



# Foreign Investment Review Board

Report  
2002-03



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**Foreign Investment Review Board**

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8 December 2003

The Hon Peter Costello, MP  
Treasurer  
Parliament House  
CANBERRA ACT 2600

Dear Treasurer

In accordance with the Foreign Investment Review Board's responsibility to advise the Government on foreign investment matters, I submit the Board's Report for the financial year 2002-2003.

The Report outlines the activities of the Board, provides a summary of the year's foreign investment proposals, comments on the more significant cases and reviews trends in foreign investment in Australia and Australian investment abroad. The Report also has a number of Appendices that provide supporting material on foreign investment policy, legislation and the text of the OECD Guidelines for Multinational Enterprises.

Yours sincerely

A handwritten signature in black ink, appearing to read 'M.J. Phillips', written in a cursive style.

M.J. Phillips, AM  
Chairman



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# Main Points

## Changes to membership

- There was one change to the membership of the Board during 2002-03:
  - Dr Jim Hagan left the Board in October 2002 to take up a position in Domestic Economy Division.
  - Mr Chris Legg succeeded Dr Hagan as Executive Member.

## 2002-03 foreign investment proposals in summary

- Of the 4,747 proposals decided, 4,668 were approved (3,563 with conditions, mainly in the real estate sector) and 79 were rejected. There were 4,443 approvals (3,400 with conditions) and 77 rejections in 2001-02.
- There were 68 orders rejecting proposals, 14 orders to divest, and 71 interim orders extending the deliberation period for up to a further 90 days.
- Approvals involved proposed investment (either alone or in partnership with Australians) of around \$85.8 billion. This represented a 27 per cent decrease on the previous year's approvals of \$118 billion. Approvals do not necessarily mean investments proceed in either the time frames or the amounts proposed.
- The value of approvals decreased in the services sector (excluding tourism) from \$49 billion in 2001-02 to

\$23 billion in 2002-03. The value of approvals in the minerals exploration and development sector decreased from \$19.1 billion to \$11.5 billion; while the value of real estate approvals increased from \$14.3 billion to \$15.5 billion.

- In 2002-03 for proposals considered under the Government's foreign investment policy, the United States was the largest source of proposed investment in Australia. The US contributed \$30.5 billion or 35.5 per cent, which was a significant increase. The United Kingdom and Malaysia were the other major sources of proposed investment during 2002-03 accounting for around 8.6 per cent and 7.7 per cent of the total, respectively.

## International investment issues

- 2002-03 was an important year in Australia's trade policy marking the twentieth anniversary of Australia's first bilateral trade agreement, that is the 'Closer Economic Relations' agreement with New Zealand, and the commencement of negotiations on an Australia — United States Free Trade Agreement. In addition, the Free Trade Agreement (FTA) with Singapore was finalised, the Government continued negotiations on a FTA with Thailand and significant progress was made in deepening Australia's trade and investment partnerships with China and Japan.

- The main activities of the Australian National Contact Point for the OECD Guidelines this year have been focusing efforts to increase general public awareness of the Guidelines, particularly among the business community, refining procedures for handling specific instance complaints and strengthening the consultation process with government agencies, business and other social partners.
- Direct Investment in the OECD area has decreased considerably since the investment boom of the late 1990s-2000. FDI inflows and outflows in 2002 for all OECD countries is less than half that of 2000. Australia has proven to be remarkably resilient to the sluggishness of the global economy and other adverse shocks, reporting greater outflows in 2002 than 1999 or 2000.



# Chapter 1

Foreign Investment  
Review Board



# Foreign Investment Review Board

## Functions of the Board

The Foreign Investment Review Board (FIRB or the Board) is a non-statutory body established in April 1976 to advise the Treasurer on foreign investment policy and its administration.

The main functions of the Board are:

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

The Board's functions are advisory only. Responsibility for the Government's foreign investment policy and for making decisions on proposals rests with the Treasurer.

The Executive member of the Board is also the Australian National Contact Point (ANCP) for the *OECD Guidelines for Multinational Enterprises* (the Guidelines) (a copy is at **Appendix G**). The ANCP is

responsible for promoting the Guidelines, handling inquiries, discussions with interested stakeholders and reporting its activities to the OECD Committee on International Investment and Multinational Enterprises.

## Membership

There was one change to the composition of the Board during 2002-03. As at 30 June 2003 the Board comprised three part-time members and a full-time Executive Member.

**Mr John Phillips, AM** was first appointed Chairman of the Board on 16 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 the position of Deputy Governor of the Reserve Bank of Australia. His present responsibilities include: Chairman, The Australian Gas Light Company; Chairman, Australia Charities Fund and Chancellor, University of Western Sydney.

**Ms Lynn Wood** has been a Board member since April 1995 and was re-appointed to the Board on 4 April 2000 for a further term of five years. Ms Wood has considerable business experience in financial services. Her present responsibilities include Director, Macquarie Goodman Funds Management Limited; Director, MS Society of NSW; Chairman of Hands Pty Limited; and Compliance Committee Member of Barclays Global Investors Australia

Limited and Mellon Global Investment Australia Limited. Ms Wood was formerly a Director of Schroders Australia Limited; Sedgwick (Holdings) Pty Limited and the Investment Funds Association of Australia (now IFSA).

**The Hon Chris Miles** was appointed to the Board on 8 June 1999 for a five year term. Between 1984 and 1998 Mr Miles represented the seat of Braddon, Tasmania, in the House of Representatives where from 1996 to 1998 he was the Parliamentary Secretary (Cabinet) to the Prime Minister. In that capacity, he had special responsibility for tax legislation in the House of Representatives. Prior to his distinguished parliamentary career, Mr Miles taught in the education systems of Tasmania, the ACT and NSW. Mr Miles is currently Director of Strategic Development, Pacific Hills Education Ltd.

**Dr Jim Hagan** was the ex officio Executive Member of the Board from mid January 2001 to October 2002. He joined the Commonwealth Treasury in 1998 after working in the New Zealand Treasury for five years, and prior to that in the Productivity Commission. In October 2002, he left the Board to take up a position in the Domestic Economy Division of the Treasury.

**Mr Chris Legg** has been the ex officio Executive Member of the Board since October 2002. He joined the Commonwealth Treasury in 1980, and has had secondments to the International Monetary Fund, the World Bank and the Office of National Assessments. He has also worked at the Bureau of Industry Economics. Before taking up his

current position, Chris was the General Manager of the International Economy Division of the Treasury. His Treasury experience includes a period as an adviser in the Treasurer's office, and work on resource allocation and transport, balance of payments, State finances, market operations, overseas borrowing and international finance.

## Relationship of the Division to the Board

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

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

## Administration of Foreign Investment Policy

In 2002-03 5,112 cases were received, up from 4,922 in 2001-02. Of these, 4,747 were decided and 365 were withdrawn. Additionally, the Division handled over 25,000 incoming telephone calls, answered 173 letters (208 in 2001-02) and 1,712 electronic mail messages (1,120 in 2001-02) in relation to specific potential proposals and the operation of foreign investment policy more generally.

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

Under the *Foreign Acquisitions and Takeovers Act 1975* (the Act) (a copy is at **Appendix E**) the statutory time limit for reaching a decision is 30 days, with up to a further ten days to notify the parties. There is scope for an interim order extending the period of examination for up to a further 90 days. In 2002-03, 71 interim orders, 68 final orders<sup>1</sup> and 14 divestiture orders were published. Interim orders are usually sought where the applicant has failed to provide adequate information to assess the proposal against the national interest test within the 30 day statutory period or to provide parties with the opportunity to address issues arising from the proposal. Final orders are issued where a proposal is inconsistent with Australia's foreign investment policy and judged not in the national interest.

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

Major proposals will often be in the public domain and the Board welcomes submissions on them from third parties. Consideration of such submissions can be an important part of the Board's examination process and the development of recommendations to the Treasurer or the Parliamentary Secretary to the Treasurer.

## 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 2002-03 were \$117,897 (\$95,375 in 2001-02). Remuneration of Board members was around 89 per cent of total Board expenses, the remainder was for local travel, car hire and incidentals. Board members' fees are determined by the Remuneration Tribunal. Under the *Remuneration Tribunal Act 1973*, the Tribunal is required to make reports or determinations in respect of the remuneration and allowances of officers at intervals of not more than one year.

Total expenses of the Division were \$2.35 million in 2002-03 compared with \$2.16 million in 2001-02. These

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

expenses were mainly for employees (including superannuation and accruing leave entitlements), with other expenses being incurred for travel, printing and advertising. The total cost of foreign investment screening would also include the expenses of other government authorities and agencies, at the Commonwealth and State levels, that are consulted on proposals.

At 30 June 2003, there were 26 staff members in the Division. This compares with 24 officers at the end of June 2002.

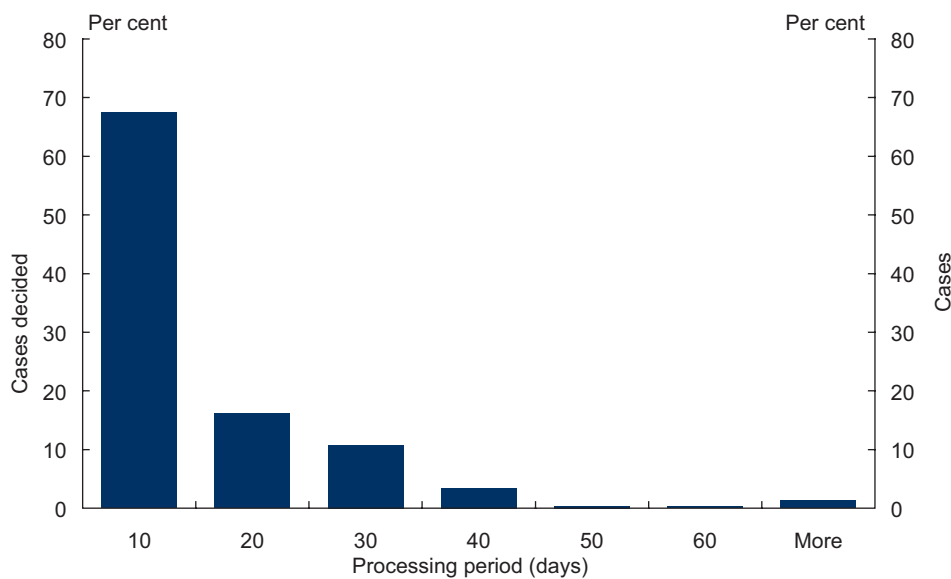
### 2002-03 outcomes

Minimising the impact on commercial decision making processes and ensuring proper consideration of cases against policy requirements continue to be important objectives of the administration of foreign

investment policy. The Board continues to ensure that proposals are dealt with quickly and efficiently and every effort is made to avoid unnecessary interference in business decision making.

The information requirements for processing proposals have been designed to minimise the time taken (and hence the cost involved) in obtaining foreign investment approval. In 2002-03, 68 per cent of applications were decided within 10 days of receipt of a 'completed' application (refer Chart 1.1), with 95 per cent of these cases decided within 30 days. A 'completed' application is one incorporating all the information needed for a decision to be taken. Of the total number of cases, 89 per cent of cases were completed within 30 days of the receipt of the initial application. Cases taking more than 30 days to process usually involve significant complexity or sensitivity.

**Chart 1.1: Processing time for cases decided**



## Processing of proposals

After proposals have been submitted, the initial work is handled within the Division. Business proposals are allocated to one of two specialist units depending on the industry sector involved, that is, the Primary and Secondary Industries Unit or the Tertiary Industries Unit. In the case of commercial and residential real estate, allocation is generally on the basis of the geographic location of the property being acquired. A third unit, the International and Compliance Unit, manages compliance issues associated with foreign investment proposals.

The Board considers reports prepared by the Division on a weekly basis concerning non-real estate sector proposals and commercial real estate proposals valued at \$100 million or more, and the more complex residential real estate proposals. Formal meetings are held approximately every four weeks, with a telephone discussion between the Executive Member and the other Board members in each of the intervening weeks. Following examination of the reports, the Board's views and recommendations are submitted by the Executive Member to the Treasurer or the Parliamentary Secretary to the Treasurer. Should a proposal raise important considerations and/or impinge on other ministerial responsibilities, the Treasurer or the Parliamentary Secretary to the Treasurer may consult his colleagues or seek Cabinet's view.

