competition policy playing important roles. In fact, research has suggested that the effects of these non-trade provisions in FTAs are more positive than the trade provisions.¹ The division, through its policy responsibility for foreign investment, is involved in the negotiation of the investment and services chapters of Australia's FTAs.

Existing agreements

Australia concluded its first FTA with New Zealand in 1983 (the Australia New Zealand Closer Economic Relations Trade Agreement, ANZCERTA). Since 2003, it has concluded FTAs with Singapore, Thailand and the United States (US).

1 R Adams, P Dee, J Gali, and G McGuire, *The Trade and Investment Effects of Preferential Trading Arrangements – Old and New Evidence*, Productivity Commission Staff Working Paper, Canberra, May 2003.

The Australia-United States Free Trade Agreement (AUSFTA) involved significant liberalisation of Australia's foreign investment framework. Further information on the rules that now apply to US investors is at Appendix A. Detailed information on Australia's existing bilateral FTAs is available at www.fta.gov.au.

Current negotiations

Investment is a significant component of Australia's current FTA negotiations with China, Malaysia and (with New Zealand) the Association of South-East Asian Nations (ASEAN).

Australia-China Free Trade Agreement negotiations

Australia and China announced their intention to commence FTA negotiations on 18 April 2005. Five negotiating rounds had taken place by June 2006.

Australia-Malaysia Free Trade Agreement negotiations

The commencement of FTA negotiations was announced on 7 April 2005. Three FTA negotiating rounds had taken place by June 2006.

Australia-New Zealand-ASEAN Free Trade Agreement negotiations

Australian, New Zealand and ASEAN leaders announced the commencement of FTA negotiations on 30 November 2004. Six rounds of negotiations had taken place by June 2006.

Australia-New Zealand Closer Economic Relations

In February 2006, Australia's Treasurer and New Zealand's Finance Minister agreed to commence negotiations on an Investment Protocol to form part of the ANZCERTA. Two rounds of negotiations had taken place by June 2006, with initial discussions focusing on technical issues relating to the structure of the proposed Protocol.

FTA feasibility studies

During 2005-06 the division participated in the ongoing feasibility study into a possible FTA between Australia and Japan. The feasibility study is expected to be completed by the end of 2006.

On 21 June 2006, Australia announced that it would consider negotiating a FTA with the six members of the Gulf Cooperation Council (GCC). This followed a decision by the United Arab Emirates (UAE) that Australia's existing bilateral FTA negotiations with them should be incorporated into broader GCC negotiations. The GCC consists of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the UAE.

Investment protection and promotion 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.

To date, Australia has IPPAs in force with Argentina, Chile, the Czech Republic, Egypt, Hong Kong, Hungary, India, Indonesia, Laos, Lithuania, Pakistan, Papua New Guinea, 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's international investment position

This section summarises trends in foreign investment in Australia and Australian investment abroad using Australian Bureau of Statistics (ABS) data.² 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 is compiled in accordance with the relevant international statistical standards promulgated by the OECD and the International Monetary Fund. This data is a measure of the actual cross-border transactions that have occurred and the level of foreign investment held at a particular time. By contrast, FIRB statistics relate to proposals submitted for approval, regardless of the source of finance or whether proposals were actually implemented. These differences are explained in Chapter 2.

Foreign investment levels³

According to ABS statistics,⁴ the stock of foreign investment in Australia at the end of June 2006 was \$1,305.8 billion. This represents an increase of \$197.4 billion (17.8 per cent) over the level at 30 June 2005. FDI accounted for \$287.8 billion of total investment, a \$19.7 billion (7.3 per cent) increase over the level at 30 June 2005.

At the same time the stock of Australian investment abroad was \$764.9 billion. This represents an increase of \$160.2 billion (26.5 per cent) over the stock at 30 June 2005.

2 As ABS data is subject to periodic revision, data included in the current report may differ from that published for the same period in previous reports.

3 Foreign investment levels were previously reported on a non-financial year basis.

4 Source: ABS Catalogue No. 5302.0 Balance of Payments and International Investment Position, Australia, June Qtr 2006.

FDI accounted for \$274.9 billion of the total stock of investment abroad, an increase of \$73.7 billion (36.6 per cent) from 30 June 2005.

Foreign direct investment levels by country

Chart 4.1 depicts recent trends in FDI flows between Australia and its five most important FDI partners: the US, the United Kingdom (UK), Japan, New Zealand and the European Union (EU) (other than the UK).

The US is Australia's single largest source of inward FDI and the most important destination for Australian FDI abroad. Almost a quarter of all FDI in Australia comes from the US and approximately 45 per cent of all Australian direct investment abroad flows to the US. At 31 December 2005, Australia had \$41.5 billion more direct investment in the US than the US had in Australia.

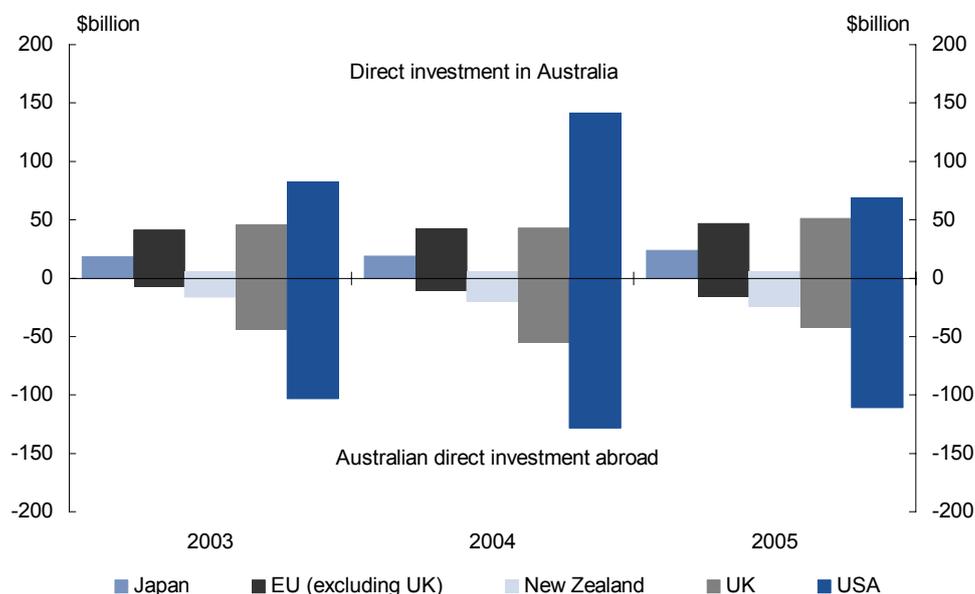
The UK has traditionally been Australia's other major source of FDI. At the end of 2005, \$51.3 billion, or approximately 18 per cent, of the level of FDI in Australia originated from the UK. The level of Australian direct investment in the UK fell slightly in 2005 to \$42.4 billion.

