

Chapter 1

**Foreign Investment
Review Board**

Foreign Investment Review Board

This is a non-statute mandated report on the operation of Australia's foreign investment review arrangements. It provides general information on those arrangements and their operation during 2006-07. It covers the administration of these arrangements, by the Treasury, on behalf of the responsible Australian Government minister, the Treasurer and the Foreign Investment Review Board (the Board or FIRB).

Functions of the Board

The 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) advises Treasury ministers on foreign investment matters and provides secretariat services to the Board.

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

- examine proposed investments in Australia that are subject to the policy and supporting legislation, and to make recommendations to the Treasurer on these proposals;
- advise the Treasurer and other Treasury portfolio ministers on the operation of the policy and the *Foreign Acquisitions and Takeovers Act 1975* (the FATA), and on proposed investments that are subject to each;
- foster an awareness and understanding, both in Australia and abroad, of the policy and the FATA;
- provide guidance to foreign persons and their representatives/agents on the policy and the FATA; and
- monitor and ensure compliance with the policy and the FATA.

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 2007, 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 was reappointed for a further term of five years on 18 April 2007. 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, Committee for Economic Development of Australia (CEDA) and Noni B Limited. 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 then Prime Minister, the Hon John Howard. 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 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, he was the General Manager of Treasury's Indirect Tax Division from 2002. 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, Mr Colmer, provides the link between the Board and the Treasury. The Division is responsible for the initial examination of proposals received under the policy and the FATA, and for preparing recommendations to Treasury ministers or officers in the Division authorised by the Treasurer to make decisions under the FATA. 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 on 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 investment-related 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

Information, advice and education

In keeping with the Board's role of fostering awareness and understanding of Australia's foreign investment review arrangements and 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 FATA and their application, including to specific proposals.

The Division also provides a telephone inquiry line, +61 2 6263 3795, an email address, firbenquiries@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 FATA, 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 FATA also provides for the issue of an Interim Order, which extends the available examination period and prohibits the proposal for up to 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 to make decisions on foreign investment proposals that are consistent with the policy or do not involve issues of special sensitivity. Around 94 per cent of proposals are decided under this authorisation. These are predominantly in the real estate sector. The Board maintains a continuing oversight of decisions made under this arrangement.

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 of the Foreign Investment Online Application (FIOLA) system for real estate purchases in December 2005, 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 Investment Review Unit (the Unit) with the Board's input on significant applications. The Unit also 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 FATA 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 other relevant Treasury ministers.

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 FATA 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 the operation of our economy and Australia's national development.

The national interest, and hence what would be contrary to it, is not defined in the FATA. Instead the FATA 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, and at Appendix A. These contain information regarding Australia's foreign investment screening arrangements. They also set out guidelines on national interest matters, especially 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 aspects of the national interest include, for example:

- 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.

The general policy document includes the principles announced by the Treasurer on 17 February 2008. These principles outline additional factors that are also considered for proposals involving foreign governments and their agencies. Thus, proposed investments by foreign governments and their agencies will be evaluated having regard to whether:

- an investor's operations are independent from the relevant foreign government;
- an investor is subject to and adheres to the law and observes common standards of business behaviour;
- an investment may hinder competition or lead to undue concentration or control in the industry or sectors concerned;
- an investment may impact on Australian Government revenue or other policies;
- an investment may impact on Australia's national security; and
- an investment may impact on the operations and directions of an Australian business, as well as its contribution to the Australian economy and broader community.

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 Citizenship (DIAC), 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 2006-07, the Division dealt with two applications under the FOI Act (compared with five in 2005-06) seeking information concerning foreign investment matters. The FOI Act provides criteria to determine whether particular documents or parts of documents are exempt from release. These 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 made to the Administrative Appeals Tribunal for a review of a decision by the Treasury regarding partial withholding of information in response to a request under the FOI Act. The subject of the application was material that had been considered by the Board, in relation to investments in Australia. The main issues in the case were, first, whether the documents to which access has been refused were exempt under a number of sections of the FOI Act and, secondly, whether Treasury had taken all reasonable steps to find further documents requested by the applicant and whether such documents could not be found or did not exist.