The nature of the Board's advice and the level to which it is submitted for decision are normally determined by the features of the foreign investment proposal. In

the case of significant proposals (in terms of their size, complexity or the policy issues raised), a full background brief is usually prepared by the Division for consideration at a formal Board meeting prior to seeking the decision of the Treasurer or Parliamentary Secretary to the Treasurer. Where time constraints make a formal meeting impracticable, the Board's involvement will be by telephone.

Arrangements are in place under which authority for decision making of certain types of proposals that do not involve issues of high sensitivity are delegated to senior staff of the Division. The majority of proposals (95 per cent in 2002-03) are decided under delegation. The types of proposals that are decided under delegation include acquisitions of urban land valued below \$50 million (\$100 million for commercial real estate and 'off the plan' proposals), acquisitions of existing businesses or the establishment of new businesses valued at less than \$100 million, and offshore takeovers where the Australian assets represent less than 50 per cent of the total assets of the business being acquired. These delegations have been in place since September 1999.

These arrangements, along with the release of the residential real estate application form in 2001 (the revised version, R2 Form, was released in 2002) and the advanced 'off the plan' application form (D1 Form) in 2002, have contributed to the considerable streamlining of the application process over recent years. This is evidenced through the increased number of 'complete' applications received by the Division. In 2002-03, 4,531 cases were decided under delegation and 216 cases

were decided by Ministers. Of these, 1,182 were seen by the Board in the weekly board reports.

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

### Consultation arrangements

In examining large or otherwise significant proposals, State and Commonwealth Government departments and authorities with responsibilities relevant to the proposed activity may be consulted.

Consultation is undertaken on a strictly confidential basis to protect the information provided by the investor and usually takes about two weeks.

The Board acknowledges the assistance received during 2002-03 from the Commonwealth and State departments and authorities whose advice and comments are important in assessing the implications of proposals. The Board regards its liaison with key stakeholders as an integral part of the administration of Australia's foreign investment policy.

Additionally, to increase familiarity with the Government's foreign investment policy and its requirements generally, the Division, commencing in 2001, has

more actively taken opportunities to make presentations to interest groups on Australia's foreign investment policy. Presentations have been directed to the real estate and conveyancing institutes. Additionally, contacts have been made with other relevant parties, including Government and State authorities as well as private agencies, such as the law societies, to ensure foreign investment policy is both widely available and understood.

### Handling of commercial-in-confidence and personal information

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

The Government is also obligated to respect the privacy of personal information that is provided by applicants to the Board, in accordance with the requirements of the *Privacy Act 1988*. In accordance with that Act, in situations where the applicant has breached, or is strongly suspected of having breached the Act, the Board may seek the assistance of other government agencies in its efforts to ensure compliance. In seeking such assistance, the Board may pass relevant personal information to those agencies. Most commonly these agencies will be the Department of Immigration and Multicultural and Indigenous Affairs, the Australian Taxation Office and/or the Australian Federal Police.

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

In 2002-03, the Division directly dealt with five applications under the *Freedom of Information Act 1982* (FOI Act) seeking information concerning foreign investment matters.

The FOI Act provides for the denial of access to commercially confidential/ personal documents. This has relevance to documents provided to the Board (or prepared by the Board or the Division) in its examination of proposals. It is the practice of the Division to consult with the parties to a proposal about documents that are the subject of a FOI request to establish whether the parties are prepared to allow their release to an applicant or whether there are justifiable grounds to withhold documents.

## Monitoring and compliance activity

The Act (at **Appendix E**) contains wide-ranging powers under which the Treasurer may take legal action to protect and enforce the intent of the Government's foreign investment policy (at **Appendix A**). The powers include the ability to:

- unwind (by requiring the parties to sell shares, assets or property) transactions that have gone ahead, without prior foreign investment approval having

been obtained, where that purchase is inconsistent with policy;

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

Furthermore, provisions of the *Crimes Act 1914* 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.

It is general policy to report breaches of the Act to the Department of Immigration and Multicultural and Indigenous Affairs and other Government agencies as appropriate.

Monitoring of compliance with foreign investment decisions continues to be a significant activity. Close attention is given to the application of policy and/or the fulfilment of conditions attached to decisions.

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.

The International and Compliance Unit systematically monitors whether foreign persons are complying with the conditions of their approvals. This involves the active co-operation of many in the business

community, local government authorities, the legal fraternity and on occasion the wider general public. During 2002-03, the International and Compliance Unit examined around 2,300 past proposals to determine compliance with the conditions attached to foreign investment decisions. In addition, compliance activities focused on:

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

During the year, the Unit also spent time reviewing existing compliance and monitoring procedures and documentation with a view to ensuring consistent treatment of cases of non-compliance. Processes for handling cases which are in serious breach of Act and/or the approval conditions were also reviewed including how and when breaches are to be reported to the Department of Immigration and Multicultural and Indigenous Affairs and other Government agencies as appropriate. Some of these reports have resulted in delays by Immigration in issuing new visas to offenders or in the refusal to issue a new visa.

Links with the Australian Federal Police and other law enforcement agencies were strengthened with the exchange of information and advice within the limits

allowed by the *Privacy Act 1984*. Two joint agency agreements were entered into with the Australian Federal Police to investigate, inter alia, possible breaches of the Act. At the time of publication one of these matters was before the Courts and the other matter resulted in the agreed sale of numerous properties acquired without approval and without regard to the Government's foreign investment policy.

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

## National interest

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

The Board provides advice to the Treasurer on large and sensitive proposals. However, it is the Treasurer, as the authority under the Act, who decides whether an investment is contrary to the national interest.

In preparing its advice to the Treasurer, the Board considers whether the proposal is inconsistent with:

- existing government policy and law — taking the view that existing policy and law define important aspects of the national interest (for example, environmental regulation and competition policy);

- national security interests; and
- economic development.

The information required to formulate advice is obtained from a range of sources including consultation with the applicant, relevant Commonwealth and State government agencies and the target entity. Affected third parties may also be asked for information, and indeed, the Board welcomes comments from all interested parties.

Where national interest concerns are identified, the Board may seek to formulate conditions that address these concerns.



# Chapter 2

Foreign Investment  
Proposals



# Foreign Investment Proposals

This chapter provides statistical information on the proposals submitted in 2002-03 for examination under Australia's foreign investment policy and comments on some of the more significant cases. There is also a section covering the Board's monitoring and compliance activities in respect of residential real estate.

## Limitations of the Board's data

The Board urges particular caution in the use of its statistics, including making comparisons with earlier years.

While FIRB statistics may appear at first glance to be a useful source for data on foreign direct investment in Australia, there are substantial differences between these statistics and Australian Bureau of Statistics' (ABS) statistics. The Board's statistics relate to the administration of foreign investment policy. ABS statistics, which are set out in Chapter 4 of this Report, seek to measure actual investment transactions between residents of Australia and non-residents.

The term 'proposed investment' is used widely throughout this Report. Total proposed investment is the aggregation of:

- the proposed cost of acquisition (including shares, real estate or other assets);
- the value of the Australian assets of merging companies;
- the proposed cost of development following acquisition; and
- in the case of a new business, the proposed cost of both establishment and development.

The FIRB statistics are not a reliable indicator of trends in foreign investment inflows because:

- they are inherently 'lumpy' (that is, the tendency for a few large investments to skew any one year's figures);
- they include proposals approved, which may not be implemented or could be implemented over a number of years; and
- major liberalisations of foreign investment policy that have occurred since the mid-1980s limit comparability over time.
  - For example, the increase in the notification exemption thresholds from \$5 million to \$50 million on 10 September 1999 has acted to reduce the number of proposals and proposed investment values for existing business assets as well as commercial real estate in 2002-03 compared with previous years.

In addition, the statistics are not a comprehensive measure of all foreign investment inflow in any year, nor do they purport to measure changes in levels of foreign ownership of particular industries.

- The data are restricted to investments within the scope of the Act and the Government's foreign investment policy. They do not cover foreign portfolio investments, direct foreign

investments below the notification thresholds, new businesses below the notification thresholds, expansions of existing foreign-owned businesses in Australia (both in existing areas and into related areas) and sales by foreign investors to Australian residents. The current notification/examination thresholds for the various sectors are specified in the policy summary at **Appendix A**.

- The figures provide no indication of the source of the funds for the investment. Some of the proposed funds to be invested would be contributed by Australians where they are in partnership with foreign interests. The extent to which approved investment proposals will directly result in foreign capital inflows depends not only upon whether the proposals are implemented, but also upon the proportion financed from foreign sources. In many cases, this proportion will be quite low. For example, the acquisition by a foreign interest of a business operating in Australia may involve no inflow of capital to Australia where the purchase is financed from existing Australian operations.
- The database that records all foreign investment proposals requires proposals to be categorised into sub-codes and does not allow for diversified companies.
- The figures do not necessarily reflect changes in foreign ownership levels as, in some cases, both the vendor and purchaser are defined as a 'foreign interest'.

## Applications decided in 2002-03<sup>1</sup>

Chart 2.1 depicts the number of applications decided. Chart 2.2 shows the value of proposed investment associated with applications decided for real estate and other sectors over the past seven years.

<sup>1</sup> The ensuing discussion relates only to proposals upon which a decision was taken. Those applications that were found not to be cases or were withdrawn are not included, except for Table 2.1

Chart 2.1: Applications decided — number

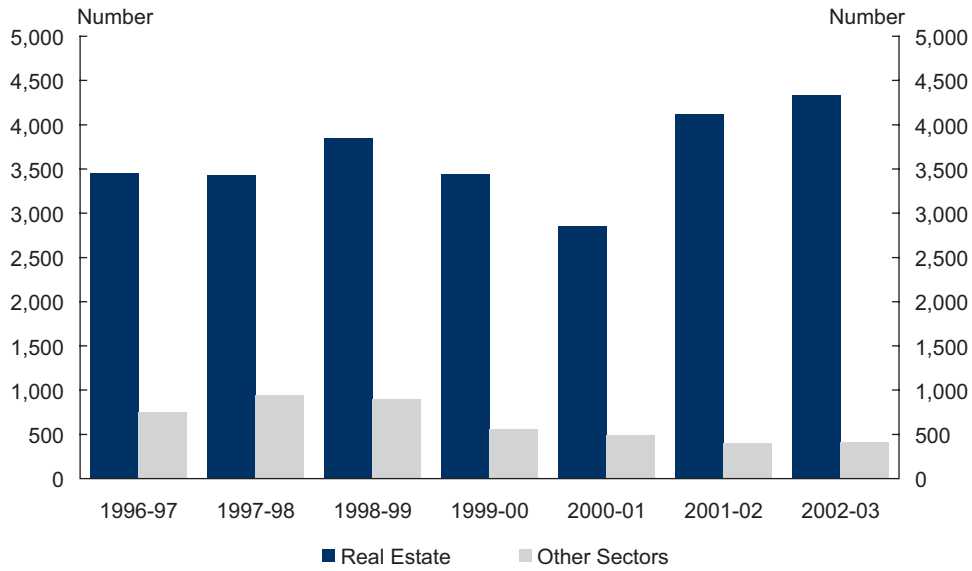
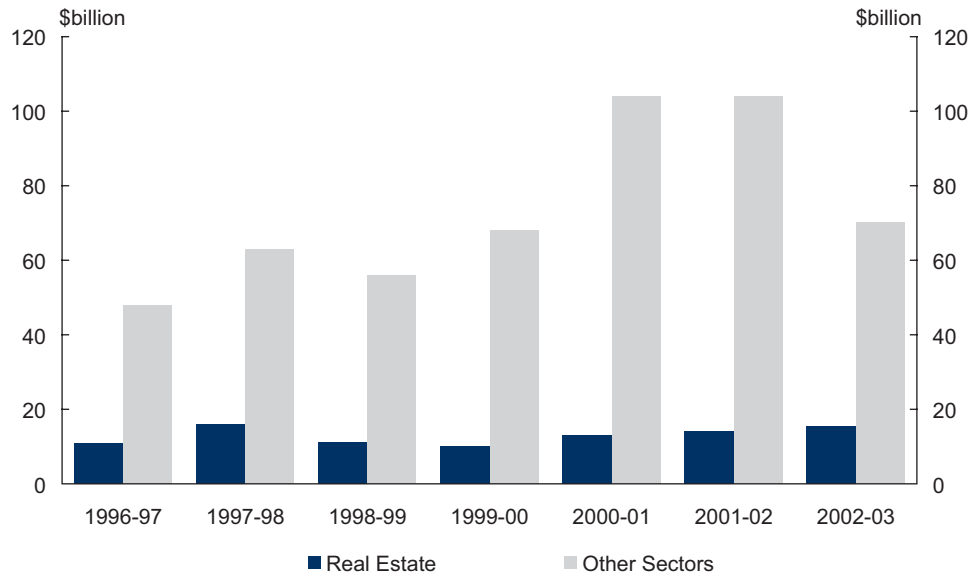


Chart 2.2: Applications decided — proposed investment



The number of applications decided during 2002-03 was around 5 per cent higher than in 2001-02. The value of proposed foreign investment associated with those applications decided in 2002-03 was more than 27 per cent lower than the level in 2001-02. A breakdown on the outcome for applications submitted over the last four years is provided in Table 2.1. Seventy-nine proposals were rejected in 2002-03, or 1.7 per cent of all decided proposals. All of these rejections were in the real estate sector.