The level of Japanese FDI in Australia grew strongly in 2005 to \$23.8 billion. However, Australian FDI in Japan remains at a very low level.

The level of Australian direct investment in New Zealand grew significantly in 2005 to \$38.3 billion. New Zealand direct investment in Australia remained relatively steady at \$5.9 billion in 2005.

The level of EU (excluding the UK) direct investment in the Australian economy grew slightly in 2005 to \$47 billion. Australian direct investment in the EU has more than doubled over the past two years to \$16.1 billion as at the end of 2005.

Chart 4.1: Level of foreign direct investment by country at 31 December 2005



Source: ABS Catalogue No. 5352.0 International Investment Position, Australia: Supplementary Country Statistics 2005.

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. Financial derivatives are linked to a specific financial instrument or indicator, or to a particular commodity. 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 4.1 provides a breakdown of the flow of foreign investment over the past five years measured by ABS statistics. The inflow of \$136.5 billion in 2005-06 is the largest ever annual inflow of foreign investment into Australia. The outflow of \$83.1 billion in 2005-06 is the largest ever annual outflow of Australian investment abroad.

Table 4.1: Foreign investment flows 2001-02 to 2005-06

	2001-02	2002-03	2003-04	2004-05(a)	2005-06
	\$b	\$b	\$b	\$b	\$b
Australian investment abroad(b)					
Direct investment					
Equity and reinvested earnings	-26.0	-12.1	-24.5	55.6	-25.6
Other capital	4.8	4.3	-1.3	-1.4	-0.7
Portfolio investment					
Equity	-17.9	-12.4	-7.4	-11.4	-20.7
Debt	-10.1	-5.0	-15.5	-14.1	-25.9
Derivatives	-0.7	3.3	24.4	23.1	12.0
Other investment(c)	-6.2	-0.1	-14.7	-3.5	-16.6
Reserve assets	0.8	-5.6	-5.1	-8.1	-5.6
<i>Total Australian investment abroad</i>	<i>-55.3</i>	<i>-27.6</i>	<i>-44.2</i>	<i>40.1</i>	<i>-83.1</i>
Foreign investment in Australia(b)					
Direct investment					
Equity and reinvested earnings	16.3	15.6	11.6	-13.6	17.1
Other capital	5.0	5.8	-1.7	4.1	1.5
Portfolio investment					
Equity	10.7	3.3	17.5	-38.3	14.4
Debt	28.6	31.5	86.5	68.2	97.2
Derivatives	1.5	-4.3	-25.5	-20.8	-13.1
Other investment(c)	14.1	16.0	0.7	13.7	19.3
<i>Total foreign investment in Australia</i>	<i>76.2</i>	<i>67.9</i>	<i>89.0</i>	<i>13.4</i>	<i>136.5</i>
Net foreign investment	20.9	40.3	44.8	53.5	53.4

(a) The figures for 2004-05 were 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.

(b) 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.

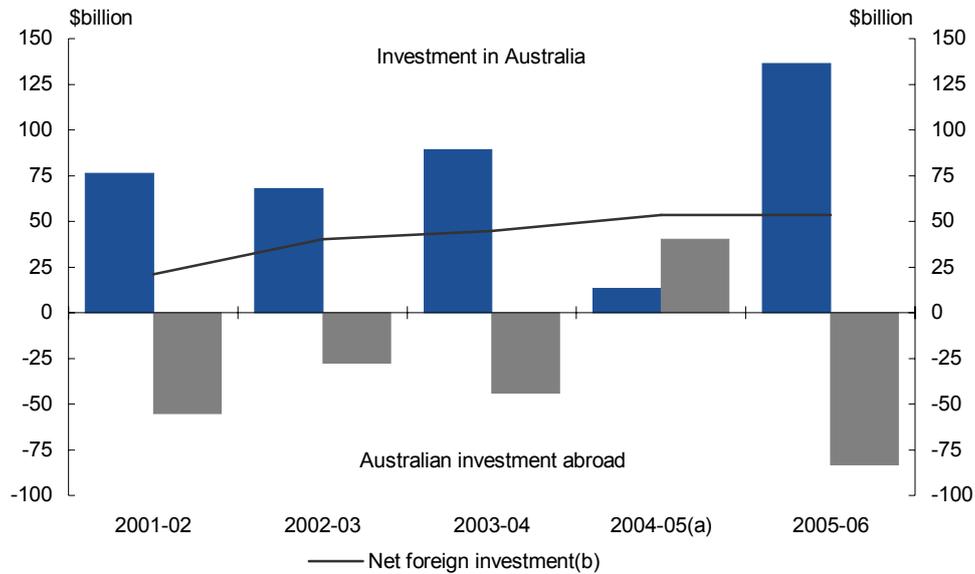
(c) Other investment includes all other investment.

Note: Figures may not add due to rounding.

Source: ABS 5302.0 Balance of Payments and International Investment Position, Australia, June Qtr 2006, Table 25 — Financial Account (a)(b).

Chart 4.2 summarises major trends in foreign investment flows using the data in Table 4.1. It indicates that Australia remains a net importer of capital.

Chart 4.2: Foreign investment flows 2001-02 to 2005-06



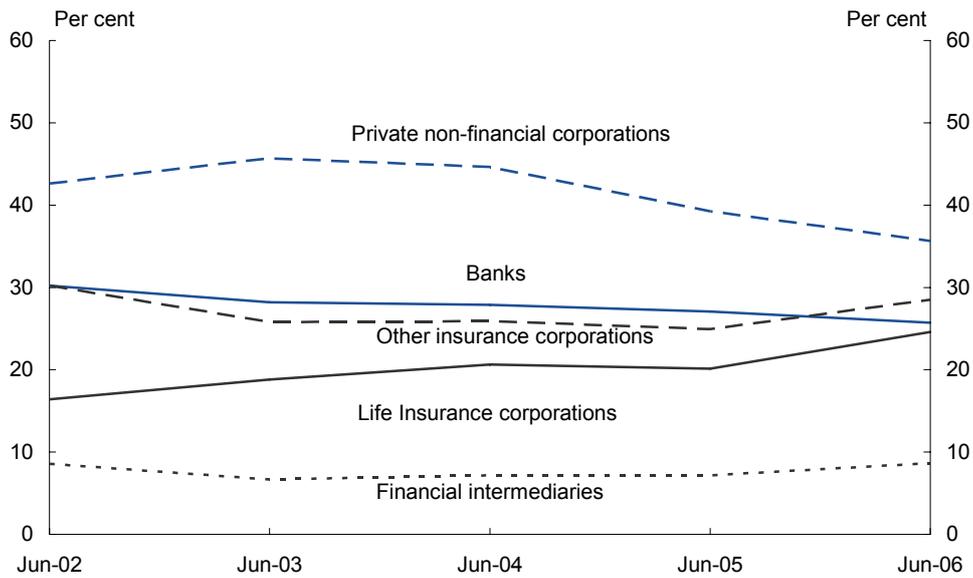
- (a) The figures for 2004-05 were significantly affected by one particular transaction whereby a major corporate reorganisation was recorded both as a transaction reducing Australian Investment Abroad and also reducing Direct Investment in Australia. The net effect of this transaction was zero.
- (b) 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 2006, Table 25 — Financial Account (a)(b).

