

Chapter 1

**Foreign Investment
Review Board**

Foreign Investment Review Board

Functions of the Board

The Foreign Investment Review Board (FIRB or the Board) is a non-statutory body established in 1976 to advise the Treasurer on foreign investment policy and its administration. As such, the Board's functions are advisory only. Responsibility for the Government's foreign investment policy and for making decisions on foreign investment proposals rests with the Treasurer. The Treasury's Foreign Investment and Trade Policy Division (the Division) provides secretariat services to the Board.

The role of the Board is to:

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

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

Board membership

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

Mr John Phillips AO was first appointed Chairman of the Board in April 1997 and re-appointed for a further term of five years on 24 April 2002. He has extensive high-level experience in the public, finance and business sectors including holding the position of Deputy Governor of the Reserve Bank of Australia. His present roles include Chancellor of the University of Western Sydney and Chairman of The Australian Charities Fund.

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

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

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

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

Relationship of the Division to the Board

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

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

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

Administration of foreign investment policy

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

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

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

Proposals are examined by the Division's Primary and Secondary Industries Unit and the Tertiary Industries Unit. A third unit, the Investment and Compliance Unit, undertakes associated compliance work. Proposals are examined as to whether they conform with the requirements of the FATA and policy, including the proponent's fulfilment of conditions attached to past approvals. While the overwhelming majority of proposals are approved, the Treasurer has powers under the Act to prohibit proposals that are inconsistent with policy or raise other national interest concerns. Decisions are advised in writing to the applicants or their representatives/agents. Where the Treasurer makes a decision on a significant proposal, he may also issue a press statement.

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

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

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

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

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

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

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

2004-05 outcomes

Cost of the Board's operations

Consistent with the proper discharge of its functions, the Board is concerned to ensure that its operating costs are minimised. Total Board expenses in 2004-05 were \$110,396 (\$105,861 in 2003-04). Remuneration of Board members was around 94 per cent of total Board expenses with the remainder expended on local travel, car hire and incidentals. Board members' fees are determined by the Remuneration Tribunal.

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

Processing of proposals

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

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

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

Consultation arrangements

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

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

The Board acknowledges the assistance received during 2004-05 from Australian and State government departments and authorities. It regards this liaison with key stakeholders as an integral part of the administration of the policy.

Where major proposals are in the public domain, the Board welcomes submissions from third parties. Consideration of such submissions can be an important part of the examination process and the development of advice on the proposal to the Treasurer.

National interest

The Act empowers the Treasurer to prohibit an acquisition if he is satisfied it would be 'contrary to the national interest'. However, the general presumption is that foreign investment proposals will generally serve the national interest. This reflects the positive stance of successive Australian Governments towards foreign investment given the important role it plays in national development.

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

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

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

Handling of commercial-in-confidence and personal information

The Board recognises that much of the information required to assess a proposal will be commercially sensitive or be private to the applicant. Consequently, the Board has appropriate procedures in place to ensure that confidentiality is protected.

Moreover, the Government is required to respect the privacy and sensitivity of personal and commercial information that is provided by applicants to the Board, in accordance with the requirements of the relevant legislation, including the *Privacy Act 1988* (Privacy Act) and the *Freedom of Information Act 1982* (FOI Act).

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

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

In 2004-05, the Division dealt with eight applications under the FOI Act (the same number as in 2003-04) seeking information concerning foreign investment matters. The FOI Act provides for the denial in certain circumstances of access to commercially confidential documents. In line with the provisions of the FOI Act, the Division consults with the parties to a proposal about documents they provided which are the subject of an FOI request, to seek their views on their possible release to an applicant.

Monitoring and compliance activity

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

- unwind or divest (by requiring the parties to sell shares, assets or property) transactions that have gone ahead, without prior foreign investment approval having been obtained, where that purchase is inconsistent with policy;
- prosecute a foreign person (including a natural person or a company) that fails to obtain prior approval;
- prosecute a foreign person that fails to comply with an order to sell shares, assets or property; and
- prosecute a foreign person that fails to comply with conditions attached to any approval granted under the foreign investment legislation.

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

In examining proposals, the applicant's compliance with any conditions relating to past proposals is taken into account. Instances of lack of compliance with conditions may result in future proposals being rejected. It is general policy to report serious

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

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

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

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

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

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

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

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

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