Foreign investors are encouraged to discuss potential or actual proposals with the Board to ensure the proposals are consistent with policy. As a result, proposals clearly inconsistent with policy may not proceed to a decision, that is, they are not lodged or, if lodged, are withdrawn. Alternatively the proponent may modify a proposal to ensure it conforms to policy. The data

for withdrawn cases reflect proposals that do not proceed for commercial or personal reasons, as well as those cases that are withdrawn by the parties instead of proceeding to a formal rejection. The low rejection rate reflects the consultative approach taken in the administration of foreign investment policy, particularly in respect to real estate proposals.

The great bulk of conditional approvals were in the real estate sector. Only 44 proposals outside the real estate sector were approved subject to conditions. The main type of condition that was applied in the non-real estate sectors was environmental. For real estate, 3,519 proposals were approved with conditions relating to the period during which development should commence, the need for temporary residents to sell established properties when they cease to reside in Australia, or the imposition of reporting requirements on 'off the plan' sales.

**Table 2.1: Applications considered (number and proposed investment) 1999-00 to 2002-03**

Action	1999-2000		2000-01		2001-02		2002-03	
	No.	\$b	No.	\$b	No.	\$b	No.	\$b
Approved unconditionally	1170	56.3	1003	80	1040	70.2	1105	53.5
Approved with conditions	2737	21.7	2298	26.3	3403	47.7	3563	32.2
Total approved	3907	78	3301	106.3	4443	117.9	4668	85.7
Rejected	96	0.1	46	9.7	77	0.1	79	-
Total decided	4003	78.1	3347	116	4520	118	4747	85.8
Withdrawn	408	-	318	-	402	-	365	-
<b>Total considered</b>	<b>4411</b>		<b>3665</b>		<b>4922</b>		<b>5112</b>	

## Approvals by sector

### General summary

Table 2.2 provides details for 2002-03 of approved proposals for each sector and the associated proposed investment on acquisitions and new businesses. The bulk of the total proposed investment is attributable to the proposed cost of acquisitions. The skewing of the foreign investment data towards acquisition costs is a consequence of the notification requirements, as the expansion of existing businesses generally does not require foreign investment approval. Bearing in mind the limitations of the Board's data noted at the beginning of this chapter, the following general points can be made:

- The services (excluding tourism) sector attracted the largest amount of proposed investment, with approvals totaling \$23.3 billion; and
- Other major sectors were manufacturing (\$21.7 billion), minerals exploration and development (\$11.5 billion), real estate (\$15.5 billion), and finance and insurance (\$6.6 billion).

**Table 2.2: Total approvals by industry sector in 2002-03 (\$billion)**

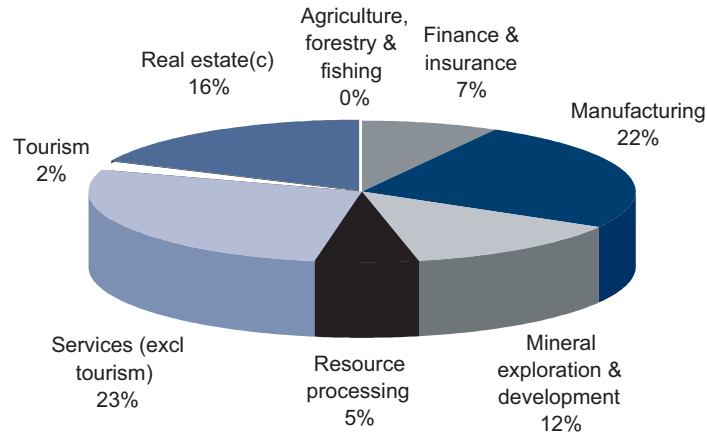
Industry sector(a)	Number of approvals(b)	Acquisition cost	Proposed investment on development	Total proposed investment
Agriculture, forestry & fishing	5	0.09	..	0.09
Finance & insurance	24	5.9	0.77	6.7
Manufacturing	73	20.58	1.14	21.72
Mineral exploration & development	54	10.5	1	11.47
Resource processing	10	0.7	4.5	5.2
Services (excl tourism)	82	21.5	1.8	23.3
Tourism	42	1.7	..	1.7
Real estate(c)	4257	12.4	3.1	15.5
<b>Total</b>	<b>4547</b>	<b>73.37</b>	<b>12.31</b>	<b>85.68</b>

Note: Totals may not add due to rounding.

'..' indicates an investment figure of less than \$100 million.

- (a) Data have been compiled by reference to the Australian and New Zealand Standard Industrial Classification published by the ABS, except proposals involving newspaper printing and publishing which have been allocated to service industries (the ABS classifies these under manufacturing). Acquisitions of diversified company groups are classified according to the industry of the major activity of the group. Acquisitions of real estate to be used for purposes incidental to the main business activity of the purchaser are classified according to that activity.
- (b) Excludes 121 proposals involving financing arrangements and corporate restructures.
- (c) Total proposed investment in the real estate sector may be overstated as it includes expenditure for annual programs and 'off the plan' approvals granted to real estate developers. Based on past experience, a significant proportion (possibly up to half) of these advance approvals are not utilised. In addition, no account is taken of real estate that is developed under an annual program by a foreign developer that is subsequently sold to Australian interests.

**Chart 2.3: Approvals by industry sector 2002-03  
(per cent of the value of proposed investment)**



### **Agriculture, forestry and fishing**

Total proposed investment during 2002-03 in the agriculture, forestry and fishing sector was \$96 million, a sharp decline from \$178 million in 2001-02.

There was only one significant acquisition. Vincor International Inc., a Canadian company, acquired the land and assets of two Western Australian companies, Goundrey Wines Pty Ltd and Fox River Wine Company, for \$62.5 million.

### **Finance and insurance**

Total proposed investment in the finance and insurance sector decreased from \$13.2 billion in 2001-02 to \$6.65 billion in 2002-03. There were 24 proposals approved, of which 15 involved expected investment in excess of \$100 million.

One of the most significant proposals by value was the proposed acquisition by GE Capital Finance Pty Ltd, GE Commercial Corporation (Australia)

Pty Ltd and GE Commercial Finance Australia Pty Ltd of a portfolio of business loans from AMP Bank Ltd and AMP Finance Ltd for a consideration of \$1 billion.

### **Manufacturing**

Total proposed investment in the manufacturing sector was \$21.7 billion in 2002-03, an increase from \$16.4 billion in 2001-02.

Proposals in the energy production and distribution (electricity and gas) industries accounted for \$13.8 billion of the total investment. This was a significant increase from \$8.4 billion in 2001-02. Proposed investment in Food Beverage and Tobacco sector was at its highest level in recent years at \$5.3 billion.

Large proposals in the energy industries continued to dominate the manufacturing sector. Two applications were considered in connection with the Loy Yang Power

Station in the LaTrobe Valley, Victoria. A Japanese utility lodged a proposal to bid in a consortium involving an Australian utility and an Australian bank. Separately, two Malaysian companies were also granted approval to participate jointly in the tender process for the Loy Yang assets valued at approximately \$4 billion. The first consortium has signed a conditional sale agreement. However this is currently stayed pending ACCC proceedings in the Federal Court.

In the food and beverage industries there were two significant acquisitions. Burns Philp & Company Ltd acquired Goodman Fielder Ltd for approximately \$2 billion and BRL Hardy Ltd was acquired by a U.S. company, Constellation Brands, Inc., for \$1.9 billion.

Table 2.3 gives a breakdown of the areas of investment in the manufacturing sector.

**Table 2.3: Manufacturing sector approvals by number and total proposed investment in 2002-03 (\$billion)**

Industry sector(a)	Number of approvals	Acquisition cost	Proposed investment on development	Total proposed investment
Food, beverages and tobacco	12	5.3	..	5.3
Wood, wood products and furniture	1	0.6	..	0.6
Chemical, petroleum and coal products	5	0.4	..	0.4
Non-metallic mineral products	2	1	..	1
Basic metal products	1	0.1	..	0.1
Electricity and gas	34	12.7	1.1	13.8
Other(b)	18	0.5	..	0.5
<b>Total</b>	<b>73</b>	<b>20.6</b>	<b>1.1</b>	<b>21.7</b>

Note: Totals may not add due to rounding.

..' indicates an investment figure of less than \$100 million.

(a) Acquisitions of diversified company groups are classified according to the industry of the major activity of the group. Acquisitions of real estate to be used for purposes incidental to the main business activity of the purchaser are classified according to that activity.

(b) Includes investment in paper and paper products, fabricated metal products, transport equipment, other machinery and equipment, water sewerage and drainage and miscellaneous manufacturing.

## Mineral exploration and development

Total proposed investment in the minerals sector was \$11.5 billion in 2002-03, a decrease from \$19.1 billion in 2001-02.

Of the 54 proposals this year, only one exceeded \$1 billion in value. Xstrata plc, a predominantly Swiss company, gained a further interest in Australian black coal acquiring MIM Holdings Ltd for \$4.9 billion. This follows Xstrata's acquisition in 2001 of the business and coal mines of Glencore Coal Australia Pty Ltd.

Table 2.4 gives a breakdown of the areas of investment in the mineral exploration and development sector.

**Table 2.4: Minerals sector approvals by number and total proposed investment — 2001-02 and 2002-03 (\$million)**

Industry	Acquisitions				New businesses			
	No of approvals		\$million		No of approvals		\$million	
	2001-02	2002-03	2001-02	2002 03	2001-02	2002 03	2000-01	2002 03
Gold	12	12	11,684	2,295	2	4	27	129
Oil and gas	5	6	1,243	792	1	2	39	560
Coal	17	12	3,344	5,526	1	2	230	145
Other metallic minerals	16	13	1,464	1,614	1	1	1,000	200
Other	5	2	73	209	0	0	-	-
<b>Total</b>	<b>55</b>	<b>54</b>	<b>17,808</b>	<b>10,436</b>	<b>5</b>	<b>9</b>	<b>1,296</b>	<b>1,034</b>

### Resource processing

Total proposed investment in the resource processing sector was \$5.2 billion in 2002-03, compared to \$4.8 billion in 2001-02.

The largest proposal was for a \$3.5 billion expansion of a liquefied natural gas plant in the Northern Territory involving a number of companies owned by US, Japanese, Italian and Australian interests. Phillips Petroleum Company, a US entity, holds a 48 per cent share in the development.

### Service industries (excluding tourism)

During 2002-03, 82 proposals were approved for investment in the service industries sector (excluding tourism), comprising twelve proposals to establish

new businesses and 70 proposed acquisitions of interests in existing businesses. The total proposed investment for the establishment of new businesses and existing businesses was \$23.34 billion.

There were 26 proposals involving investment of over \$100 million. Of these, three were for more than \$1 billion. Two of these involved the acquisition of small interests in The News Corporation Limited, while the other involved a subsidiary financing reorganisation.

Table 2.5 give a breakdown of the areas of investment in the services industries (excluding tourism) sector.

**Table 2.5: Services sector (excluding tourism) approvals by number and total proposed investment in 2002-03 (\$billion)**

Industry Sector(a)	Number of approvals	Acquisition cost	Proposed investment on development	Total proposed investment
Wholesale trade	5	0.3	..	0.3
Retail trade	5	1.1	..	1.1
Transport(b)	7	0.3	0.7	1
Services to transport	3	0.1	0.7	0.8
Storage (grain & cold storage)	3	0.3	..	0.3
Communications	26	15.4	0.2	15.6
Property and business services	18	3	..	3
Health	4	0.4	..	0.4
Entertainment and recreational services	5	0.5	..	0.5
Other(c)	6	0.1	0.2	0.3
<b>Total</b>	<b>82</b>	<b>21.5</b>	<b>1.8</b>	<b>23.3</b>

Note: Totals may not add due to rounding.

'..' indicates an investment figure of less than \$100 million.