Foreign investment by sector

Over the period 1 July 2005 to 30 June 2006, the percentage of foreign ownership of Australian equity declined for private non-financial corporations and banks and increased for financial intermediaries and life and other insurance corporations (see Chart 4.3).

**Chart 4.3: Foreign ownership of Australian equity by sector
2002-03 to 2005-06**



Source: ABS 5232.0 Financial Accounts, Australia, June quarter 2006, Tables 40 and 41 — Listed and Unlisted Shares and Other Equity Market (a).

Useful references on international investment issues

Websites

Organisation	Address
APEC: Investment Experts Group (IEG)	www.apecsec.org.sg
Attorney-General's Department	www.ag.gov.au
Australian Bureau of Statistics (ABS)	www.abs.gov.au
Australian Competition and Consumer Commission	www.accc.gov.au
ANCP for the <i>OECD Guidelines for Multinational Enterprises</i>	www.ausncp.gov.au
Australian Prudential Regulatory Authority	www.apra.gov.au
Australian Securities and Investment Commission	www.asic.gov.au
Australian Treasurer	www.treasurer.gov.au
Business and Industry Advisory Committee to the OECD	www.biac.org
ComLaw (Commonwealth Law)	www.comlaw.gov.au
Department of Foreign Affairs and Trade	www.dfat.gov.au
Foreign Investment Review Board	www.firb.gov.au
International Monetary Fund	www.imf.org
Invest Australia	www.investaustralia.gov.au
The <i>OECD Guidelines for Multinational Enterprises</i>	www.oecd.org
Online guide to Australia's Free Trade Agreements	www.fta.gov.au
Organisation for Economic Co-operation and Development (OECD)	www.oecd.org
The Treasury	www.treasury.gov.au
United Nations Conference on Trade and Development (UNCTAD)	www.unctad.org
World Trade Organization (WTO)	www.wto.org

Documents

Document title	Available at:
<i>Code of Liberalisation of Capital Movements</i>	www.oecd.org
<i>Economic Roundup</i> (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
<i>Guide to the Investment Regimes of the APEC Member Economies</i> (5th Edition)	www.apecsec.org.sg
<i>International Direct Investment Statistics Yearbook</i>	www.oecd.org
<i>OECD Code of Liberalisation of Current Invisible Operations</i>	www.oecd.org
<i>OECD Declaration on International Investment and Multinational Enterprises</i>	www.ausncp.gov.au
<i>The OECD Guidelines for Multinational Enterprises</i>	www.ausncp.gov.au
<i>Policies and International Integration: Influences on Trade and Foreign Direct Investment</i> (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
<i>The Treasury Annual Report 2005-06</i>	www.treasury.gov.au
UNCTAD Series on Issues in International Investment Agreements	www.unctad.org
UNCTAD World Investment Directory	www.unctad.org
UNCTAD World Investment Report	www.unctad.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 (the policy) is to balance these concerns against the strong economic benefits to Australia that arise from foreign investment.

3. The policy provides the framework for Government scrutiny of proposed foreign purchases of Australian businesses and real estate. The Government has the power under the *Foreign Acquisitions and Takeovers Act 1975* (the FATA) to block those proposals subject to the FATA which would result in a foreign person acquiring control of an Australian corporation or business or an interest in real estate where this is determined to be contrary to the national interest.¹ The FATA and the *Foreign Acquisitions and Takeovers Regulations 1989* provide monetary thresholds below which the relevant FATA provisions do not apply, and separate thresholds for acquisitions by US investors.² The FATA also provides a legislative mechanism for ensuring compliance with the policy.

4. In the majority of industry sectors, smaller proposals are exempt from the FATA or notification under the policy and larger proposals are approved unless determined to be contrary to the national interest. The screening process undertaken by the Foreign Investment Review Board (the Board) enables comments to be obtained from

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.

relevant parties and other Government agencies in considering whether larger or more sensitive foreign investment proposals are contrary to the national interest.

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 real estate. 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 dwellings and is not speculative in nature. The 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 its 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. 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 foreign investment proposals which are subject to the FATA or the policy or both, and hence should be notified to the Government for approval, include:

- acquisitions of substantial interests in an Australian business where the value of its gross assets, or the proposal values it above, \$100 million.³ For US investors⁴ different exemption thresholds apply:⁵ \$100 million⁶ for investments in prescribed

3 \$50 million prior to December 2006.

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*.

5 The US thresholds are subject to annual indexation.

6 \$52 million during the calendar year 2006.

Appendix A: Summary of Australia's Foreign Investment Policy

sensitive sectors⁷ or by an entity controlled by a US government, or \$871 million⁸ in any other case;

- 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;
- 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 \$200 million⁹ and represent less than 50 per cent of total assets. For US investors the \$871 million threshold applies, except for offshore takeovers involving prescribed sensitive sectors or an entity controlled by a US government, whereby a \$200 million threshold applies;
- direct investments by foreign governments and their agencies irrespective of size;
- acquisitions of interests in Australian 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 \$871 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.)

7 The AUSFTA prescribed sensitive sectors are set out in Attachment B.

8 \$831 million during the calendar year 2006.

9 \$50 million prior to December 2006.

9. A foreign person 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 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 a corporation, business or trust.*

*A **'US investor'** is a national or permanent resident of the United States of America; a US enterprise;¹⁰ or a branch of an entity located in the United States of America and carrying on business activities there.¹¹*

Examination by sector

10. Below is an outline of the policy and the examination guidelines it provides in relation to particular industry sectors which are regarded as sensitive. The majority of foreign investment proposals will fall within these guidelines. Those that do not are examined on a case-by-case basis.

11. The *FATA* applies to most examinable proposals and provides penalties for non-compliance.

10 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.

11 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.

12. The Government may raise no objections to individual investment proposals or do so subject to the parties meeting conditions imposed under the FATA. Such conditions ordinarily relate to acquisitions of real estate, primarily the time period for the development of vacant land and to second hand residential real estate being used as the acquirer's principle place of residence.

Australian urban land¹²

13. 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.

14. Proposed acquisitions of real estate for development (generally vacant land) 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 advice of the completion date and actual development expenditure.

