

# Foreign Investment Review Board

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## Chapter 1



# Foreign Investment Review Board

The Foreign Investment Review Board (the Board) is a non-statutory body established in 1976 to advise the Treasurer and the Government on foreign investment matters. The Board's annual reports, which are not statutorily mandated, outline the activities of the Board and provide data on foreign investment proposals. This chapter covers the role of the Board and its administration of the foreign investment framework.

The Board's functions are advisory only. Responsibility for making decisions rests with the Treasurer. The role of the Board, including through its secretariat, is to:

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

## Board membership

During 2014-15, the Board comprised five part-time members and a full-time Executive Member. The part-time Board members were Mr Brian Wilson (Chairman), Mr Hamish Douglass, Ms Anna Buduls, Mr Michael D'Ascenzo AO and Mr Patrick Secker. Mr Douglass and Ms Buduls' terms on the Board ended during 2014-15. Transitioning into 2015-16, the Board currently comprises six part-time members and a full-time Executive Member. We welcome Ms Alice Williams, Mr David Irvine AO and Mr David Peever to the Board.



**Mr Brian Wilson** was appointed to the Board on 10 December 2009 and appointed Chairman on 16 April 2012. He is also Chancellor of the University of Technology Sydney, a non-executive director of Bell Financial Group and a member of the Payments System Board of the Reserve Bank of Australia. He was a member of the Commonwealth Government Review of Australia's Superannuation System, the Specialist Reference Group on the Taxation of Multinational Enterprises in Australia and the Australian Taxation Office (ATO) Superannuation Reform Steering Committee. Mr Wilson retired in 2009 as a Managing Director of the global investment bank Lazard, after co-founding the firm in Australia in 2004 and was previously a Vice-Chairman of Citigroup Australia and its predecessor companies.



**Mr Hamish Douglass** was appointed to the Board on 10 December 2009. He has extensive experience in global investment management and in the origination and execution of corporate finance transactions and in particular, public company mergers and acquisitions. He is the Co-Founder, Chief Executive Officer and Chief Investment Officer of Magellan Financial Group, a specialist global fund management group that is listed on the Australian Securities Exchange. He was previously Co-Head of Global Banking for Deutsche Bank AG in Australia and New Zealand. He is a former member of: the Australian Government's Takeovers Panel; the forum of the Young Global Leaders (a forum of the World Economic Forum); and the Financial Literacy Board. Mr Douglass' term ended on 9 December 2014.



**Ms Anna Buduls** was appointed to the Board on 15 July 2010. Through her corporate advisory work and 21 years of non-executive company directorships, Ms Buduls has gained wide commercial experience across a broad range of companies and industries, including the agriculture sector. She is currently owner and Chairman of a travel software group and is a non-executive director of the listed company SAI Global Ltd (since October 2003). Ms Buduls was also one of the three Australian members on the APEC Business Advisory Council for three years to the end of 2014. Ms Buduls' term ended on 14 July 2015.



**Mr Michael D'Ascenzo AO** was appointed to the Board on 2 January 2013. Mr D'Ascenzo is recognised internationally for his leadership and expertise in taxation, administration, governance and policy. Mr D'Ascenzo was Commissioner of Taxation from January 2006 to December 2012. In January 2010 he was appointed an Officer of the Order of Australia for service to public administration and in 2012 he was awarded the Chartered Accountants' Federal Government Leader of the Year. Mr D'Ascenzo is currently also a non-executive director of Australia Post and a member of the Clean Energy Regulator, as well as an adjunct professor at the University of New South Wales and a professorial fellow at Melbourne University.



**Mr Patrick Secker** was appointed to the Board on 17 December 2013 and brings extensive agricultural sector experience to the Board. He was a primary producer, agricultural retailer and company director before entering politics as the member for the rural South Australian electorate of Barker. Mr Secker has a degree in economics and has participated in a number of parliamentary agricultural committees over many years. His parliamentary career included serving positions as Opposition Whip and Deputy Speaker of the House of Representatives. Mr Secker has also served as an elected member in local government for 11 years including deputy mayor, chairman of various committees including planning, library, development plan and works. He also chaired the Southern and Hills LGA and co-chaired the South Australian Government Mt Lofty Ranges Strategy Review.



**Mr Rob Donnelly** commenced as Executive Member of the Board on 15 September 2014. The position of Executive Member is held by the Division Head of Treasury's Foreign Investment and Trade Policy Division (the Division). The Executive Member provides the link between the Board and the Division, which provides secretariat support to the Board.