(a) Acquisitions of diversified company groups are classified according to the industry of the major activity of the group. Acquisitions of real estate to be used for purposes incidental to the main business activity of the purchaser are classified according to that activity.

(b) Includes road, rail, water and miscellaneous transport services.

(c) Includes general construction services and personal services.

## Tourism

There was an increase, from \$950 million in 2001-02 to \$1.72 billion in 2002-03, in proposed investment in the tourism sector. Of the 42 proposals approved in this sector, four involved proposed investment in excess of \$100 million.

## Urban real estate

Urban land is defined under the *Foreign Acquisitions and Takeovers Act 1975* to be all land that is not used wholly and exclusively for carrying on a business of primary production. Reflecting concerns over foreign ownership of urban land, the policy in relation to this sector is

restrictive. As a result, all proposals relating to urban real estate need to be submitted for examination, unless explicitly exempted by regulation (see **Appendixes A and F**).

Table 2.6 gives a breakdown of approved investments in urban real estate.

The number of approvals rose from 4,043 in 2001-02 to 4,257 in 2002-03. Total proposed investment associated with these proposals rose from \$14.1 billion in 2001-02 to \$15.5 billion in 2002-03, reflecting higher levels of investment in developments.

**Table 2.6: Investment in urban real estate by type and number of proposals approved in 2002-03 (\$billion)**

	Number of approvals	consideration	Proposed development expenditure	Total proposed investment
<b>For development</b>				
Residential				
Ordinary approvals	1233	0.7	1.5	2.2
Off-the-plan				
Individual	627	0.3	..	0.3
Developer	320	6.1	..	6.1
Annual programs	6	0.48	0.21	0.69
Total residential	2186	7.6	1.7	9.29
Commercial				
Ordinary approvals	50	0.2	1.1	1.32
Annual programs	9	0.08	0.2	0.28
Total for development	2245	7.88	3	10.89
<b>Developed</b>				
Residential	1965	1.19	..	1.19
Commercial	47	3.3	0.1	3.4
Total developed	2012	4.49	0.1	4.59
<b>Total</b>	<b>4257</b>	<b>12.37</b>	<b>3.1</b>	<b>15.48</b>

Note: Totals may not add due to rounding.  
 ..' indicates an investment figure of less than \$100 million.

### Real estate for development

During 2002-03, 2,186 proposals were approved for the acquisition of residential real estate for development (including eligible redevelopment), an increase from the 2,036 proposals approved in 2001-02. Proposed development expenditure decreased from approximately \$2 billion in 2001-02 to \$1.7 billion in 2002-03. As a consequence of changes in the Government's foreign investment policy applying from September 1999, the acquisition of house and land packages, where construction has not commenced, are treated as vacant land for development rather than under the 'off the plan' category.

**Ordinary approvals** comprise the purchase of broadacres for residential subdivision and vacant building blocks for single dwelling construction and for integrated residential developments (such as townhouse and high rise units). Some 1,233 proposals (1,180 in 2001-2002) by foreign interests to acquire residential real estate for development were approved in 2002-03, with a total proposed investment of \$1.5 billion (\$2.8 billion 2001-02). Such approvals have a condition that continuous development must commence on the land/site within 12 months of approval. In addition, the parties are required to report on the completion of development to demonstrate compliance with the development condition. The Government views seriously any breaches of these development conditions (see section on Residential Real Estate Compliance).

In 2002-03, 627 proposals from individuals were approved under the '**off the plan arrangements**' involving proposed investment of around \$300 million. In addition, there were 320 applications approved from real estate developers seeking 'advance approval' to sell property 'off the plan' to foreign persons (compared with 284 in the previous year). The value of such developments rose from \$5.7 billion to \$6.1 billion.

Certain points should be noted in relation to the Board's statistics dealing with 'off the plan' applications. First, the Board's figures overstate the likely extent of foreign purchases as few developers with 'off the plan' approvals will sell 50 per cent of their developments to foreign purchasers. (There is necessarily a significant lag between the granting of approvals and receipt of reports due to construction time and completion of sales).

Secondly, the 'off the plan' category has zero proposed development expenditure recorded against it. In the case of 'individual off the plan' the consideration relates to the proposed amount payable by foreign interests for newly completed dwellings.

The **annual program** arrangements are designed to avoid the need for established developers to notify individual acquisitions of property. Such developers may be granted annual approvals to buy land up to specified limits on condition that they report to the Board at the end of the year on their acquisitions and the developments undertaken. The granting of an annual program for acquisitions of

land for development does not relieve the developer of responsibility for complying with the general requirements of foreign investment policy. For example, additional investment in relation to acquisitions of existing businesses, or for the establishment of new businesses with total investment of \$10 million or more, or acquisitions of heritage listed properties would require an additional application to be submitted to the Board for examination. In 2002-03, 15 annual programs were approved. These arrangements involved residential and commercial real estate for development totalling approximately \$100 million in proposed acquisition costs.

Information on development expenditure in relation to annual programs is collected on an ex-post basis, with developers required to report annually on actual acquisitions, development expenditures and details of any properties sold following development.

Approval was given to 50 proposals to purchase land for commercial development involving total proposed investment of \$1.3 billion. This was a slight increase on the 49 proposals approved during 2001-02.

There was increase from 10 in 2001-02 to 24 in 2002-03 in the number of rejections in relation to the proposed acquisition of residential real estate for development (including 'off the plan' dwellings). Usually there were one or more of the following reasons for these rejections:

- the planned development expenditures were not considered significant in relation to the acquisition price for the

property (there is an expectation that proposed development expenditure should be equivalent to at least 50 per cent of the acquisition price);

- the proposed timetables for development were unsatisfactory;
- the property proposed to be acquired for the purpose of demolition and redevelopment was not considered to be at the end of its economic life, for example, it was rented out;
- the proposal did not add to the housing stock;
- the prospective foreign purchasers had not established, to the Government's satisfaction, that they had the technical and financial capacity, nor the necessary planning approvals, to undertake the proposed development within an acceptable timeframe; and/or
- the applicant had breached conditions associated with a previously approved application.

#### **Acquisitions of developed real estate**

Generally, foreign investment policy enables the purchase of developed commercial real estate by foreign persons. Conversely, it restricts the purchase by foreign persons of developed residential real estate. However, certain categories of foreigners are able to purchase developed residential real estate under particular conditions (see **Appendix A**). In 2002-03, 1965 proposals were approved for acquisitions of developed residential real estate compared to 1909 in 2001-02.

Reflecting the comparatively restrictive nature of the policy, there were

54 rejections in 2002-03 (53 in 2001-02) of proposed acquisitions of developed residential property. The total potential acquisition cost involved in these rejected proposals was \$30.77 million. These proposals were rejected because the prospective buyers did not fall into an eligible category.

In 2002-03 there were 47 approvals to purchase interests in developed commercial real estate (for example, shopping centres, offices, warehouses, etc) involving total proposed investment of \$3.2 billion. This represents only a small fraction of the total foreign investment in developed commercial real estate as the majority of proposals are exempt from Government examination. The exemption threshold for commercial real estate was increased from \$5 million to \$50 million in September 1999.

### Real estate by state

Table 2.7 provides details of approved investment in all categories of urban real estate (that is residential and commercial) for each State and Territory. New South Wales was the main location for proposed foreign investment in urban real estate by value with 39.7 per cent of the total in 2002-03. There was a significant increase in the value of foreign investment approvals in Queensland accounting for 23.8 per cent of the total in 2002-03, up from 15.9 per cent in 2001-02. Victoria also had approvals for significant foreign investment accounting for 12.2 per cent of the total value. However, this was a significant decrease from 29.4 per cent in 2001-02.

**Table 2.7: Total proposed investment in urban real estate by category of real estate and location of investment, approved in 2002-03 (\$million)**

Location	For development		Developed		Total
	residential	Commercial	residential	Commercial	
New South Wales	3489	763	592	1311	6155
Queensland	3035	313	188	154	3690
Victoria	1411	61	180	249	1901
Western Australia	640	105	183	28	956
Other(a)	812	340	47	1623	2822
<b>Total</b>	<b>9387</b>	<b>1582</b>	<b>1190</b>	<b>3365</b>	<b>15524</b>
<b>Number of proposals</b>	<b>2186</b>	<b>59</b>	<b>1965</b>	<b>47</b>	<b>4257</b>

Note: Totals may not add due to rounding.

(a) 'Other' includes acquisitions of companies/trusts with real estate holdings in more than one State or Territory and proposals in the ACT, NT, Tasmania and South Australia.

## Residential real estate compliance

Under policy, the purchase of developed residential real estate by foreign interests purely for the earning of rental income, for speculative purposes or where it may involve land banking is not permitted. Therefore, the Government seeks to ensure that where foreign interests acquire residential real estate for development, any stated development is carried out within a reasonable time (this usually involves a requirement to commence continuous construction within 12 months).

The policy is directed at maintaining greater stability of house prices and the affordability of housing for the benefit of Australian residents (see **Appendix A**). Any failure by foreign interests to pursue stated development plans is considered to be a breach of policy. Section 25 of the Act provides for financial penalties or imprisonment on conviction for failing to comply with conditions.

There are a number of processes that assist in ensuring compliance with the residential real estate policy.

- Information on Australia's foreign investment policy is disseminated directly by the Board through publications, public presentations and in response to inquiries. In addition, information is provided by other government departments, such as by the Department of Immigration and Multicultural and Indigenous Affairs.
- In purchasing property, foreign persons may deal with a number of professionals and organisations, such as

solicitors, financial institutions and real estate agents, who have an interest in ensuring that foreign purchasers have information on the need to comply with foreign investment policy.

- There is a reporting requirement placed on approvals to improve compliance with conditions imposed, for example, on real estate for development.
- Assessment of new proposals includes examination of compliance.
- All allegations of possible non-compliance are fully investigated.
- Sample checks on compliance are made by the Division.

The Treasurer has the power under Section 36 to serve a notice in writing requiring a person capable of giving information or producing documents relevant to the exercise of the Act to supply the information within a specified time.

## Approvals by country of investor

Data on proposed investment associated with approvals in 2002-03 are shown by country, aggregated by State in Table 2.8 and by industry sector in Table 2.9.

- The United States was the most important single source of proposed foreign investment in Australia during 2002-03. The other major sources of foreign investment were the United Kingdom, Malaysia and Switzerland.
- Approved proposed investment from the USA rose from \$18.5 billion in 2001-02 to \$30.5 billion in 2002-03. This proposed investment was

- principally in the services (excluding tourism) sector accounting for 56 per cent of total US investment. Refer to Chapter 4 for further discussion on the US/Australia foreign investment position.
- Interestingly, approved proposed investment from the UK was substantially lower at \$7.4 billion (8 per cent of total investment) compared with \$19.5 billion in 2001-02 (16.5 per cent of total investment). The majority of UK proposed investment for 2002-03 was in the finance and insurance sector.
  - Malaysia emerged as a significant investor in 2002-03 contributing \$6.7 billion and significant investment in the mineral exploration and development sector by Xstrata Plc (see discussion above) ensured that Switzerland accounted for 6.6 per cent of total investment (\$6.1 billion).
  - Despite a significant decrease in the level of investment, Japan and Singapore continued as major foreign investors in 2002-03 with approved investment of \$3.5 billion (\$10.5 billion in 2001-02) and \$2.7 billion (18.1 billion in 2001-02) respectively.

**Table 2.8: Proposed investments by country by state 2002-03 (\$billion)**

	USA	UK	Malaysia	Switzerland	NZ	Japan	Other/ Aust(a)	Total
Queensland	0.9	0.8	-	5	-	1	3.6	11.3
Victoria	0.2	0.4	4	-	0.4	0.4	4.5	9.9
New South Wales	1.5	0.8	-	-	-	0.2	7.1	9.6
Western Australia	2.2	2.2	-	0.6	-	-	2.9	7.9
More than one(b)	22.1	2.9	2.4	0.5	3.6	1.2	6.9	39.6
Offshore takeover	0.9	0.1	-	-	-	-	0.9	1.9
Other(c)	2.7	0.2	0.3	-	0.1	0.8	1.5	5.6
<b>Total</b>	<b>30.5</b>	<b>7.4</b>	<b>6.7</b>	<b>6.1</b>	<b>4.1</b>	<b>3.6</b>	<b>27.4</b>	<b>85.8</b>

Note: Totals may not add due to rounding.

(a) Includes proposed investment from Australian controlled companies.

(b) Includes proposals where the investment is proposed to be undertaken in more than one State or Territory.

(c) Includes investment in the ACT, NT, Tasmania and South Australia.