15. Foreign persons are normally given approval to buy:

- **vacant land** for residential or commercial development, including house and land packages where construction has not commenced, subject to a condition imposed under the FATA that continuous construction commences within 12 months; and
- **new dwellings** such as house and land packages, home units and townhouses purchased 'off-the-plan' that is 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 persons.

16. Certain categories of foreign nationals, who hold a visa that permits them to reside in Australia continuously for at least the next 12 months, may be given approval to purchase **developed residential real estate** (that is, **second hand dwellings**) for use

12 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.

as their principal place of residence (that is, not for rental purposes) while in Australia. A condition of such purchases is that the dwelling 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.

17. Foreign companies, with an established substantial business in Australia, buying for named senior executives resident in Australia for periods longer than 12 months, may be eligible for approval 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, 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 not be eligible under this category where the property would represent a significant proportion of its assets in Australia.

18. Proposals by foreign persons to acquire developed residential real estate that do not fall within the above categories are subject to the FATA but are not normally approved.

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

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 ITR status.¹³

21. 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 *Foreign Investment Policy Urban Land (Real Estate)*. 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.

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

Banking

22. 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 FATA. The FSSA continues to apply.

23. 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

24. 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

25. 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

26. 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

27. 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.

Media¹⁴

28. All direct (that is, non-portfolio) proposals by foreign persons to invest in the media sector irrespective of size are subject to prior approval under the policy. Proposals involving portfolio shareholdings of 5 per cent or more must also be submitted for examination.

Broadcasting

29. 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 the 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.

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

Newspapers

31. Foreign investment in mass circulation national, metropolitan, suburban and provincial newspapers is restricted. All proposals by foreign persons 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

14 The Government has announced that it will amend the policy as it applies to the media sector following proclamation of media reform legislation expected to occur in 2007. This will involve removal of the requirements set out under the headings 'Broadcasting' and 'Newspapers', but retaining the requirements in the paragraph headed 'Media'.

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

32. Around 83 per cent of Telstra Corporation Limited (Telstra) is owned by institutional and individual investors, with the remaining approximately 17 per cent to be transferred by the Government to the Future Fund, a fund established by the Government to fund its public service superannuation liabilities. Shares transferred to the Future Fund will be held in escrow for a two year period.

33. Aggregate foreign ownership of Telstra is restricted to 35 per cent of the privatised equity (including instalment receipts) and individual foreign investors are only allowed to acquire a holding of no more than 5 per cent of the privatised equity.

Approval period

34. Approval under the 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.

35. 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.

36. 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.

37. 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

38. The information normally required to enable foreign investment proposals to be processed is set out at Attachment A. **No fees or charges** apply to applications.

39. All applications should be addressed in writing to:

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

40. The Government recognises the commercial-in-confidence sensitivity of much of the information provided to 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.

41. 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 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 Affairs, the Australian Taxation Office or the Australian Federal Police.

Further enquiries

42. Further information on the policy may be found at the Foreign Investment Review Board's webpage, www.firb.gov.au.

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

General enquiries:	02 6263 3795	<i>From overseas</i>	+61 2 6263 3795
Fax:	02 6263 2940		+61 2 6263 2940
Email:	firb@treasury.gov.au		

Attachment A

Supporting information for applications for foreign investment approval

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 forms prescribed under the *Foreign Acquisitions and Takeovers (Notices) Regulations*).

Australian urban land (real estate) acquisitions

Please refer to the separate Government policy statement applying to the acquisition of interests in Australian urban land *Foreign Investment Policy Urban Land (Real Estate)*.

Share and business asset acquisitions

Acquisitions of interests in enterprises with total assets of (or valued at) \$100 million

A Parties to the proposal

For both the purchaser and target business:

- name;
- major activities and locations;
- major subsidiaries and associated companies;
- a copy of the latest financial statements, which should include total assets, net tangible assets and pre-tax profits;
- details of ownership (including identity of ultimate or beneficial owners); and
- country of ultimate control of purchaser.

B 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.

C Consideration

- Amounts involved and the source of the funds.

D Reason(s) for the proposal

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

New business or project involving total investment (including debt) during the establishment phase of \$10 million and above

A Parties to the proposal

- Name, location and major activities of the investor; and
- A copy of the latest financial statements for the investor which should include total assets, net tangible assets and pre-tax profits.

B The proposal

- Description of proposal including the total funds to be invested, the proposed location of the investment and the purpose of the investment.

C Ownership of the proposed business

- Details of proposed beneficial ownership, voting and board representation rights, and other rights concerning management and control.

D Industry information

- A description of the industry in which the new venture will be engaged.

E Other considerations

- Information should also be provided on any patents, royalty and licensing arrangements and export franchises held by the applicant 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; and
- Describe the environmental impact, if any, of the proposal, and provide details of any environmental studies undertaken.

Attachment B

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 and regulations, media releases and policy statements and publications

Legislation and regulations, media releases and policy statements and publications

Legislation and regulations

Current

1. *Foreign Acquisitions and Takeovers Act 1975* (Act No. 92 of 1975 as amended: see Appendix D)
2. *Foreign Acquisitions and Takeovers Regulations 1989* (Statutory Rules No. 177 of 1989 as amended: see Appendix E)
3. *Foreign Acquisitions and Takeovers (Notices) Regulations* (Statutory Rules No. 226 of 1975 as amended: see Appendix E)

Historical

1. *Companies (Foreign Take-overs) Act 1973*, No. 199 of 1973 – **December 1973**.
2. *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 – Qantas Offer – **14 December 2006.**
2. Statement by the Treasurer, The Hon Peter Costello MP – Foreign Investment: Brambles Industries Limited – **9 November 2006.**
3. Statement by the Treasurer, The Hon Peter Costello MP – Foreign Investment Proposal: Thales Australia Holdings Pty Limited – Acquisition of remaining 50 per cent interest in ADI Limited – **12 October 2006.**
4. Statement by the Treasurer, The Hon Peter Costello MP – Reappointment of member of Foreign Investment Review Board [Ms Lynn Wood] – **29 April 2005.**
5. 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.**
6. 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.**
7. 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.**
8. 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.**
9. 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.**
10. Statement by the Treasurer, The Hon Peter Costello MP – Xstrata Plc – No objections raised to the Acquisition of MIM Holdings Ltd – **28 May 2003.**
11. Statement by the Treasurer, The Hon Peter Costello MP – Foreign Investment Review Board: Re-appointment of Mr John Phillips, AM – **24 April 2002.**
12. 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.**
13. Statement by the Treasurer, The Hon Peter Costello MP – Singapore Telecommunications Limited – Acquisition of Cable & Wireless Optus Limited – **28 August 2001.**