## Board members appointed since 2014-15



**Ms Alice Williams** was appointed to the Board on 16 July 2015. Ms Williams has over 25 years of senior management and Board level experience in corporate and Government sectors. Ms Williams was previously a Director at JP Morgan, NM Rothschild and Ansett Australia. She has been a consultant to listed corporations in Australia and the Gulf States and State and Federal regulatory bodies. She is a former director of the Australian Accounting Standards Board, State Trustees and a Commissioner of the Victorian Competition and Efficiency Commission. Ms Williams' current directorships include Cooper Energy Ltd, Equity Trustees Ltd, Djerriwarrh Investments Ltd, Defence Health, Guild Group, Barristers Chambers Limited and the Port of Melbourne Corporation.



**Mr David Irvine AO** was appointed to the Board on 3 December 2015. Mr Irvine has significant national security expertise as a former Director-General of both the Australian Security Intelligence Organisation and the Australian Secret Intelligence Service. He is also a former Australian Ambassador to China and former Australian High Commissioner to Papua New Guinea. In 2005, Mr Irvine was awarded an Officer of the General Division of the Order of Australia for services furthering Australian international interests. He is currently a visiting Fellow of the National Security College at the Australian National University.



**Mr David Peever** was appointed to the Board on 1 February 2016. Mr Peever retired as Managing Director of Rio Tinto Australia in October 2014 after 27 years with Rio Tinto. Mr Peever is also Chairman of Cricket Australia and a Director of the International Cricket Council, a Non-Executive Director of the Australian Foundation Investment Company and the Melbourne Business School. He is a member of the Prime Minister's Indigenous Advisory Council and the Chief of Defence's Gender Equality Advisory Board. He chaired the Minister of Defence's First Principles Review of Defence and following the acceptance of the Review by Government, now chairs the Oversight Board which helps guide implementation of the Review's recommendations. Mr Peever is also a non-executive director of the Stars Foundation.

## The role of Treasury's Foreign Investment and Trade Policy Division and the Australian Taxation Office

The Division provides advice to the Government on foreign investment issues and leads Treasury's work on trade policy. The Division provides secretariat support to the Board and is responsible for the day to day administration of the foreign investment framework in relation to business, agriculture and commercial land proposals. This involves engagement across government agencies, within Treasury and also as a contact point for foreign investors and their representatives or agents.

Since May 2015, the Board has also been supported by the ATO which administers foreign investment into residential real estate. Initially, the ATO focussed on residential real estate compliance activities but since 1 December 2015, the ATO has been responsible for the administration of all aspects of foreign investment in residential real estate. The ATO also has responsibility for the collection of foreign investment application fees and for administering the register of foreign ownership of agricultural land.

### Box 1.1: Foreign investment reforms

Following public consultation, on 2 May 2015, the Government announced a package of reforms to strengthen the foreign investment framework. These reforms commenced on 1 December 2015 and provide stronger enforcement of the rules, a better resourced system and clearer rules for foreign investors. The reforms included:

- increased enforcement of the residential real estate rules by establishing a dedicated unit (comprising 50 officers) within the ATO to review cases and strengthen compliance;
- stricter and more flexible penalties to make it easier to pursue foreign investors that breach the rules;
- application fees to ensure that Australian taxpayers no longer have to fund the cost of administering the system;
- increased scrutiny around agricultural investments by lowering the applicable thresholds;
- improved transparency through a comprehensive register of foreign ownership of agricultural land that commenced collecting data from 1 July 2015; and
- an overhaul of the legislation to make it clearer and more modern.

The Government has also negotiated with the states and territories to use land titles data to expand the agricultural land register to include all land, including residential real estate. As part of the parliamentary passage of the foreign investment reforms, the Government also agreed to pass legislation by 1 December 2016 to establish a register of foreign ownership of water entitlements.

The Board played a significant role in helping to design and implement the reform package. Discussions were held throughout 2014-15 at Board meetings on the options being put forward to reform the system with this advice fed back to Government. The Board also reviewed the draft legislation and helped prepare the associated guidance material that has been released on the Board's website to assist investors.

## **Administration of the foreign investment framework**

The Board provides advice on the application of the foreign investment framework 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 general handling of other applications. The Board performs this role with the benefit of weekly reports prepared by the Division on proposals received and through regular meetings and discussions with the Executive Member and Divisional officers. 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 advisory role.