**Table 2.9: Total proposed investment associated with approved proposals, by country of investors and industry sector 2002-03 (\$million)**

	Number of proposals approved (c)	Agriculture forestry & fishing	Finance & insurance	Manufacturing	Mineral exploration & development	Real estate	Resource processing	Services (excluding tourism)	Tourism	Total
USA	361	-	1,940	5,125	2,842	764	2,545	17,127	117	30,460
UK	1,980	4	2,051	1,054	1,287	1,706	-	1,259	30	7,391
Malaysia	210	-	-	6,400	55	210	-	-	17	6,682
Switzerland	34	-	1	500	5,538	18	2	-	-	6,059
New Zealand	30	-	-	3,860	-	43	-	216	-	4,119
Japan	149	2	51	695	318	149	865	529	983	3,592
Singapore	252	-	120	40	-	2,170	-	17	399	2,746
Germany	111	26	317	30	23	1,371	-	946	-	2,713
Italy	34	-	-	-	-	14	432	2,096	-	2,542
Netherlands	76	-	401	98	-	263	-	888	82	1,732
Canada	82	63	-	-	140	145	1,000	-	17	1,365
France	65	-	266	990	-	27	-	54	16	1,353
Hong Kong	19	-	-	617	-	27	-	12	-	656
Not Allocated(a)	322	1	-	2	35	6,358	-	-	-	6,396
World Other	1,492	1	323	45	910	7,289	-	67	4	8,639
Sub-total	5,217	97	5,470	19,456	11,148	20,554	4,844	23,211	1,665	86,445
Australia(b)	117	-	1,162	2,261	357	1,327	396	125	58	5,686
<b>Total</b>	<b>5,334</b>	<b>97</b>	<b>6,632</b>	<b>21,717</b>	<b>11,505</b>	<b>21,881</b>	<b>5,240</b>	<b>23,336</b>	<b>1,723</b>	<b>92,131</b>

Note: Totals may not add due to rounding.

(a) 'Off the plan' approvals to real estate developers have been recorded as not allocated to country because the country of investors is not known in advance.

(b) The investment identified as originating from Australia represents the contribution by Australian-controlled companies and Australian residents to the total investment associated with foreign investment proposals in which they are in partnership with foreign interests, but does not generally include the contribution attributable to minority Australian shareholders in companies with majority or controlling foreign shareholders.

(c) These figures indicate the total number of proposals in which investors from the particular country have an interest. Proposals involving investment from more than one country count as one proposal for each of the countries concerned. Therefore, this number is greater than the number reported in Table 2.1.



# Chapter 3

Overview of the *Foreign Acquisitions  
and Takeovers Act 1975*





# Overview of the *Foreign Acquisitions and Takeovers Act 1975*

The *Foreign Acquisitions and Takeovers Act 1975* (the Act) provides legislative backing for the Government's foreign investment policy. A copy of the Act is at **Appendix E**.

## Introduction

The Act empowers the Treasurer to examine proposals by foreign persons:

- to acquire interests in Australian urban land; and
- to acquire, or increase, an interest of 15 per cent or more in, or takeover an Australian business valued at more than \$50 million.

The Act provides for the notification of proposals by the parties involved and for the prohibition of certain types of proposals that, in the judgment of the Treasurer, are contrary to the national interest. Where proposals coming within the scope of the Act are implemented without prior notification, and are subsequently found to be contrary to the national interest, the Treasurer may order divestment and the parties required to sell these assets.

## Notification

**Section 26** makes it compulsory for a foreign interest to notify a proposal to acquire, or increase, a substantial shareholding (that is, 15 per cent or more) of an Australian corporation, unless its total assets are below the \$50 million threshold.

**Section 26A** makes it compulsory for a foreign interest to notify a proposal to acquire an interest in Australian urban land. The section does not apply if the proposed acquisition is exempt under the Foreign Acquisitions and Takeovers Regulations (see **Appendix F**).

There are substantial penalties for non-compliance with the notification provisions of sections 26 and 26A.

**Section 25** provides for the notification of other proposals that come within the scope of the Act but which are not subject to compulsory notification (for example, off-shore takeovers, takeovers of businesses by purchase of assets, or acquisitions of shares in Australian companies that are less than a substantial shareholding).

Formal notification of a proposal under sections 25, 26 or 26A (that is, in accordance with the forms prescribed in the Foreign Takeovers (Notices) Regulations (refer to **Appendix F**) activates a time clock and, if the Treasurer does not take action within 30 days and notify the parties of this action within a further 10 days, the Treasurer loses the ability to either prohibit the proposal or to impose conditions. The normal 30 day examination period may be extended by up to a further 90 days by the issue of an interim order (sections 22 and 25(3) of the Act).

## Examination

The Treasurer's powers to examine proposals (and to take action against them

in certain circumstances) are contained in **sections 18, 19, 20, 21 and 21A**.

**Section 18** deals with proposals involving the acquisition or issue of shares in companies that carry on an Australian business (unless the total assets are below the \$50 million threshold). Where a proposal under section 18 would lead to a change in control of the company with the resultant control being foreign, and the Treasurer concludes that the proposal would be contrary to the national interest, the proposal may be prohibited by the issue of an order. The Treasurer's powers under the section apply irrespective of whether control is changing from Australian to foreign or from a foreign person(s) to another foreign person(s).

**Sections 19, 20 and 21** confer upon the Treasurer essentially similar powers to section 18 but in respect of other kinds of takeovers. Section 19 deals with takeovers of businesses by the purchase of assets, section 20 with takeovers achieved by board representation arrangements or alterations of such constituent documents as the articles of association, and section 21 with takeovers implemented through the leasing or hiring of assets, management agreements or profit sharing arrangements.

**Sections 18, 19, 20 and 21** also give the Treasurer the power to order the unwinding of a proposal if the proposal proceeded without prior notice and which the Treasurer subsequently found to be contrary to the national interest.

**Section 21A** empowers the Treasurer to examine acquisitions of interests in Australian urban land, to prohibit proposed acquisitions that would be contrary to

the national interest, and to order the divestment of interests in urban land that are purchased without prior notice and which the Treasurer subsequently concludes are contrary to the national interest.

As the definition of interests in Australian urban land is so broad (see section 12A), section 21A applies not only to direct purchases of Australian urban land, but also to the purchase of shares and units in companies and trusts that have more than half their assets in the form of Australian urban land. There is no threshold for such companies and trusts.

Another feature of section 21A is that there is no limit (in either dollar terms or in terms of the proportionate interest in the whole property) on the size of examinable acquisitions. However, the regulations provide for an extensive range of exemptions for categories of urban real estate acquisitions (see the Foreign Acquisitions and Takeovers Regulations 1989 refer to **Appendix F**).

The Treasurer's powers in section 21A to take action against foreign acquisitions of interests in Australian urban land are not limited to acquisitions where there is a change of control with the resultant control being foreign. As noted earlier, the powers of the Treasurer in sections 18 to 21 are restricted to such cases.

### **Foreign to foreign transactions**

Transactions involving takeovers by foreign interests of businesses operating in Australia which are already foreign-owned and controlled are subject to examination

and are subject to action under the Act, for example,

- ‘foreign-to-foreign takeovers’ where a foreign-owned business operating in Australia is the target of a takeover by another foreign interest; and
- ‘offshore takeovers’ where an offshore company that conducts a business in Australia is acquired by another offshore company and the target company’s Australian assets are valued at more than \$50 million.

Foreign-to-foreign and offshore takeovers are assessed against the policy applicable to the relevant sector of the economy and having regard to the fact that they do not involve any reduction in Australian ownership and control. Such takeovers normally do not raise issues which would be contrary to the national interest. In cases where such issues are raised, the Government would seek to resolve any concerns through consultations with the parties involved.

### **Prior approval for contractual arrangements**

When parties propose to enter into transactions which are subject to the provisions of the Act, including underwriting arrangements, the exercise of pre-emptive rights or transactions entered into by way of bids at auction or by tender, the parties should ensure that the contractual arrangements include a provision that makes the arrangement subject to approval under the Act. Failure to provide for such a condition may result in contractual arrangements being in contravention of the provisions of the

Act and expose the acquiring party to divestiture.

### **Foreign control**

Foreign investment policy does not rely upon a single all-embracing definition of control. Under the Act, there is a presumption that, unless the Treasurer is satisfied to the contrary, a ‘substantial interest’ that is, an interest of 15 per cent or more (for an individual) and/or 40 per cent or more (in aggregate) in a corporation is a controlling interest. However, a variety of factors other than share ownership may be taken into account when determining where ultimate control of a corporation or venture lies. These include:

- voting rights attached to shareholdings and the rights of shareholders to representation on the Board or controlling body;
- the distribution of share ownership; and
- arrangements or agreements between shareholders and a corporation or controlling body that would enable a shareholder to exercise control, such as through the provision of finance, technology, materials, markets and marketing or management expertise.

The extent to which each of these factors is relevant depends on the particular circumstances of each case. These circumstances can vary widely and determination of control can, therefore, only be undertaken on a case-by-case basis.

## Other provisions of the Act

If the Treasurer raises no objections to a proposal subject to conditions and the parties implement the proposal but do not comply with these conditions, the parties commit an offence (section 25(1C)).

Failure to comply with an order made by the Treasurer is an offence (section 30) and provision of false or misleading information is also an offence (refer to Chapter 7 of the *Criminal Code Act 1995*). The Treasurer may also make orders to prohibit or unwind any schemes entered into for the purpose of avoiding the provisions of the Act (section 38A).

## Other aspects of Foreign Investment Policy

### Foreign portfolio shareholdings

The Act defines a holding of 15 per cent or more of the shares or voting power of a company by a single foreign interest, either alone or together with associates, to be a controlling interest unless the Treasurer is satisfied to the contrary. Accordingly, a holding of 15 per cent or more is normally deemed a non-portfolio holding.

A holding of less than 15 per cent is normally regarded as being of a portfolio nature in determining levels of ownership for the purposes of foreign investment policy. There are, however, three exceptions to this approach.

First, where a person with a shareholding of less than 15 per cent is able to exert control through representation on the board of the company and/or is otherwise able to influence the operations through other means, for example, the provision

of technology, finance or marketing links, the shareholding may be taken into account in calculating the level of foreign ownership of the company. The person's arrangements affecting control of the company may also come within the scope of the Act.

Second, where foreign shareholdings (including foreign portfolio shareholdings) aggregate to 40 per cent or more in a company or venture, the foreign portfolio shares are counted as foreign and the company or venture would be regarded as a 'foreign interest'.

Third, where more than half the assets of a company are in the form of Australian urban land, proposed acquisitions by foreign interests of shareholdings of less than 15 per cent are examinable, unless exempted by regulation (see the Foreign Acquisitions and Takeovers Regulations 1989 refer to **Appendix F**).

### Responsibilities of the foreign investor

In the application of foreign investment policy, the Government seeks the co-operation of foreign investors. As part of this process of co-operation, and in its role of maintaining awareness of the activities of foreign controlled corporations operating in Australia, the Board welcomes opportunities to discuss with foreign companies their operations and plans for investment in Australia.

The Government also directs the attention of foreign investors to the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (see **Appendix G**). The guidelines form an integral part of the

OECD Declaration on International Investment and Multinational Enterprises, with which Australia has associated itself. The Government seeks the co-operation of foreign companies operating in Australia to observe those guidelines.

## **Taxation**

Taxation revenue arising from foreign investment represents a significant benefit to Australia. Special taxation controls apply to the financing of foreign investments in Australian companies and businesses to ensure that foreign investors do not, through the structuring of their investments, obtain a taxation advantage not available to local investors.

The provisions of the income tax legislation seek to ensure that financing arrangements associated with foreign investment reflect normal commercial practice. This is of particular relevance where funds for the implementation of a proposal are to be provided by foreign associates of the parties to a proposal, for instance, by a foreign parent or associated company. In these circumstances, the Government is concerned to ensure that the capital structure employed, and especially the proportion of debt to equity funds employed, reflects the commercial practices of the industry concerned.

## **Foreign government investment in Australia**

Special taxation considerations can arise in respect of proposals by foreign governments or their agencies to invest in Australia. The Government requires commercial investments in Australia by foreign governments or their agencies to

be structured in a manner that enables all normal taxes and charges to be levied, and that questions of sovereign immunity do not arise.





# Chapter 4

International Investment Issues and  
Australia's International Investment Position



# International Investment Issues and Australia's International Investment Position

One of the Government's principal trade objectives is to generate and capture benefits for Australia through international trade and investment liberalisation. This is pursued through a multi-faceted trade policy involving complementary multilateral, regional and bilateral engagements.