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

14. 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**.
15. Statement by the Treasurer, The Hon Peter Costello MP – Foreign Investment Approval of Brambles Industries Limited – GKN Plc – **26 July 2001**.
16. Statement by the Treasurer, The Hon Peter Costello MP – Foreign Investment Approval of BHP Limited-Billiton Plc Merger – **4 June 2001**.
17. 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**.
18. 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**.
19. Statement by the Treasurer, The Hon Peter Costello MP – Foreign Investment Review Board: Re-appointment of Ms Lynn Wood – **4 April 2000**.
20. Statement by the Assistant Treasurer, Senator The Hon Rod Kemp – Virgin receives Foreign Investment Approval – **7 December 1999**.
21. Statement by the Treasurer, The Hon Peter Costello MP – Foreign Investment Policy Changes – **3 September 1999**.
22. Statement by the Treasurer, The Hon Peter Costello MP – Foreign Investment Review Board: Appointment of The Hon Chris Miles – **8 June 1999**.
23. 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**.
24. 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**.
25. Statement by the Treasurer, The Hon Peter Costello MP – Foreign Investment Review Board: Appointment of Mr John Phillips AM as Chairman – **9 April 1997**.
26. 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**.

27. 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**.
28. Statement by the Treasurer, The Hon Peter Costello MP – Uranium Sector – **19 November 1996**.
29. Statement by the Treasurer, The Hon Peter Costello MP – Rationalisation of Notification Thresholds for Portfolio Investments in the Media Sector – **18 September 1996**.
30. 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**.
31. Statement by the Treasurer, The Hon Ralph Willis MP – Foreign Investment Review Board: Appointment of Ms Lynn Wood – **4 April 1995**.
32. Statement by the Treasurer, The Hon John Dawkins MP – Foreign Investment Policy: Mass Circulation Newspapers – **20 April 1993**.
33. 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**.
34. Statement by the Treasurer, The Hon John Dawkins MP – Economic Statement: Foreign Investment Policy Changes – **26 February 1992**.
35. Statement by the Treasurer, The Hon John Kerin MP – Foreign Investment in the Print Media – **10 October 1991**.
36. Statement by the Treasurer, The Hon John Kerin MP – Foreign Investment Policy: Integrated Tourism Resorts – **25 July 1991**.
37. 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**.
38. Statement by the Treasurer, The Hon Paul Keating MP – Foreign Investment Policy: New Oil and Gas Developments – **20 January 1988**.
39. Statement by the Treasurer, The Hon Paul Keating MP – Foreign Investment Policy: Developed Residential Real Estate – **29 September 1987**.
40. Statement by the Treasurer, The Hon Paul Keating MP – Thin Capitalisation and Corporate Restructures in relation to Foreign Investment Policy – **30 April 1987**.

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

41. Statement by the Treasurer, The Hon Paul Keating MP – Further Liberalisation of Foreign Investment Policy – **30 April 1987**.
42. Statement by the Treasurer, The Hon Paul Keating MP – Foreign Investment Policy Relaxations – **28 July 1986**.
43. Statement by the Acting Treasurer, The Hon Chris Hurford MP – Economic and Rural Policy Statement – **15 April 1986**.
44. Statement by the Acting Treasurer, The Hon Chris Hurford MP – Review of Foreign Investment Policy – **29 October 1985**.
45. Statement by the Treasurer, The Hon Paul Keating MP – New Banking Authorities – **27 February 1985**.
46. Statement by the Treasurer, The Hon Paul Keating MP – Foreign Investment Policy and Stockbroking – **18 December 1984**.
47. Statement by the Treasurer, The Hon Paul Keating MP – Participation in Banking in Australia and Other Issues of Financial Deregulation – **10 September 1984**.
48. Statement by the Treasurer, The Hon Paul Keating MP – Foreign Investment Policy and Stockbroking – **18 April 1984**.
49. Statement by the Treasurer, The Hon Paul Keating MP – Review of Foreign Investment Policy – **20 December 1983**.

Publications

- Foreign Investment Review Board annual reports: 1977 to 2005.
- 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 (December 2004) :
 - C1 – Application for approval to purchase residential real estate by a company or a trust;
 - D2 – Application by vendor/developers for prior approval to sell up to 50 per cent of residential dwellings in a new complex; and
 - R3 – Application for approval to purchase residential real estate in individual names.
- Statutory notices:
 - Form 1 – Notice under section 25;
 - Form 2 – Notice under section 26; and
 - Form 3 – Notice under section 26A.
- FIRB service charter.
- Buying a home in Australia (pamphlet: September 2003).
- Advanced off-the-plan sales reporting template for developers (January 2006).

The current versions of guidelines, application forms, statutory notices and the FIRB service charter, as well as annual reports (from 1996), are available on the Foreign Investment Review Board's website at www.firb.gov.au.

The residential real estate C1 and R3 application forms may be filled in online through the Foreign Investment Online Application system (FIOLA). The relevant form and section 26A statutory notice must be printed, signed and forwarded with supporting documentation via email, fax or post (see Appendix G). The 30-day statutory examination period commences upon receipt of the valid statutory notice.

Appendix C

**Chronology of
policy measures**

Chronology of policy measures

November 2006

Following a review flowing from a commitment made by Australia under the Australia-United States Free Trade Agreement, the reforms listed below have been made to Australia's foreign investment screening arrangements.

1. As of 2 December 2006 the FATA's general asset value threshold was raised from \$50 million to \$100 million.¹ A \$100 million threshold now applies to the sensitive sectors for US investors.
2. As of 2 December 2006 the threshold for offshore takeovers was raised from \$50 million to \$200 million.¹ This threshold applies where the target is a foreign corporation whose Australian assets account for less than 50 per cent of its total assets.
3. As of 18 November 2006 foreign custodians are exempt from the FATA where they acquire interests in shares in relevant corporations and interests in Australian urban land when only acting at the direction of clients. In relation to such holdings, foreign beneficiaries (clients) remain subject to the FATA and foreign custodians remain subject to the FATA where they are not acting at the direction of their clients.

13 July 2006

The Government announced that it is proposing to remove elements of the Government's foreign investment policy that impose foreign ownership restrictions on both regional/suburban and metropolitan newspapers. The changes announced by the Government are expected to come into effect upon proclamation of the applicable amending legislation in 2007.

1 January 2005

US investor specific thresholds agreed under the Australia-United States Free Trade Agreement came into effect. The initial thresholds of \$800 million and \$50 million are indexed annually. The latter threshold has been affected by the reforms announced in November 2006. For current US investor thresholds, see Appendix A.

May 2004

The Australia-United States Free Trade Agreement was signed in May 2004 and came into effect on 1 January 2005. A number of changes were made to Australia's foreign

¹ Different thresholds apply to US investors (see Appendix A).

investment policy as it applies to US investors only through amendments to the FATA and the *Foreign Acquisitions and Takeovers Regulations 1989* (see 1 January 2005).

