

Chapter 1

**Foreign Investment
Review Board**

Foreign Investment Review Board

Functions of the Board

The Foreign Investment Review Board (FIRB or the Board) is a non-statutory body established in April 1976 to advise the Treasurer on foreign investment policy and its administration. The Board's functions are advisory only. Responsibility for the Government's foreign investment policy and for making decisions on proposals rests with the Treasurer. Assistance is provided for the Board's functions by the Foreign Investment Policy Division (the Division) of Treasury.

The main functions of the Board are:

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

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

Membership

There were no changes to the composition of the Board during 2003-04. At 30 June 2004 the Board comprised three part-time members and a full-time 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: Chairman, The Australian Charities Fund and Chancellor, University of Western Sydney.

Ms Lynn Wood has been a Board member since April 1995 and was reappointed to the Board on 4 April 2000 for a further term of five years. Ms Wood has considerable business experience in financial services. Her present responsibilities include: Director, Macquarie Goodman Funds Management; Director, MS Society of NSW; Compliance Committee Member of Macquarie Goodman Funds Management, Barclays Global Investors Australia and Mellon Global Investments Australia. Ms Wood was formerly a Director of Schrodgers Australia, Schrodgers Australia Property Management, Sedgwick (Holdings) Australia, NSW Lotteries Corporation and the Investment Funds Association of Australia (now IFSA).

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

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

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 2003-04 were \$105,861 (\$117,897 in 2002-03). Remuneration of Board members was around 94 per cent of total Board expenses, the remainder being for local travel, car hire, legal advice and incidentals. Board members' fees are determined by the Remuneration Tribunal. Under the *Remuneration Tribunal Act 1973*, the Tribunal is required to make reports or determinations in respect of the remuneration and allowances of officers at intervals of not more than one year.

Total expenses of the Division were \$2.39 million in 2003-04 (\$2.35 million in 2002-03). These expenses were mainly for employees (including superannuation and accruing leave entitlements). The total cost of foreign investment screening also includes the expenses of other government authorities and agencies at the Commonwealth and state levels, which are consulted on proposals.

At 30 June 2004, there were 24 staff members in the Division. This compares with 26 officers at the end of June 2003.

Relationship of the Division to the Board

Executive assistance to the Board is provided by the Foreign Investment Policy Division of the Treasury. The Division is headed by Mr Legg as General Manager. The Division provides secretariat services for the Board, prepares draft and final reports on proposals and is usually the first point of contact for foreign investment applicants.

In addition to its function as a secretariat for the Board, the Division also advises the Government on foreign investment policy matters. This includes providing advice on relevant policy issues which emerge in the context of multilateral forums, such as the Organisation for Economic Co-operation and Development (OECD), the World Trade Organization (WTO) and the Asia-Pacific Economic Cooperation (APEC), and bilaterally through free trade and investment protection and promotion agreements. Chapter 4 covers these issues in more detail and also examines Australia's international investment position.

2003-04 outcomes

The administration of foreign investment policy seeks to balance the need to minimise the impact on commercial decision-making processes while also ensuring that proper consideration of cases is made against policy requirements. The Board endeavours to ensure that proposals are dealt with quickly and efficiently and every effort is made to avoid unnecessary interference in business decision-making.

The information requirements for processing proposals have been designed to minimise the time taken (and hence the cost involved) in obtaining foreign investment approval. In 2003-04, the majority of cases were decided within the 30-day statutory period, with straightforward real estate cases, representing the majority of cases received, generally decided within two weeks. Where cases took more than 30 days to process, this generally reflected delays in receiving sufficient information from the parties or the fact that the case involved significant complexity or sensitivity.

Administration of foreign investment policy

In 2003-04, 4,830 applications for foreign investment approval were decided (5,112 in 2002-03), comprising 4,447 approved, 64 rejected, 319 withdrawn by the parties and the

remaining applications judged exempt. Additionally, the Division handled over 25,000 incoming telephone calls, and answered 122 letters (173 in 2002-03) and 1,960 email messages (1,712 in 2002-03) in relation to potential proposals and the operation of foreign investment policy more generally.