The Foreign Investment Policy Division is responsible for ensuring effective representation of Australia's foreign investment policy and negotiating position on international investment policy issues. This includes multilateral forums, such as the Organisation for Economic Cooperation and Development (OECD) and the World Trade Organisation (WTO); regional forums, such as Asia-Pacific Economic Cooperation (APEC); and bilateral forums, such as free trade agreements (FTAs), investment protection and promotion agreements (IPPAs) and other bilateral partnerships.

The Division also manages the Executive Member of the Board's responsibility as the Australian National Contact Point (ANCP) for the OECD Guidelines for Multinational Enterprises (the Guidelines) and related corporate social responsibility issues. The role of the ANCP is to ensure the effective implementation and promotion of the Guidelines in Australia.

The recent proliferation of bilateral trade and investment agreements world-wide and Australia's commitment to FTAs with Singapore, the United States and Thailand,

has invoked heightened public reaction and sensitivities on the issue of globalisation. Within this debate, the argument for bilateralism vis-à-vis multilateralism is a strong point of contention. The Division must therefore balance appropriately its work on bilateral agreements with its continuing involvement in the negotiation of strengthened multilateral arrangements and ensure it has the capacity to respond to these competing pressures.

Australia has traditionally relied on inward FDI to meet the shortfall of domestic savings against domestic investment needs. Utilising foreign capital to supplement local savings ensures higher economic growth, which in turn, has meant more employment and higher standards of living for Australians.

Australia also benefits from its increasing levels of outward FDI. Outward investment enables firms to remain competitive and thus also supports employment at home. Investment abroad stimulates exports of machinery and other capital goods and increases demand for intermediary products, know-how and specialised services. A 1999 study of OECD countries<sup>1</sup> found that each \$1.00 of outward foreign direct investment was associated with \$2.00 of additional exports and a trade surplus of \$1.70. Without FDI those exports would be smaller, sustaining fewer of the more productive, better paying jobs that go with them.

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1 Public Affairs Division of the OECD. Open Markets Matter — The benefits of Trade and Investment Liberalisation, October 1999.

The importance of FDI, both inwards and outwards, to Australia creates great potential for benefits from the negotiation of international investment agreements and maintenance of existing cooperative regimes. In 2001, the value of sales by foreign affiliates was more than twice the value of world exports. Inwards FDI investment is a large and stable source of capital and has the additional benefits of stimulating competition and encouraging innovation. For Australian companies, the opportunity to invest overseas allows improved access to markets and diversification of operations.

## Multilateral investment issues

The Division's role in negotiating international investment agreements allows it to contribute to the development of an international rules based system that takes appropriate account of both the interests of foreign investors and the wellbeing of Australians. The Division's work on promoting the Guidelines for Multinational Enterprises supports this by contributing to a culture of good corporate behaviour.

The Executive Member of the Board is the Australian National Contact Point for the Guidelines and is responsible for the administration and promotion of these Guidelines in Australia.

In contrast to its involvement in OECD work, the Division is not directly

responsible for the Government's involvement in trade related forums like the WTO and APEC. The Department of Foreign Affairs and Trade (DFAT) has primary responsibility for Australia's involvement in these forums. The Division provides expert advice and briefings on foreign investment matters to DFAT.

## OECD matters

### Committee on International Investment and Multinational Enterprises (CIME)

CIME is a leading source of investment analysis and policy assistance that contributes to the development of investment rules based systems. Its work program falls into three categories: improving the international investment architecture; mobilising investment for development; and promoting corporate responsibility.

Continuing projects in relation to the first two categories include:<sup>2</sup>

- *Transparency*: Following the release in April 2003 of a general report on the benefits of public sector transparency for foreign investment and beyond,<sup>3</sup> CIME is working on the development of a framework on investment policy transparency practices. This framework is to help OECD and non-OECD governments as they conduct self-evaluation, report on measures and engage in peer reviews. OECD work on transparency would also contribute to assisting WTO members in their discussions in Geneva.

<sup>2</sup> See Recent Work in the OECD Committee on International Investment and Multinational Enterprises, OECD, June 2003.

<sup>3</sup> Available at <[www.oecd.org](http://www.oecd.org)>.

- *Checklist on FDI incentives*: The Checklist<sup>4</sup>, released by CIME in April 2003, serves as a tool to assess the costs and benefits of using incentives to attract FDI; to provide operational criteria for avoiding wasteful effects and to identify the potential pitfalls and risks of excessive reliance on incentive-based strategies.
- *Analysis of key obligations in investment agreements*: The proliferation of international investment agreements has led the Committee to engage in discussions on the implications of the 'Most-Favoured-Nation' provisions included in these agreements. The Committee is also considering the interpretation of 'fair and equitable treatment' and 'expropriation' in the investment protection provisions of these agreements. These analyses involve a compilation of factual elements of information based on legal literature, evolving arbitral jurisprudence and state practices.
- *Foreign Direct Investment for Development*: This is the title of a major CIME report released in September 2002.<sup>5</sup> The 2003 OECD Ministerial Meeting provided support for continued work by the Committee to develop, with non-Member partners, a shared strategy to promote investment in developing countries. As part of this strategy, CIME has launched a project aimed at exploring the role of official development assistance supporting developing countries' efforts to attract FDI and maximise its benefits.
- *Africa Initiative*: An initiative to enhance the investment policy of African countries with the involvement of other international organisations and stakeholders. This initiative will begin with the preparation of a discussion paper on OECD's experience with investment and peer reviews.

The Division's participation in the work of CIME is important in keeping it abreast of current research in the field of international investment especially the emergence of new perspectives.

### **Committee on Capital Movements and Invisible Transactions (CMIT)**

OECD Member countries have committed themselves to maintaining and expanding the freedom of international capital movements and current invisible operations under the legally binding OECD Codes of Liberalisation.

During 2002-03, CMIT finalised the User's Guide to Codes of Liberalisation and continued its work in reviewing restrictions on foreign participation in the telecommunications sector.

<sup>4</sup> Available at <[www.oecd.org](http://www.oecd.org)>.

<sup>5</sup> Foreign Direct Investment for Development: Maximizing Benefits, Minimizing Costs, OECD, 2002.

## OECD Guidelines for Multinational Enterprises

The Guidelines represent another significant component of CIME's work. CIME is the custodian of the Guidelines and is the reporting post for national contact points (NCPs) on their activities in relation to the Guidelines. CIME also oversees member countries' adherence to the *Declaration on International Investment and Multinational Enterprises*.

Australia is a signatory to the *Declaration on International Investment and Multinational Enterprises* and to a number of procedural decisions made by the member countries of the OECD in June 1976. The text of the Declaration is at **Appendix G** along with the Guidelines and an annex to the Declaration, the General Considerations and Practical Approaches to Conflicting Requirements Imposed on Multinational Enterprises.

The Guidelines, a voluntary code for responsible business conduct, are recommendations by governments to multinational enterprises operating in or from the 30 OECD member countries and 7 non-member adhering countries (Argentina, Brazil, Chile, Estonia, Israel, Lithuania and Slovenia). The Guidelines were reviewed in June 2000.

While the public debate about globalisation appears to have eased over the last few years, increasing international political and economic instability is likely to continue to underpin latent community concerns about foreign investment. The globalisation debate is relevant to the Guidelines with regard to their role in

helping to address community concerns about corporate social responsibility.

The role of the Australian National Contact Point (ANCP) is to ensure the effective implementation and promotion of the Guidelines in Australia. The ANCP is required to operate in accordance with the core criteria of visibility, accessibility, transparency and accountability in accordance with the principle of 'functional equivalence' between NCPs.

The ANCP's main activities this year have been on focusing efforts to increase general public awareness of the Guidelines, particularly among the business community, refining procedures for handling specific complaints and strengthening the consultation process with government agencies, business and other social partners. This has involved:

- Bi-annual consultation sessions with social partners in November 2002 and May 2003 in Melbourne, Sydney and Canberra. Representatives from 18 different organisations attended. The aim of these sessions is, among other things, to seek the views of these organisations on the most effective way for the ANCP to promote the Guidelines, and to more effectively involve interested and relevant community groups in that process.
- Interdepartmental meetings on the Guidelines in March and October 2003 chaired by the ANCP. Representatives from 12 government agencies attended.
- Presentations on the Guidelines at various government and community forums.

- Efforts to incorporate the Guidelines into various domestic corporate governance and social responsibility reporting frameworks.
- Establishing links between the ANCP website and other related domestic sites including Invest Australia, Australia's Export Finance and Insurance Corporation, the Australian Stock Exchange, Austrade and AusIndustry.
- The presentation to the OECD in June 2003 of the third annual report of the ANCP's activities. Details are available on the ANCP website at <www.ausncp.gov.au>.

Corporate Social Responsibility (CSR) continues to be a prominent theme of the consultation process. The CSR concept seeks to broaden the focus of corporations, small and medium enterprises, government and others to include not just their contribution to economic wellbeing, but also their potential impact on environmental and social conditions.

The ANCP participated in the annual OECD Roundtable on Corporate Responsibility held in conjunction with the annual meeting of NCPs in June. The 2003 topic was 'enhancing the role of business in the fight against corruption — making the most of the OECD Guidelines'. Held under Chatham House rules to allow for a candid and constructive discussion, the discussion focused on governments' roles in the effort to fight corruption and how the OECD Guidelines can be used in synergy with other anti-corruption instruments.

The Guidelines include provisions encouraging greater corporate disclosure. The importance of this provision has been highlighted by recent high profile Australian and US corporate collapses.

No specific instances regarding the operation of the Guidelines have been raised with the ANCP in the past 12 months.

### Recent developments

The ANCP has upgraded its website <www.ausncp.gov.au> in response to comments made at the community consultations to grant participants greater access to OECD documents. This website provides the text of the Guidelines, a secure section for registered social partners to access and comment on 'for official use' CIME and Guidelines related OECD material, the ANCP's service charter, procedures for raising specific instances and the ANCP's procedures for handling them, frequently asked questions about the Guidelines and specific instances, a notice board publicising coming events and additions to the site, links to related sites, and a compilation of related documents.

The ANCP is continuing to develop its work in promoting the Guidelines and, in particular, ensuring that the Australian business sector is actively engaged in this process.

### World Trade Organization (WTO)

Australia also pursues its interests in relation to international investment through involvement in the WTO Working Group on the Relationship between Trade and Investment (Working Group). The

Working Group was formed following the Uruguay Round at the WTO Ministerial Conference in Singapore in 1996 and its mandate was extended indefinitely in 1998.

At the WTO Ministerial Meeting in Doha in November 2001, Ministers agreed to begin, subject to explicit consensus, negotiations of multilateral rules for trade and investment after the Fifth Ministerial Conference to be held in Cancun, Mexico in September 2003.

The Division provides investment policy advice and briefings to the Department of Foreign Affairs and Trade, which represents Australia at Working Group meetings. The two Working Group meetings held in 2003 built on the four meetings held in 2002 giving further consideration to seven key areas, as identified in the Doha Declaration, viz, scope and definition; transparency; non-discrimination; modalities for pre-establishment commitments; development provisions; balance of payments safeguards; and settlement of disputes between members. Possible negotiating modalities were also discussed in the lead up to the Cancun meeting.

The necessary consensus was not reached at Cancun. The way forward is, for now, uncertain, though the Working Group is likely to be asked to do further work on a range of issues.

## Asia-Pacific Economic Cooperation (APEC)

Australia continues to participate actively in the work of APEC, including in relation to foreign investment. Australia's

main investment interest in APEC is to encourage APEC members to enhance the environment for investment liberalisation in their economies and to improve transparency. This is done through Individual Action Plans (IAPs), peer reviews and collective action through the work of the Investment Experts Group (IEG).

During 2002-03, the Division updated Australia's entry in the *2003 Guide to the Investment regimes of the APEC Member Economies*. The publication includes background on each member's foreign investment regime; regulatory framework and investment facilitation; investment protection; investment promotion and incentives; summary of international investment agreements or codes to which the member is a party; and an assessment of recent trends in foreign investment. The publication was last updated in 1999.

During the period, the Division also revised and updated the Investment Chapter of Australia's annual IAP. This Chapter describes the investment environment and policies of APEC member economies, and is intended to give a clear view of progress in achieving the announced Bogor goal of free and open trade and investment between APEC member economies. Australia's IAP for 2002-03 included information on liberalisation of Australia's foreign investment policy and investment related measures which have occurred in the past twelve months, as well as those which have been implemented since the base year of 1996. Copies of APEC IAPs are available on the APEC website at <[www.apecsec.org.sg](http://www.apecsec.org.sg)>.