30 March 2004

The Foreign Acquisitions and Takeovers Regulations 2004 (No. 1) provided a mechanism to exempt from the FATA 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. This has been superseded by the exemption for foreign custodians introduced in November 2006.

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 Regulations. These included changes to the thresholds that:

- increased the threshold for foreign investment in existing businesses from \$5 million (\$3 million for rural businesses) to \$50 million (superseded by a \$100 million threshold as of 1 December 2006);
- increased the 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 (superseded by a \$200 million threshold as of 1 December 2006); and

- increased the 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). For US investors, this threshold was superseded as of 1 January 2005.

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 FATA. 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 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 threshold that applies to portfolio investments by foreign interests in the media sector. This change rationalised the 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 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 thresholds where the relevant total assets/total investment falls below \$50 million. 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 (see 10 September 1999 and November 2006 for announcements that affect some of these thresholds);

- 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 FATA. 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 1975*, 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 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, stockbroking 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 1 January 2005¹
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

¹ The latest compilation of the Act can be accessed via ComLaw (Commonwealth Law) at
www.comlaw.gov.au.

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Notes

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; or
- (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.

Notes to the *Foreign Acquisitions and Takeovers Act 1975*

Note 1

The *Foreign Acquisitions and Takeovers Act 1975* as shown in this compilation comprises Act No. 92, 1975 amended as indicated in the Tables below.

All relevant information pertaining to application, saving or transitional provisions prior to 24 November 2000 is not included in this compilation. For subsequent information see Table A.

Table of Acts

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
<i>Foreign Takeovers Act 1975</i>	92, 1975	28 Aug 1975	1 Jan 1976 (see <i>Gazette</i> 1975, No. S267)	

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Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
<i>Foreign Takeovers Amendment Act 1976</i>	93, 1976	20 Sept 1976	Ss. 1, 2, 3(2), 5, 9, 11 and 12: Royal Assent Remainder: 1 Jan 1976	Ss. 11 and 12
<i>Jurisdiction of Courts (Miscellaneous Amendments) Act 1979</i>	19, 1979	28 Mar 1979	Parts II–XVII (ss. 3–123): 15 May 1979 (see <i>Gazette</i> 1979, No. S86) Remainder: Royal Assent	S. 124
<i>Commonwealth Functions (Statutes Review) Act 1981</i>	74, 1981	18 June 1981	Part XII (ss. 185–187): Royal Assent (a)	—
<i>Foreign Takeovers Amendment Act 1989</i>	14, 1989	13 Apr 1989	1 Aug 1989 (see <i>Gazette</i> 1989, No. S240)	S. 32
<i>Migration Legislation Amendment Act 1994</i>	60, 1994	9 Apr 1994	S. 85: 1 Sept 1994 (b)	—
<i>Crimes and Other Legislation Amendment Act 1997</i>	20, 1997	7 Apr 1997	Schedule 2 (item 5): Royal Assent (c)	—
<i>Company Law Review Act 1998</i>	61, 1998	29 June 1998	Schedule 4 (item 10): 1 July 1998 (see <i>Gazette</i> 1998, No. S317) (d)	—
<i>Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000</i>	137, 2000	24 Nov 2000	Ss. 1–3 and Schedule 1 (items 1, 4, 6, 7, 9–11, 32): Royal Assent Remainder: 24 May 2001	Sch. 2 (items 418, 419) [see Table A]
<i>Treasury Legislation Amendment (Application of Criminal Code) Act (No. 1) 2001</i>	31, 2001	28 Apr 2001	Ss. 1–3, Schedule 1 (items 1–4) and Schedule 2: Royal Assent Schedule 1 (items 171, 172): 18 Jan 2001 (see s. 2(2)) Remainder: 15 Dec 2001 (see s. 2(4))	—
<i>US Free Trade Agreement Implementation Act 2004</i>	120, 2004	16 Aug 2004	Schedule 5: 1 Jan 2005	—

(a) The *Foreign Acquisitions and Takeovers Act 1975* was amended by Part XII (sections 185–187) only of the *Commonwealth Functions (Statutes Review) Act 1981*, subsection 2(1) of which provides as follows:

- (1) Parts I, IV, IX, X, XI, XII, XIII, XVII (other than sections 220, 221, 222, 223, 225, 226, 227, 228, and 230), XX, XXI, XXII and XXIII shall come into operation on the day on which this Act receives the Royal Assent.

Appendix D: *Foreign Acquisitions and Takeovers Act 1975*

- (b) The *Foreign Acquisitions and Takeovers Act 1975* was amended by section 85 only of the *Migration Legislation Amendment Act 1994*, subsection 2(3) of which provides as follows:
- (3) The remaining provisions of this Act commence immediately after the commencement of section 3 of the *Migration Reform Act 1992*.
- Section 3 commenced on 1 September 1994.
- (c) The *Foreign Acquisitions and Takeovers Act 1975* was amended by Schedule 2 (item 5) only of the *Crimes and Other Legislation Amendment Act 1997*, subsection 2(1) of which provides as follows:
- (1) Subject to subsection (2), this Act commences on the day on which it receives the Royal Assent.
- (d) The *Foreign Acquisitions and Takeovers Act 1975* was amended by Schedule 4 (item 10) only of the *Company Law Review Act 1998*, subsection 2(2) of which provides as follows:
- (2) Subject to subsection (3), section 3 and Schedules 1, 2, 3 and 4 commence on a day to be fixed by Proclamation.

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Title	rs. No. 14, 1989
Part I	
S. 1	am. No. 14, 1989
S. 3	am. No. 93, 1976; No. 19, 1979
S. 4	am. No. 14, 1989
S. 5	am. No. 93, 1976; No. 74, 1981; No. 14, 1989; No. 61, 1998; No. 120, 2004
S. 5A	ad. No. 14, 1989 am. No. 60, 1994
Ss. 6, 7	am. No. 14, 1989
S. 8	am. No. 93, 1976
S. 9	am. No. 14, 1989
S. 9A	ad. No. 14, 1989
Ss. 12A–12C	ad. No. 14, 1989
S. 13	am. No. 14, 1989
S. 13A	ad. No. 14, 1989
S. 13B	ad. No. 14, 1989 am. No. 120, 2004
Ss. 13C, 13D	ad. No. 14, 1989
S. 15	am. No. 93, 1976
Part IA	
Part IA	ad. No. 120, 2004
Ss. 17A–17H	ad. No. 120, 2004
Part II	
Heading to Part II	am. No. 14, 1989
S. 21A	ad. No. 14, 1989
Ss. 22–24	am. No. 14, 1989
S. 25	am. No. 14, 1989; No. 31, 2001
S. 26	rs. No. 93, 1976 am. No. 74, 1981; No. 14, 1989; No. 31, 2001
S. 26A	ad. No. 14, 1989 am. No. 31, 2001
S. 27	am. No. 14, 1989
S. 28	rs. No. 93, 1976
S. 29	rep. No. 93, 1976
Part III	
S. 30	am. No. 14, 1989; No. 31, 2001
S. 32	am. No. 14, 1989 rep. No. 31, 2001
S. 33	rep. No. 20, 1997
S. 34	rep. No. 14, 1989
S. 35	am. No. 14, 1989
S. 36	am. No. 14, 1989; No. 31, 2001
S. 36A	ad. No. 14, 1989 rep. No. 137, 2000