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

Under the *Foreign Acquisitions and Takeovers Act 1975* (the Act) (a copy is at **Appendix D**) the statutory time limit for reaching a decision is 30 days, with up to a further ten days to notify the parties. There is also scope for the issue of an 'interim order', extending the period of examination for up to a further 90 days. In 2003-04, 70 interim orders, 49 final orders¹ and six divestiture orders were published. Interim orders are usually issued where the applicant has failed to provide adequate information to assess the proposal against the national interest test within the 30-day statutory period, or to provide parties with the opportunity to address issues arising from the proposal. Final orders are issued where a proposal, assessed in terms of Australia's foreign investment policy, is judged to be contrary to the national interest. Divestment orders are issued where the acquisition has already proceeded and is subsequently assessed, in terms of foreign investment policy, to be contrary to the national interest.

In keeping with the Board's responsibility to foster an awareness and understanding of the Government's policy and to provide guidance to investors, the Division is available to meet with both potential foreign investors and Australian businesses to explain foreign investment policy and its application to specific proposals.

Where major proposals are in the public domain, the Board welcomes submissions on them from third parties. Consideration of such submissions can be an important part of the Board's examination process and the development of recommendations to the Treasurer or his delegate.

Processing of proposals

After proposals have been submitted, the initial work is handled within the Division. Business proposals are allocated to specialist units depending on the industry sector involved, that is, either the Primary and Secondary Industries Unit or the Tertiary Industries Unit. In the case of commercial and residential real estate, allocation is normally based on the geographic location of the property being acquired. A third

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

unit, the International and Compliance Unit, has oversight of compliance issues associated with foreign investment.

Proposals are examined to determine whether they conform with the general and particular requirements of foreign investment policy, including the proponent's fulfilment of conditions attached to past approvals. Proposals can be prohibited using foreign investment powers where the proposals are inconsistent with policy and involve national interest concerns. Reasons for rejecting substantial commercial proposals are usually published in a press release issued by the Treasurer.

The Board considers reports, prepared by the Division on a weekly basis, regarding proposals in the business/industry sectors valued at \$100 million or more, as well as the more complex real estate proposals. Formal meetings are held approximately every four weeks, with a telephone discussion between the Executive Member and the other Board members in each of the intervening weeks. The nature of the Board's advice and the level to which it is submitted for a decision are normally determined by the features of the foreign investment proposal. In the case of significant proposals (in terms of their size, complexity or the policy issues raised), a full background brief is usually prepared by the Division for consideration at a formal Board meeting prior to seeking the decision of the Treasurer or Parliamentary Secretary to the Treasurer. Where time constraints make a formal meeting impractical, the Board's involvement will be by telephone. Should a proposal raise important considerations and/or impinge on other ministerial responsibilities, the Treasurer or the Parliamentary Secretary to the Treasurer may consult his colleagues or seek Cabinet's view.

Arrangements are in place under which authority for decision-making of certain types of proposals that do not involve issues of high sensitivity is delegated by the Treasurer to senior staff of the Division. The majority of proposals (around 95 per cent of all cases decided) are decided under these delegations. Proposals decided under delegation generally include acquisitions of urban land valued below \$50 million (\$100 million for commercial real estate and advanced 'off-the-plan' proposals); acquisitions of existing businesses valued at more than \$50 million or the establishment of new businesses with initial investment of more than \$10 million, but in each case valued at less than \$100 million; reorganisations of businesses where ultimate ownership of the business does not change and offshore takeovers where the Australian assets represent less than 50 per cent of the total assets of the business being acquired. Revised delegations/authorisations were implemented in June 2004.

These arrangements, along with the use of the residential real estate application form (R2 Form), and the advanced 'off-the-plan' application form (D1 Form), continue to contribute to the streamlining of the application processes. These forms assist in reducing delays arising from incomplete information in the applications received by the Division. In 2003-04, 4,234 cases were decided under authorisations and 258 cases were decided by ministers, similar to the numbers from last year. Of these, 1,179 were seen by the Board in the weekly board reports.