The Division was also involved in reporting Australia's performance against the APEC Options for Investment Liberalization and Business Facilitation, presenting Australia's position in the paper on *Transparency in Trade and Investment Liberalization and Facilitation*, and reviewing and providing questions on the investment regimes of New Zealand, Korea and Hong Kong as part of the IAP Peer Review Process.

The Division provided technical assistance to other areas of Treasury and to DFAT regarding attendance at meetings of the IEG.

## Bilateral investment issues

2002-03 was an important year in Australia's trade policy. In addition to marking the twentieth anniversary of Australia's first bilateral trade agreement, which was with New Zealand, negotiations also commenced on an Australia — United States FTA. In addition, the FTA with Singapore was signed, negotiations on an FTA with Thailand continued and significant progress was made in deepening Australia's trade and investment partnerships with China and Japan.

Bilateral agreements have an important role to play in providing FDI benefits to Australia. They can provide greater security, certainty and opportunities for outward FDI as well as ensuring that Australia is a desirable destination for overseas investors. In contrast to multilateral forums, bilateral agreements are less cumbersome to initiate and maintain and may be tailored to meet the needs of unique relationships between nations. They can secure practical results

for Australian businesses and establish a high benchmark for the multilateral system.

Bilateral agreements are often complementary to regional and multilateral efforts, providing momentum to our wider multilateral trade objectives. They can provide precedents, examples of best practice and ensure that progress in improving the global environment for FDI continues when multilateral efforts are slowed. Australia's negotiations with Thailand and Singapore for example, complement Australia's relationship with ASEAN. Therefore, although the geographical coverage of bilateral agreements is by definition narrower than that of multilateral agreements, bilateral agreements can make important contributions to investment liberalisation in circumstances where any removal of impediments is extended to all countries as is more often the case.

## Investment Promotion and Protection Agreements (IPPAs)

Australia's bilateral IPPAs provide a clear set of obligations relating to the promotion and protection of investments of the signatory parties. By promoting confidence in the regulatory environment relating to foreign investment, IPPAs have the potential to enhance investment flows between Australia and other countries. Australia's IPPAs apply post-establishment, that is Australia's sovereign right to admit investments (either through acquisitions or new businesses) is unaffected by the provisions of such agreements.

Australia uses its model IPPA text to provide the basis on which these agreements are negotiated. The IPPAs provide fair and equitable treatment, 'most favoured nation' commitments relating to the treatment of foreign investment, give undertakings about expropriation/nationalisation (including the nature of compensation for such acts) and establish mechanisms for resolving disputes over investment matters.

To date, Australia has signed IPPAs with Argentina, Chile, the Czech Republic, Hong Kong, Hungary, India, Indonesia, Laos, Lithuania, Pakistan, Papua New Guinea, the People's Republic of China, Peru, the Philippines, Poland, Romania, and Vietnam. Agreements with Egypt, Sri Lanka, the United Arab Emirates and Uruguay have been signed but are not yet in force. Australia recently completed IPPA negotiations with Mexico and Turkey with an intention to sign the agreements in the near future. Australia is currently negotiating IPPAs with a number of countries including Russia and Iran.

## Other agreements involving investment

### Australia — New Zealand Closer Economic Relations

This year marked the twentieth anniversary of the Closer Economic Relations Agreement between Australia and New Zealand. The objectives of CER are to expand free trade by eliminating barriers to trade and promoting fair competition. The Agreement has assisted in building momentum for trade liberalisation. By 1990, five years ahead of schedule, all

tariffs and quantitative restrictions had been removed from trans-Tasman goods trade.

Australia and New Zealand continue to enjoy a close relationship with high levels of investment flowing between the two countries. In 1999 The Joint Prime Ministerial Taskforce on Australia New Zealand Bilateral Economic Relations (ANZBER) was established to address a number of issues including impediments to trans-Tasman investment. The review resulted in significant liberalisations to the investment regimes of Australia and New Zealand.

Australia aims to continue to build on the considerable achievements already made to simplify laws and regulations that affect trans-Tasman business. There are no practical impediments to trans-Tasman investment, ongoing flows of new investment are high, and neither of our respective screening bodies has declined an investment proposal from the other country in the last ten years.

### Australia — Singapore Free Trade Agreement

In recognition of our longstanding friendship and growing trade and investment relationship, a free trade agreement between Australia and Singapore was signed during the period, creating greater economic integration and bilateral relations between our countries. The Singapore-Australia FTA (SAFTA) is Australia's first FTA since the conclusion of the Australia-New Zealand Closer Economic Relations Agreement over twenty years ago. SAFTA reflects a trend in recent years towards bilateral negotiations

where the key objectives are the further liberalisation of trade in goods, services and investment between two countries.

SAFTA will improve the environment for Australian investment in Singapore. Australian investors will receive national treatment placing them on a par with domestic investors except in areas specifically exempted. In the event that investors from another country are offered more favourable terms by Singapore under another agreement, Singapore has agreed to consider offering Australian investors treatment no less favourable. Australian investors will also enjoy greater transparency in relation to investment restrictions in Singapore's government-linked companies. They will enjoy protection against expropriation and will be entitled to compensation should expropriation or other loss occur.

Under this agreement, Australia agreed to provide a help desk to assist Singaporean **business** investors with applications for direct investment in Australia. This was agreed in response to concerns expressed by Singaporean investors for more certainty and tangible assistance in the foreign investment application process. The help desk's services include the provision of advice regarding:

- foreign investment policy and its administration in Australia;
- any potential national interest concerns that proposals raise;
- how to complete forms and where to submit them; and
- statutory and non-statutory timeframes for assessing proposals.

The desk will also assist Singaporean investors to fulfil requests by the Foreign Investment Review Board for further information.

### **Australia — Thailand Closer Economic Relations (Free Trade Agreement)**

On 30 May 2002, Prime Minister John Howard and his Thai counterpart, Dr Thaksin Shinawatra, announced that Australia and Thailand would begin negotiations towards a Closer Economic Relations-Free Trade Agreement. At the launch of these negotiations, the Prime Ministers indicated that the agreement would be comprehensive in scope, covering liberalisation of trade in goods and services, and provide for greater cooperation in a broad range of areas that would facilitate expanded trade flows and strengthen investment linkages.

The two Governments agreed to aim to complete the negotiations in time for the two Prime Ministers to make an announcement in the margins of the 2003 APEC Leaders' meeting scheduled for 20-21 October in Bangkok.

The completion of a comprehensive and liberalising agreement with the second largest economy in South East Asia, positions Australian exporters to take advantage of a rapidly growing Thai economy and improve the environment for two-way investment. The completion of this Agreement also demonstrates Australia's close economic integration within the South East Asian region and is expected to strengthen the linkages between Australia and the ASEAN Free Trade Area (AFTA).

This is Thailand's first comprehensive free trade agreement and its first free trade agreement with an OECD country. It is the third free trade agreement to be negotiated by Australia.

The Division was involved in negotiations relating to investment matters and attended four of the five full rounds of negotiations and a separate round on investment promotion and protection issues.

On investment, Australia sought to include investment promotion and protection provisions and liberalisation of Thailand's Foreign Business Act in the Agreement. Australia also sought to include a provision for further negotiations on market access in services and investment to be undertaken three years after the FTA enters into force.

The protection provisions of the Investment Chapter will guarantee that both countries' investors and their investments enjoy fair and equitable treatment, full protection and security and will be granted compensation for any losses incurred through expropriation and strife at fair market value.

### **Australia — US Free Trade Agreement**

The Prime Minister, Mr John Howard, the Minister for Trade, Mr Mark Vaile, and the US Trade Representative, Mr Robert Zoellick, announced on 14 November 2002 that Australia and the United States would commence negotiations to conclude a free trade agreement. The Prime Minister and the US President have agreed to end-2003 as the target date for concluding the Agreement.

Both sides also indicated they are prepared to work hard to achieve a comprehensive and liberalising agreement that includes agriculture, manufacturing and services, and sets a high standard both for other FTAs and for the Doha round of WTO negotiations. It was acknowledged that the negotiation of a satisfactory outcome for both parties would be a difficult and challenging process.

Overall responsibility for the negotiations rests with DFAT. However, the Division has provided considerable input and participated in the investment and services negotiations.

During 2002-03, investment issues were discussed at two full rounds of negotiations and during some inter-sessional discussions. Discussions comprised:

- detailed information exchange on key areas of each others' regulatory regimes;
- substantive discussions on key obligations to be included in the Investment Chapter (including national treatment, most favoured nation treatment, fair and equitable treatment, full protection and security, expropriation and compensation for loss, transfers, exceptions and dispute settlement); and
- substantive discussions on market access offers tabled by both sides in the third round.

While both sides are seeking a broad-ranging agreement, which will provide a 'win-win' outcome for both Australia and the US, the successful conclusion of negotiations is dependent on reaching a

balanced package of commitments in terms of each country's specific market access objectives. To Australia, many of its most important market access objectives are in agriculture.

### **Australia — Japan Trade and Economic Framework**

On 1 May 2002, Prime Minister John Howard and Japanese Prime Minister Junichiro Koizumi announced jointly that the two Governments would commence consultations to explore all options for deeper economic linkages between Australia and Japan. In recognition of the strong trade and investment flows between Australia and Japan, the two Governments committed to undertake three working-level meetings to discuss options to further strengthen the bilateral economic relationship and build on the two other formal agreements between Australia and Japan (the Agreement on commerce between the Commonwealth of Australia and Japan, 1957 and the Basic Treaty of Friendship and Co-operation between Australia and Japan, 1976).

The first round of consultations was held in Tokyo on 2-3 September 2002, the second in Canberra on 28-29 November 2002 and the third, and final, working group session was held in Tokyo on 26-28 March this year. Australia registered its support for a comprehensive bilateral FTA. However, the significant differences between the views of Australia and Japan on agricultural trade issues will likely result in a more incremental approach to deepening bilateral linkages. On investment, the consultations focussed on an exchange of information and views

on specific aspects of the investment regimes in both countries.

Department Secretary level officials met in Canberra on 26-27 June to agree on the outline of a report to both Prime Ministers on the next steps. The main objective of the report was the preparation of a Trade and Economic Framework Agreement to be signed by the two Prime Ministers during Mr Howard's visit to Tokyo in July 2003. Australia sought Japan's agreement to the following measures prior to the Prime Minister's visit to Japan in July:

- An "aspirational statement" on the long-term goal of trade and investment liberalisation between Australia and Japan.
- A package of trade and investment facilitation and cooperative measures in areas of commercial and policy priority.
- A forward work programme to examine the merits of bilateral liberalisation.
- An undertaking to hold bilateral consultations regarding the possible impact of both countries' FTAs with third countries on the Australia-Japan trade and investment relationship.
- Institutional provisions to oversee progress and implementation.
- Preserve the option of a comprehensive bilateral FTA in the future.

DFAT has primary responsibility for pursuing a trade and economic agreement with Japan. However, the Division is involved in the working group meetings and has provided analysis of Japan's foreign investment regime and conducted preparatory work for consultations.

## Australia — China Trade and Economic Framework

Preliminary work toward an Australia-China Trade and Economic Framework Agreement, to examine the feasibility and benefits of an FTA between our countries, was undertaken during the period.

### Recent Developments

For details of more recent developments regarding Australia's bilateral and multilateral relationships, refer to the international section of the FIRB website (see [www.firb.gov.au/content/international.asp](http://www.firb.gov.au/content/international.asp)).

## International investment position

This section summarises trends in foreign investment in Australia and Australian investment abroad using Australian Bureau of Statistics (ABS) data.

Foreign investment in Australia refers to the stock of financial assets in Australia owned by non-residents and financial transactions that increase or decrease this stock. Conversely, Australian investment abroad refers to the stock of foreign financial assets owned by Australian residents and financial transactions that increase or decrease that stock.

ABS data on Australia's international investment, which are compiled in accordance with the relevant international statistical standards promulgated by the OECD and the International Monetary Fund, are based on different criteria from those used by the Board.

There are substantial differences between the Board's statistics and ABS statistics. These include differences in coverage, concepts and timing. ABS data are a measure of the actual cross-border transactions that have occurred and the level of foreign investment held at a particular time. The Board's figures are an aggregation of the proposals submitted for approval, regardless of the source of finance used, along with the proposed associated expenditures. The limitations of the Board's data are explained in Chapter 2.