## **Examination and approval process**

The examination of foreign investment proposals is rigorous. The assessment process seeks to ensure that particular proposals are not contrary to Australia's national interest. In fulfilling this objective, the Division, and where appropriate the Board, examine proposals with a view to identifying any sensitivities regarding the national interest and determining whether these sensitivities can be mitigated or managed.

### **Consideration timeframe**

The Act requires that a decision be made within 30 calendar days of an application being lodged and provides up to a further 10 calendar days for the applicant to be advised of the decision. If a decision has not been made within this time and the applicant has not been advised, the application is deemed to be 'approved' since 'no objection' to the proposal has been made.

As it is sometimes not possible to make a decision on a particular proposal within the statutory time limit, the Treasurer can issue an Interim Order extending the timeframe up to a further 90 days. Interim Orders are normally only issued if a proposal is complicated or where insufficient information has been provided.

If the applicant considers the timeframe for assessing their case is insufficient, or they do not wish for an Interim Order to be made (which has to be published in the Commonwealth of Australia Gazette), they can voluntarily extend the period. There is no limit on the number of times the decision period can be extended.



### **Initial examination**

Proposals are initially examined by the Division in its role as Board Secretariat. The Board has direct and early involvement in significant or sensitive applications. The preliminary assessment seeks to determine whether an application meets the notification requirements for a proposal in so far as the Act applies, whether the application contains sufficient detail and that the correct application fee has been paid. Timing is also considered, including deadlines that are commercially important to the applicant.

The applicants or their representatives may be contacted to discuss their proposal at an early stage. This is particularly likely where a proposal is complex, information is inadequate, or the proposal raises potential national interest sensitivities. The examination process, including consultation on proposals, is assisted by applicants providing complete and accurate information about their proposal at the time of lodgement.

### **Consultation arrangements**

In examining significant proposals, consultations are undertaken by the Board's secretariat with Australian, state and territory government departments, national security agencies and authorities with responsibilities relevant to the proposals. Advice and comments provided by such agencies are important in assessing the implications of proposals and in particular, in determining whether they raise any national interest issues. Such consultations are undertaken on a strictly confidential basis to protect information provided by the applicants. The Board regards this liaison with key stakeholders as an integral part of the administration of the foreign investment framework. The Board may also receive unsolicited submissions from third parties.

### **National interest factors**

The Act empowers the Treasurer to prohibit an investment if satisfied it would be contrary to the national interest. However, the general presumption is that foreign investment is beneficial, given the important role it plays in Australia's economy.

The national interest, and 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 investment would be contrary to the national interest. However, to provide certainty for investors, the Government has provided general guidance on the national interest factors that the Board typically considers when assessing foreign investment proposals.

The foreign investment framework outlines the types of residential real estate that foreign persons may buy and whether they need foreign investment approval to do so, including whether an approval is generally subject to conditions. All residential real estate applications are considered in light of the overarching principle that foreign investment in residential real estate should increase Australia's housing stock.

### **Box 1.2: Reviewing the national interest — infrastructure privatisation**

The Board encourages early engagement from foreign investors with the FIRB Secretariat to ensure proposals are fully understood and that any national interest issues can be identified early in the process. This helps ensure that applications can be progressed in a timely fashion.

The various programs of asset sales by the state and territory governments present a particular challenge, as these often involve key infrastructure assets of national significance. During 2014-15, FIRB commenced a process of engagement with state and territory governments and bidders in the privatisation of public assets, including the first tranche of sales of NSW electricity assets. Consultations with State governments and their investment advisers, potential bidders, and relevant Commonwealth agencies, allowed potential national interest concerns to be considered and mitigations developed early in the privatisation process.

The FIRB Secretariat engaged with the NSW Government and relevant Commonwealth agencies for over 12 months before the finalisation of the 99 year lease of TransGrid, the NSW electricity transmission network. This preliminary work resulted in constructive engagement between the FIRB Secretariat, the NSW Government and its investment advisers, potential bidders and other Commonwealth agencies.

As a result of extensive consultation, the Treasurer imposed safeguards on TransGrid's new owners that mitigated potential national interest concerns in respect of continuity of electricity supply and of protection of data. The conditions included guarantees about Australia's involvement in the management of the network. The Treasurer's media release of 25 November 2015 provides further details about the proposal.

For business, agriculture and commercial land acquisitions, assessing the national interest allows the Government to balance potential sensitivities against the benefits of foreign investment. The Government typically considers the following factors when assessing foreign investment proposals:

- national security;
- competition;
- impact on other Government policies (including taxation);
- impact on the economy and the community; and
- the character of the investor.