Consultation arrangements

In examining large or otherwise significant proposals, state and Commonwealth departments and authorities with responsibilities relevant to the proposed activity may be consulted. Such consultation is undertaken on a strictly confidential basis to protect the information provided by the investor and usually takes around two weeks.

The Board acknowledges the assistance received during 2003-04 from the Australian and state government departments and authorities whose advice and comments are important in assessing the implications of proposals. The Board regards its liaison with key stakeholders as an integral part of the administration of Australia's foreign investment policy.

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

National interest

Under the Act, the Treasurer may reject applications to control an Australian business or acquire an interest in urban land if he considers the matter is 'contrary to the national interest'. However, the presumption is that foreign investment proposals are in the national interest and should go ahead. This reflects the positive stance of successive Australian Governments towards foreign investment.

While the Board provides advice to the Treasurer on such matters, under the Act it is the Treasurer or his delegate who decides whether an investment is contrary to the national interest.

In preparing its advice to the Treasurer, the Board takes into consideration whether the proposal is consistent with:

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

Handling of commercial-in-confidence and personal information

The Board recognises that much of the information required to assess a proposal will be sensitive, private or commercial-in-confidence. The Government respects this confidential status and has appropriate security procedures in place to ensure that this status is fully protected.

The Government is obligated to respect the privacy of personal 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). In accordance with the Privacy Act, in situations where the applicant has breached, or is strongly suspected of having breached the Act the Board may seek the assistance of other government agencies in its efforts to ensure compliance. In seeking such assistance, the Board may pass relevant personal information to those agencies. Most commonly these agencies will be the Department of Immigration and Multicultural and Indigenous Affairs (Immigration), the Australian Taxation Office (ATO) and/or the Australian Federal Police (AFP).

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

In 2003-04, the Division dealt with eight applications under the FOI Act (compared with five in the previous year) seeking information concerning foreign investment matters. The FOI Act provides for the denial in certain circumstances of access to commercially confidential documents otherwise subject to release. This has relevance to documents provided to the Board (or prepared by the Board or the Division) in its examination of proposals. 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 about the possible release of the documents to an applicant.

Monitoring and compliance activity

The Act (at Appendix D) provides the Treasurer with wide-ranging powers to take legal action to protect and enforce the intent of the Government's foreign investment policy (at Appendix A). The powers include the ability to:

- unwind (by requiring the parties to sell shares, assets or property) transactions that have gone ahead, without prior foreign investment approval having been obtained, where that purchase is inconsistent with policy;
- prosecute people and companies who fail to obtain prior approval;

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- prosecute people and companies who fail to comply with an order to sell shares, assets or property; and
- prosecute people and companies who fail to comply with conditions attached to any approval granted under the foreign investment legislation.

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

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

The Division's International and Compliance 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 fraternity and on occasion, the general public. During 2003-04, the Unit examined nearly 3,000 past proposals to determine compliance with the conditions attached to foreign investment decisions. In addition, compliance activities focused on:

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

During the year, the Unit also spent time reviewing existing compliance and monitoring procedures and documentation with a view to ensuring consistent treatment of cases of non-compliance. Processes for handling cases involving a serious breach of the Act and/or of the approval conditions were also reviewed, including the protocols for reporting such cases to Immigration and other government agencies as appropriate. These reports have resulted in delays by Immigration in issuing new visas to offenders or in refusal to issue a new visa.

Links with the AFP and other law enforcement agencies were strengthened with the exchange of information and advice within the limits allowed by the Privacy Act. Two joint agency agreements entered into in 2002 with the AFP continued to operate to investigate, inter alia, possible breaches of the Act. During 2003-04 action on a significant breach was resolved through the successful prosecution of a Russian citizen in the Queensland Magistrates Court and in another matter, action resulted in the

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agreed sale of numerous properties which had been acquired without approval and without regard to the Government's foreign investment policy.

The International and Compliance 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 2003-04, some 57 such cases were referred to the ATO.

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