A hearing took place on 16 and 17 February 2007. Treasury agreed to release some further, but not all, material before the second day of the hearing. The applicant agreed and the matter was settled under section 42 of the *Administrative Appeals Tribunal Act 1975* (agreement between parties outside of adjudication by the Deputy President).¹

2006-07 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 2006-07 were \$122,057 (\$119,367 in 2005-06). Remuneration of Board members was around 93 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 2006-07 were \$3.2 million (\$2.8 million in 2005-06). These expenses mainly comprised employee salary (including superannuation and accruing leave entitlements) and administrative costs. Over the course of 2006-07, the Division employed an average of 32 staff, 4 more than the average for 2005-06.

¹ *Baronsun Pty Ltd v Secretary, The Treasury.*

Consideration of proposals and enquiries

In 2006-07, 7,025 applications for foreign investment approval were considered, comprising 6,157 approved, 39 rejected and 629 withdrawn by the parties with the remaining 200 determined as exempt or not subject to the policy or the FATA. Of the 6,196 applications decided in 2006-07 (that is, excluding withdrawn and exempt proposals), 5,835 were decided within the Division under the Treasurer's authorisation and 361 were decided by a Treasury minister, in most cases by the Treasurer's Parliamentary Secretary.

Additionally, in 2006-07 the Division handled an increased amount of telephone enquiries and items of correspondence² in relation to potential proposals, compliance with conditional approvals and the policy and the FATA, with 37,595 telephone enquiries and 5,085 items of correspondence. This is compared with approximately 32,000 and 4,600 received in 2005-06.

In 2006-07, 90 Interim Orders and 27 Final Orders were made and published in the Commonwealth of Australia *Gazette*.³ No Divestiture Orders were made. 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 2006-07, 90 per cent of proposals were decided within 30 days, compared with 92 per cent of proposals in 2005-06. The slight decrease in the percentage of proposals decided within 30 days can be attributed to the increase in the number of Interim Orders made. Such an Order was typically made due to delays in receiving sufficient information from the parties or because the application involved significant complexity or sensitivity.

2 This figure excludes all correspondence in relation to proposals that were yet to be finalised when the correspondence was received.

3 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 FATA 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.

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 FATA.

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 FATA to DIAC, the AFP and other government agencies as appropriate.

In order to ensure compliance with foreign investment policy, the Division 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 2006-07, the Division examined in excess of 3,700 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 Division'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 DIAC and other government agencies as appropriate. The application of these processes has in some cases resulted in further investigations by DIAC prior to issuing visas or in refusal to issue a visa to those who have breached approvals with conditions.

Links with the AFP, DIAC, 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.

In December 2006, following a referral to the Commonwealth Director of Public Prosecutions (the DPP) for consideration of prosecution, a Bangladeshi citizen was successfully prosecuted in the Melbourne Magistrates Court for offences against the FATA – a notification offence (section 26A(2) of the FATA) and for failure to comply with an order made under the provisions of the FATA (section 30(1)). This person had been subject to previous successful prosecution in December 2005 for not meeting the conditions imposed on acquisitions of two lots of vacant land (section 25(1C)) and for a notification offence (section 26A(2)).

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 prosecution action. This matter was subject to two appeals under the provisions of the *Judiciary Act 1903*, concerning the decision making process and constitutional issues. The Federal Court of Australia heard the case on 6 and 7 June 2006 and judgment was handed down on 29 January 2007. One appeal under the provisions of the *Judiciary Act 1903* relating to the decision making process was upheld; the other appeal relating to the constitutionality of part of the FATA was dismissed. Following this, the matter with the DPP was withdrawn.⁴

The Division 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 2006-07, 101 such cases were referred to the ATO.

⁴ *Marie Madeline Wight v The Honorable Chris Pearce MP.*