The Policy provides guidance on the above factors, as well as guidance on additional factors considered when examining investments in the agricultural sector, or investment involving foreign government investors.

### **Decision making process**

The Treasurer has provided a delegation to the Executive Member and other senior Division staff to make decisions on foreign investment proposals that are consistent with the Government's framework or do not involve issues of special sensitivity. The majority of proposals, mostly real estate, were decided under this delegation in 2014-15. These arrangements streamline the approval process and facilitate a timely decision on applications.

When assessing more significant proposals, the Board's approach is to work closely with applicants. If a foreign investment proposal raises potential national interest concerns, these concerns are discussed with the applicant and the applicant is provided an opportunity to comment and have these considered. If the applicant proposes mitigating actions, these will also be taken into account.

Where the Treasurer considers that an application raises no national interest concerns or that any concerns are adequately addressed by conditions, the applicant is notified in writing of no objection or no objection subject to conditions. Once an applicant receives a no objection or no objection subject to condition notification, the applicant may proceed with the proposal. If national interest concerns remain and may not be able to be addressed, the proposal may be blocked by the Treasurer.

Decisions are advised in writing to the applicants or their representatives or agents. Applicants will generally have 12 months from notification to implement their proposal. Should a proposal materially change after a decision is made then a further notification would be required. Where the Treasurer makes a decision on a significant proposal, the Treasurer may also issue a media release.

### **Handling of commercially sensitive and personal information**

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

In the event that access to confidential information is sought for purposes other than the assessment of an application, the Act contains explicit provisions on the circumstances in which information may be used or disclosed. This can include the administration of specified Commonwealth statutes, information disclosed to certain law enforcement bodies and information provided with written consent. Unauthorised disclosure of protected information under the Act is an offence subject to a maximum of two years imprisonment, a \$21,600 fine, or both.

Under the *Freedom of Information Act 1982* (FOI Act), the Division received 22 freedom of information applications concerning foreign investment matters in 2014-15, (28 in 2013-14). The FOI Act provides criteria to determine whether particular documents or parts of documents are available or exempt from release. These include, for example, 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 may consult with the parties to a proposal about documents they provided which are the subject of a freedom of information request, to seek their views on the possible release of documents to a freedom of information applicant.

## **Monitoring and compliance activity**

The Act provides wide-ranging powers to enforce the decisions made, including the ability to:

- order the unwinding or divestment (by requiring the parties to sell shares, assets or property) of transactions that have gone ahead, without prior foreign investment approval having been obtained, where that purchase was contrary to the national interest;
- prosecute a foreign person (including a natural person or a company) that failed to obtain prior approval;
- prosecute a foreign person that failed to comply with an order to sell shares, assets or property; and
- prosecute a foreign person that failed to comply with conditions attached to any approval granted under the Act.

In examining proposals, the applicant's compliance with any conditions relating to past proposals is taken into account. Instances of failure to comply with conditions may result in future proposals being rejected. It is general policy to report potential breaches of the Act to the Department of Immigration and Border Protection, the ATO, the Australian Federal Police, national security agencies and other government agencies as appropriate.

General compliance and monitoring work includes the following activities:

- educating and providing information to individuals and organisations affected directly and indirectly by the foreign investment framework. Activities include presenting at industry forums and seminars, providing information such as the Guidance Notes and the Investor Obligations – Fact Sheets (which are available on the Board's website); responding to written enquiries and providing information through the general enquiries helpline and the compliance hotline;

- monitoring to ensure that foreign persons are complying with the conditions of their approvals. This involves cooperation with relevant members of the business community, local government authorities, the legal profession and on occasions, the general public;
- systemic investigations of compliance performance, including through data analysis and interpretation of trends using internal as well as external information sources. These investigations include analysis of retrospective case histories, reviews of shareholding structures among listed Australian companies and regular monitoring of property market leasing activity;
- interagency cooperation and liaison with a range of government agencies including relevant national security agencies, the Department of Immigration and Border Protection, the ATO, the Australian Securities and Investments Commission and the Australian Federal Police; and
- case investigations triggered by information received from members of the public.

