

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.

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- 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.*