Appendix D: *Foreign Acquisitions and Takeovers Act 1975*

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
S. 38.....	rs. No. 93, 1976
S. 38A	ad. No. 14, 1989

Table A

Application, saving or transitional provisions

Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences)
Act 2000 (No. 137, 2000)

Schedule 2

418 Transitional—pre-commencement offences

- (1) Despite the amendment or repeal of a provision by this Schedule, that provision continues to apply, after the commencement of this item, in relation to:
 - (a) an offence committed before the commencement of this item; or
 - (b) proceedings for an offence alleged to have been committed before the commencement of this item; or
 - (c) any matter connected with, or arising out of, such proceedings;as if the amendment or repeal had not been made.
- (2) Subitem (1) does not limit the operation of section 8 of the *Acts Interpretation Act 1901*.

419 Transitional—pre-commencement notices

If:

- (a) a provision in force immediately before the commencement of this item required that a notice set out the effect of one or more other provisions; and
- (b) any or all of those other provisions are repealed by this Schedule; and
- (c) the first-mentioned provision is amended by this Schedule;

the amendment of the first-mentioned provision by this Schedule does not affect the validity of such a notice that was given before the commencement of this item.

Appendix E

Foreign Acquisitions and Takeovers Regulations 1989

*Foreign Acquisitions and Takeovers (Notices)
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 13 December 2006¹
taking into account amendments up to SLI 2006 No. 364

The text of any of those amendments not in force
on that date is appended in the Notes section

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

¹ The latest compilation of the Regulations can be accessed via ComLaw (Commonwealth Law) at www.comlaw.gov.au.

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Notes

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 in the business of providing custodian services to other persons in relation to the holding of shares.

2B Kind of interest

For paragraph 2A (a), the interest is an interest in a share:

- (a) in:
 - (i) a prescribed corporation to which paragraph 18 (1) (a) of the Act applies; or
 - (ii) a holding corporation of a prescribed corporation to which paragraph 18 (1) (a) of the Act applies; and
- (b) in which an equitable interest is held by a person that is not the holder of the legal interest in the share; and

- (c) in which the holder of the legal interest in the share exercises voting rights associated with the interest in the share only at, or in accordance with, the direction of:
 - (i) another person that is providing custodian services to a person in relation to the holding of the legal interest; or
 - (ii) the holder of an equitable interest in the share that is receiving custodian services that are related to that interest.

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

- (iia) 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;
- (v) where the following circumstances apply:
 - (i) the foreign person is a corporation;
 - (ii) the foreign person is in the business of providing custodian services to other persons in relation to the holding of interests in Australian urban land;
 - (iii) the foreign person acquires the interest in Australian urban land in the course of the foreign person's business;
 - (iv) the foreign person exercises rights associated with the interest only at, or in accordance with, the direction of:
 - (A) another person that is providing custodian services to a person in relation to the holding of the legal interest in the Australian urban land; or
 - (B) the holder of an equitable interest in the interest in the Australian urban land that is receiving custodian services that are related to that interest.

4 Prescribed corporations — value of assets of foreign corporation

- (1) For paragraph 13 (1) (d) of the Act, the amount of \$200 000 000 is prescribed.
- (2) For paragraph 13 (1) (e) of the Act, the amount of \$200 000 000 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 \$100 000 000 is prescribed.
- (2) For subparagraph (b) (ii) of the definition of *exempt corporation* in subsection 13A (4) of the Act, the amount of \$100 000 000 is prescribed.
- (3) For paragraph (a) of the definition of *exempt business* in subsection 13A (4) of the Act, the amount of \$100 000 000 is prescribed.
- (4) For paragraph (b) of the definition of *exempt business* in subsection 13A (4) of the Act, the amount of \$100 000 000 is prescribed.

6 Asset thresholds for exempt foreign investments in prescribed corporations etc — prescribed foreign investors [see Note 2]

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)	(a) For the calendar year 2006 — \$52 000 000; or (aa) For the calendar year 2007 — \$100 000 000; or (b) For any other calendar year — the amount worked out under regulation 13

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Item	Provision	Amount
2	paragraph 17B (1) (c)	(a) For the calendar year 2006 — \$52 000 000; or (aa) For the calendar year 2007 — \$100 000 000; or (b) For any other calendar year — the amount worked out under regulation 13
3	paragraph 17B (2) (b)	(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)	(a) For the calendar year 2005 — \$800 000 000; or (b) For any other calendar year — the amount worked out under regulation 13
5	subparagraph 17B (3) (a) (ii)	(a) For the calendar year 2006 — \$52 000 000; or (aa) For the calendar year 2007 — \$100 000 000; or (b) For any other calendar year — the amount worked out under regulation 13

Item	Provision	Amount
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 2006 — \$52 000 000; or (aa) For the calendar year 2007 — \$100 000 000; or (b) For any other calendar year — the amount worked out under regulation 13
2	paragraph 17C (1) (b)	(a) For the calendar year 2006 — \$52 000 000; or (aa) For the calendar year 2007 — \$100 000 000; 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 2006 — \$52 000 000; or (aa) For the calendar year 2007 — \$100 000 000; 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 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 relevant 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:

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:

$$\frac{\text{existing amount} \times \text{latest GDP implicit price deflator value}}{100}$$

(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.

Notes to the *Foreign Acquisitions and Takeovers Regulations 1989*

Note 1

The *Foreign Acquisitions and Takeovers Regulations 1989* (in force under the *Foreign Acquisitions and Takeovers Act 1975*) as shown in this compilation comprise Statutory Rules 1989 No. 177 amended as indicated in the Tables below.

Under the *Legislative Instruments Act 2003*, which came into force on 1 January 2005, it is a requirement for all non-exempt legislative instruments to be registered on the Federal Register of Legislative Instruments. From 1 January 2005 the Statutory Rules series ceased to exist and was replaced with Select Legislative Instruments (SLI series). Numbering conventions remain the same, ie Year and Number.