Since May 2015, the ATO has had responsibility for compliance activities around foreign investment and residential real estate. Compliance teams within the ATO receive intelligence from:

- self-reporters taking advantage of the reduced penalty period (that applied between 2 May 2015 and 30 November 2015);
- community information including media referrals; and
- cases identified through ATO data matching (the ATO matches its own taxpayer data with a variety of third party sources, including Treasury data on past foreign investment approvals, immigration, Australian Transaction Reports and Analysis Centre (AUSTRAC), banking data and state and territory land title offices).

Investigations typically involve a case officer checking the visa type of the foreign person using immigration data held within the ATO, checking the land titles data (also held within the ATO) then determining whether a breach has occurred. In some cases the source of funds is also investigated and liaison with the Australian Federal Police, AUSTRAC and the Australian Crime Commission may occur.

## **Information, advice and education**

In keeping with the Board's role of fostering awareness and understanding of Australia's foreign investment framework, the Division and the ATO regularly engage with potential foreign investors, their representatives or agents and Australian businesses to provide information on the operation of the framework and its application, including to specific proposals.

The Division and the ATO also provide dedicated telephone enquiry lines, compliance hotlines for people wanting to raise potential compliance issues, an email address and a website, [www.firb.gov.au](http://www.firb.gov.au), for people seeking information or advice.

## 2014-15 Outcomes

### Cost of the Board's operations

Total Board expenses in 2014-15 were \$339,586 (\$328,048 in 2013-14). Remuneration of Board members was around 90 per cent of total Board expenses, with the remainder expended on travel, car hire and incidentals. Board members' fees are determined by the Remuneration Tribunal.

Total expenses of the Division for 2014-15 were \$4.4 million (\$3.9 million in 2013-14). These expenses mainly comprised employee salary (including superannuation and accruing leave entitlements) and administrative costs. Over the course of 2014-15, the Division employed an average of 31 Treasury staff. As at the end of June 2015, the Division comprised 37 full time Treasury staff and a number of external contractors and consultants including lawyers from the Australian Government Solicitor.

The ATO also spent around \$0.168 million in 2014-15 preparing for the transfer of the new foreign investment functions and on compliance activities.

### Consideration of proposals and enquiries

In 2014-15, a total of 38,932 applications for foreign investment approval were considered, with 37,953 approved, zero rejected, 799 withdrawn and 180 exempt as not subject to the Policy or the Act. Of the 37,953 applications decided in 2014-15 (that is, those approved or rejected but not those withdrawn or exempt), 37,167 were decided within the Division under the Treasurer's delegation and 786 were decided by a Treasury minister.

In 2014-15, three non-residential real estate related Interim Orders were published in the Commonwealth of Australia Gazette.<sup>4</sup> No Final Orders were made. Final Orders are issued where a proposal is considered to be contrary to the national interest.

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4 The Act provides the Treasurer with the power to make orders prohibiting an acquisition (an Interim Order or a 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 up to 90 days, or until a decision has been made. The Act also provides the Treasurer with the power to revoke an Order that has been made.

Divestiture Orders are issued where an acquisition has already occurred and is subsequently assessed as being contrary to the national interest. One Divestiture Order was made in 2014-15. It related to a \$39 million Sydney property which had been purchased illegally by a foreign-owned company. This was the first Divestiture Order issued in around ten years.

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 unnecessary delays to business decision-making.

Of the 37,953 applications decided in 2014-15 (that is, those approved or rejected but not those withdrawn or exempt), over 99 per cent of proposals were decided within 30 days. Proposals that take more than 30 days to decide are generally delayed by a lack of sufficient information from the parties, or because the application involved significant complexity or sensitivity.

## Regulator Performance Framework

The Board, as a Commonwealth regulator, is subject to the Regulator Performance Framework that was established by the Australian Government in 2014. It encourages regulators to minimise the regulatory burden created through their administration.

The Regulator Performance Framework establishes a common set of six outcomes-based key performance indicators that allow for the comprehensive assessment of regulator performance and their engagement with stakeholders. The six key performance indicators are:

- regulators do not unnecessarily impede the efficient operation of regulated entities;
- communication with regulated entities is clear, targeted and effective;
- action undertaken by regulators is proportionate to the regulatory risk being managed;
- compliance and monitoring approaches are streamlined and coordinated;
- regulators are open and transparent in their dealings with regulated entities; and
- regulators actively contribute to the continuous improvement of regulatory frameworks.

Consistent with the Regulator Performance Framework, the Board has established a set of metrics that will be used from 2015-16 to make an annual assessment of the Board's performance. It is intended that these results will be published in future annual reports. Further information is available on the website, [www.firb.gov.au](http://www.firb.gov.au).