Table of Instruments

Year and number	Date of notification in <i>Gazette</i> or FRLI registration	Date of commencement	Application, saving or transitional provisions
1989 No. 177	6 July 1989	1 Aug 1989 (see <i>Gazette</i> 1989, No. S240)	
1991 No. 302	30 Sept 1991	30 Sept 1991	—
1994 No. 295	31 Aug 1994	1 Sept 1994	—
1995 No. 416	19 Dec 1995	19 Dec 1995	—
1999 No. 199	10 Sept 1999	10 Sept 1999	—
2004 No. 49	30 Mar 2004	30 Mar 2004	—
2004 No. 316	11 Nov 2004	1 Jan 2005 (see r.2)	—
2004 No. 401	23 Dec 2004	1 Jan 2005 (see r.2)	—
2006 No. 286	17 Nov 2006 (see F2006L03741)	18 Nov 2006	—
2006 No. 316	1 Dec 2006 (see F2006L03836)	2 Dec 2006	—
2006 No. 364	13 Dec 2006 (see F2006L04021)	14 Dec 2006	—

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
R. 1	rs. 1999 No. 199
Heading to r. 2.....	rs. 2004 No. 316
R. 2	am. 1995 No. 416; 1999 No. 199; 2004 No. 316
R. 2AA.....	ad. 2004 No. 316
R. 2AB.....	ad. 2004 No. 316
R. 2A.....	ad. 2004 No. 49 am. 2006 No. 286
R. 2B.....	ad. 2004 No. 49 rs. 2006 No. 286
R. 2C.....	ad. 2004 No. 49 rep. 2006 No. 286
R. 3	am. 1991 No. 302; 1994 No. 295; 1995 No. 416; 1999 No. 199; 2004 Nos. 49 and 316; 2006 No. 286
R. 4	ad. 1999 No. 199 am. 2006 No. 316
R. 5	ad. 1999 No. 199 am. 2006 No. 316
R. 6	ad. 2004 No. 316 am. 2006 No. 316
R. 7	ad. 2004 No. 316 am. 2006 No. 364
R. 8	ad. 2004 No. 316
R. 9	ad. 2004 No. 316
R. 10	ad. 2004 No. 316
R. 11	ad. 2004 No. 316 am. 2004 No. 401
R. 12	ad. 2004 No. 316
R. 13	ad. 2004 No. 316 am. 2006 No. 316

Note 2

Regulation 6 — Schedule 1 (item 1) of the *Foreign Acquisitions and Takeovers Amendment Regulations 2006* (No. 3) provides as follows:

[1] Regulation 6, table, item 2, column 3, paragraph (a)

omit

\$100 000 000

insert

\$200 000 000

The proposed amendment was misdescribed and is not incorporated in this compilation.



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 2000²
taking into account amendments up to SR 1989 No. 197

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

² The version shown here is an edited version. The latest full compilation of the Regulations can be accessed via ComLaw (Commonwealth Law) at www.comlaw.gov.au.

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

Schedule *[Omitted]*

Notes

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.

Schedule [Omitted]

Notes to the Foreign Acquisitions and Takeovers Regulations 1989

Note 1

The Foreign Acquisitions and Takeovers Regulations 1989 (in force under the *Foreign Acquisitions and Takeovers Act 1975*) as shown in this compilation comprise Statutory Rules 1989 No. 177 amended as indicated in the Tables below.

Table of Statutory Rules

Year and number	Date of notification in Gazette	Date of commencement	Application, saving or transitional provisions
1975 No. 226	30 Dec 1975	1 Jan 1976 (see r. 2 and Gazette 1975, No. S267)	
1976 No. 203	23 Sept 1976	Rr. 1 and 3: 1 Jan 1976 Remainder: 23 Sept 1976	—
1989 No. 178	6 July 1989	6 July 1989	R. 1 (as am. by 1989 No. 197)
as amended by			
1989 No. 197	31 July 1989	1 Aug 1989	—

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
R. 1	am. 1989 No. 178
Rr. 3, 4	am. 1989 No. 178
R. 6	rs. 1976 No. 203 am. 1989 No. 178
R. 8	am. 1989 No. 178
Schedule	am. 1976 No. 203 rs. 1989 No. 178

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

Executive member of the Foreign Investment Review Board

The General Manager of Treasury's Foreign Investment and Trade Policy Division, Mr Patrick Colmer, performs the role of the Executive member of the Board. His phone number is 02 6263 3763.

Foreign investment proposals

Application lodgment

Application forms (C1, R3, and D2) and statutory notices (sections 25, 26, and 26A) are available on the Foreign Investment Review Board's website at www.firb.gov.au. The 30 day statutory examination period, where applicable, commences upon receipt of a valid statutory notice.

The residential real estate C1 and R3 application forms may be filled in online through the Foreign Investment Online Application system (FIOLA). The relevant form and section 26A statutory notice must be printed, signed and forwarded with supporting documentation for the application to be valid.

Applications may be forward by email, fax or post.

Email: firb@treasury.gov.au

Fax: 02 6263 2940

Tel: 02 6263 3353

Postal applications should be addressed to:

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

General enquiries

The Foreign Investment Review Board website (www.firb.gov.au) includes guidelines relating to Australia's foreign investment policy, application forms and statutory notices, and responses to frequently asked questions.

Written enquiries may be forward by email, fax or post as shown above under 'Application lodgment'.

General enquiries may also be made by calling 02 6263 3795 (9:00 am – 12:30 pm and 1:30 pm – 5:00 pm AEST, Monday to Friday, excluding public holidays).

Foreign Investment and Trade Policy Division

Foreign investment policy

The **Domestic Investment Unit** is responsible for the management of foreign investment applications and providing advice on the Government's foreign investment policy and the operation of the *Foreign Acquisitions and Takeovers Act 1975*.

Mr John Hill
Co-Manager
Tel: 02 6263 3072

Mr Michael Rosser
Co-Manager
Tel: 02 6263 3834

International investment issues and compliance

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

Dr Ian Beckett
Manager
Tel: 02 6263 3212

Singaporean business investors (Singapore Help Desk)

This service assists Singaporean business investors with the lodgment of foreign investment applications for proposed direct investments in Australia. This includes the provision of foreign investment policy advice and assistance with the application process. The service is for Singaporean business investors and their agents only. All correspondence should be sent to:

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

Tel: +61 2 6263 3755
Fax: +61 2 6263 2940
Internet: www.firb.gov.au/singaporehelpdesk.asp
Email: singaporehelpdesk@treasury.gov.au

Australian National Contact Point for the *OECD Guidelines for Multinational Enterprises*

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
PARKES ACT 2600

Executive Member — Mr Patrick Colmer

Tel: 02 6263 3763
Fax: 02 6263 2940
Internet: www.ausncp.gov.au
Email: ancp@treasury.gov.au