### Foreign investment levels

Foreign investment has made a significant contribution to the development of Australia. It provides scope for higher rates of economic activity and employment than could be achieved from domestic levels of savings. FDI also provides access to the latest technology, production techniques and management skills. It also brings added value through commercial links that offer access to new markets.

The ABS estimated level, or stock, of foreign investment in Australia as at 30 June 2003, was \$904 billion. This represented an increase of \$47 billion, or 5.5 per cent, over the level at 30 June 2002. FDI accounted for \$233 billion of this.

In comparison, the level of Australian investment abroad, as at 30 June 2003, was \$461 billion. This represented an increase of \$1.2 billion, over the level at 30 June 2002. FDI accounted for \$152 billion of this.

FDI in the OECD area has decreased considerably since the investment boom of the late 1990s-2000. Table 4.1 highlights that expected FDI inflows and outflows in 2002 for all OECD countries are less than half that of 2000 and are significantly less than that in 1998 and 1999. Inflows are expected to be USD\$490.6 billion in 2002 compared with USD\$1,272.6 billion in 2000. FDI outflows were USD\$1,276.5 billion in 2000 while they are expected to be only USD\$606.4 billion in 2002.

Australia has proven to be remarkably resilient to the sluggishness of the global economy and other adverse shocks such as the drought. For example, both 2001 (USD\$6.8 billion) and 2002 (USD\$11 billion preliminary figure only) outflows of FDI respectively are greater than that reported for each year between 1997 and 2000. While our inflows have been relatively volatile over recent years, they tell a similar story with USD\$14 billion expected in 2002, the highest level since the early 1990s, compared with only USD\$2.9 billion in 1999 and USD\$13 billion in 2000.

The countries accounting for the largest falls in FDI inflows over recent years are the United States and the United Kingdom. These countries are expected to receive 90 per cent and 79 per cent less FDI respectively in 2002 than that received during their peaks in 1999 and 2000. By contrast, FDI outflows from the United States have held up rather well. In 2002, total preliminary expected outflows are USD\$123.5 billion compared with USD\$30.1 billion inflows. This highlights a shift from the United States' previous role as a net importer of FDI to a net exporter.

New Zealand saw the largest relative decline in FDI inflows among OECD countries in 2002 with a 93 per cent decline.

Table 4.2 demonstrates that, while Australia's stock of inward FDI has remained relatively steady over the past five years (albeit still increasing), Australia's stock of outward FDI has increased at a rapid rate over the same period. As at 30 June 2001, among OECD countries, Australia had the twelfth largest stock of inward and outward FDI with USD\$105.5 billion (4 per cent increase from 1997), and USD\$91.4 billion (27 per cent increase from 1997) respectively.

**Table 4.1: International Direct Investment Flows in OECD Countries (billion \$USD)**

Country	Inflows						Outflows					
	1997	1998	1999	2000	2001 p	2002 e	1997	1998	1999	2000	2001 p	2002 e
Australia	7.6	6.0	2.9	13.0	4.0	14.0	6.4	3.3	0.7	0.6	11.0	6.8
Austria	2.7	4.5	3.0	8.8	6.1	1.7	2.0	2.7	3.3	5.7	3.5	5.4
Belgium/Luxembourg	16.5	30.1	142.5	221.0	84.7	..	7.9	29.1	132.3	218.4	100.6	..
Belgium	..	..	..	..	..	18.3	..	..	..	..	..	13.3
Luxembourg	..	..	..	..	..	125.7	..	..	..	..	..	154.1
Canada	11.5	22.8	24.4	66.6	27.5	21.4	23.1	34.3	15.6	47.5	35.5	27.9
Czech Republic	1.3	3.7	6.3	5.0	5.6	8.4	..	0.1	0.1	..	0.2	0.2
Denmark	2.8	7.7	16.7	32.8	11.5	6.0	4.4	4.5	16.9	25.0	13.0	4.9
Finland	2.1	12.1	4.6	8.8	3.7	9.2	5.3	18.6	6.6	24.0	8.4	9.8
France	23.2	31.0	46.5	43.3	52.6	48.2	35.6	48.6	126.9	177.5	93.	62.6
Germany	12.2	24.6	55.8	203.1	33.9	38.1	41.8	88.8	109.6	56.9	42.1	24.6
Greece	1.1	0.1	0.6	1.1	1.6	..	..	-0.3	0.6	2.1	0.6	0.7
Hungary	2.2	2.1	2.0	1.7	2.6	0.9	0.5	0.5	0.3	0.6	0.3	0.3
Iceland	0.1	0.1	0.1	0.2	0.2	0.1	0.1	0.1	0.1	0.4	0.3	0.2
Ireland	2.7	8.9	18.5	26.5	15.7	19.0	1.0	3.9	6.1	4.6	5.9	2.7
Italy	5.0	4.3	6.9	13.4	14.9	14.6	12.2	16.1	6.7	12.3	21.5	17.1
Japan	3.2	3.2	12.7	8.3	6.2	9.3	26.0	24.2	22.8	31.5	38.4	32.3
Korea	2.8	5.4	9.3	9.3	3.5	2.0	4.4	4.7	4.2	5.0	2.4	2.7
Mexico	14.2	12.2	12.9	15.5	25.3	13.6	..	..	..	..	4.4	1.0
Netherlands	11.1	36.9	41.2	60.3	51.2	29.2	24.5	36.5	57.6	73.5	48.5	26.3
New Zealand	1.9	1.8	0.9	1.3	4.0	0.3	-1.6	0.4	1.1	0.6	0.7	0.3
Norway	3.9	4.4	8.3	5.9	2.1	0.8	5.0	3.2	6.3	8.3	-0.7	4.8
Poland	4.9	6.4	7.3	9.3	5.7	4.1	..	0.3	..	..	-0.1	0.3
Portugal	2.5	3.1	1.2	6.8	5.9	4.3	1.9	3.8	3.2	7.5	7.6	3.5
Slovak Republic	0.2	0.5	0.4	2.2	1.3	4.0	0.1	0.1	-0.4	..	0.1	..
Spain	6.4	11.8	15.8	37.5	28.0	21.2	12.5	18.9	42.1	54.7	33.1	18.5
Sweden	11.0	19.8	60.9	23.2	11.8	11.1	12.6	24.4	21.9	40.6	6.6	10.9
Switzerland	6.6	8.9	11.7	19.3	8.9	9.3	17.7	18.8	33.3	44.7	17.3	11.8
Turkey	0.8	0.9	0.8	1.0	3.3	1.0	0.3	0.4	0.6	0.9	0.5	0.2
United Kingdom	37.4	74.6	89.3	119.7	62.0	25.0	62.7	121.5	202.3	255.2	68.1	39.7
United States	105.6	179.0	289.5	307.7	130.8	30.1	104.8	142.6	188.9	178.3	127.8	123.5
<b>Total OECD</b>	<b>303.7</b>	<b>527.2</b>	<b>893.0</b>	<b>1272.6</b>	<b>614.5</b>	<b>490.6</b>	<b>411.3</b>	<b>650.4</b>	<b>1009.7</b>	<b>1276.5</b>	<b>690.4</b>	<b>606.4</b>

Source is IMF for: Japan 1990-95, Denmark 1992, 1993, 1995 and 1997.

Source is OECD International direct investment database for all other data.

p Provision data.

e Expected outcomes.

.. Statistics unavailable.

**Table 4.2: International direct investment position in OECD countries (billion \$USD)**

Country	Inward										Outward													
	1997	1998	1999	2000	2001 p	2002 e	1997	1998	1999	2000	2001 p	2002 e	1997	1998	1999	2000	2001 p	2002 e						
Australia	101.1	106.0	121.7	109.3	105.5	128.7	72.0	78.6	89.6	83.2	91.4	91.2	19.5	23.6	23.5	30.4	34.8	43.3	14.0	17.5	19.1	24.8	27.0	38.1
Austria	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
Belgium	135.9	143.3	175.0	205.0	209.5	221.2	153.0	171.8	201.4	235.4	244.7	273.4	..	..	..	..	..	..	..	..	..	..	..	..
Canada	9.2	14.4	17.5	21.6	27.1	38.5	0.5	0.8	0.7	0.7	1.1	1.5	..	..	..	..	..	..	..	..	..	..	..	..
Czech Republic	22.3	31.2	41.3	66.5	65.8	..	28.1	34.9	44.9	65.9	69.8	..	..	..	..	..	..	..	..	..	..	..	..	..
Denmark	9.5	16.5	18.3	24.3	24.1	35.5	20.3	29.4	33.9	52.1	52.2	69.5	..	..	..	..	..	..	..	..	..	..	..	..
Finland	195.9	246.2	244.7	259.8	289.0	401.3	237.2	288.0	334.1	445.1	489.4	652.1	..	..	..	..	..	..	..	..	..	..	..	..
France	188.9	250.3	288.6	439.6	453.0	..	296.3	365.2	411.9	478.3	505.3	..	..	..	..	..	..	..	..	..	..	..	..	..
Germany	..	13.1	15.5	12.5	13.5	..	..	2.8	3.2	5.9	6.5	..	..	..	..	..	..	..	..	..	..	..	..	..
Greece	16.3	18.8	19.5	20.0	23.1	28.7	0.9	1.3	1.5	2.0	2.3	2.7	..	..	..	..	..	..	..	..	..	..	..	..
Hungary	0.3	0.5	0.6	0.8	0.7	..	0.3	0.4	0.5	0.7	0.8	1.1	..	..	..	..	..	..	..	..	..	..	..	..
Iceland	..	62.5	72.8	118.5	138.3	..	..	20.3	25.2	27.9	33.7	..	..	..	..	..	..	..	..	..	..	..	..	..
Ireland	85.4	108.8	108.6	113.0	107.9	126.5	139.4	177.0	181.9	180.3	182.4	194.5	..	..	..	..	..	..	..	..	..	..	..	..
Italy	27.1	26.1	46.1	50.3	50.3	78.1	271.9	270.0	248.8	278.4	300.1	304.2	..	..	..	..	..	..	..	..	..	..	..	..
Japan	..	..	..	..	..	..	..	..	..	..	20.0	..	..	..	..	..	..	..	..	..	..	..	..	..
Korea	17.3	20.8	20.4	23.1	..	..	5.0	8.0	8.1	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
Luxembourg	55.8	63.6	78.1	97.2	140.4	..	..	..	..	..	..	11.9	..	..	..	..	..	..	..	..	..	..	..	..
Mexico	127.4	168.9	192.6	246.6	285.4	..	209.6	230.8	263.8	307.8	329.4	..	..	..	..	..	..	..	..	..	..	..	..	..
Netherlands	31.4	33.2	32.9	28.1	20.6	25.4	5.6	5.5	7.0	6.1	7.0	8.5	..	..	..	..	..	..	..	..	..	..	..	..
New Zealand	20.7	26.1	29.4	30.3	32.6	..	27.5	31.6	31.9	33.7	..	..	..	..	..	..	..	..	..	..	..	..	..	..
Norway	14.6	22.5	26.1	34.2	41.0	..	0.7	1.2	1.0	1.0	1.1	..	..	..	..	..	..	..	..	..	..	..	..	..
Poland	19.3	24.5	23.5	28.5	32.9	44.0	5.4	9.6	10.3	17.2	23.5	32.0	..	..	..	..	..	..	..	..	..	..	..	..
Portugal	1.7	2.1	2.3	3.7	4.8	..	0.2	0.4	0.3	0.3	0.4	0.4	..	..	..	..	..	..	..	..	..	..	..	..
Slovak Republic	100.0	118.2	116.3	144.8	164.8	217.8	50.3	70.1	112.8	164.8	189.4	216.0	..	..	..	..	..	..	..	..	..	..	..	..
Spain	41.5	51.0	73.3	94.0	92.2	..	78.2	93.5	106.3	123.2	122.	145.4	..	..	..	..	..	..	..	..	..	..	..	..
Sweden	59.5	72.0	76.0	86.8	89.3	..	165.4	184.2	194.6	233.4	247.8	..	..	..	..	..	..	..	..	..	..	..	..	..
Switzerland	..	..	..	19.2	17.5	..	..	..	..	3.7	3.8	..	..	..	..	..	..	..	..	..	..	..	..	..
Turkey	253.0	337.4	385.1	438.6	531.6	638.5	360.8	488.4	686.4	897.8	899.2	1033.0	..	..	..	..	..	..	..	..	..	..	..	..
United Kingdom	824.1	920.0	1101.7	1418.5	1514.4	1504.4	1879.3	2279.6	2839.6	2694.0	2301.9	..	..	..	..	..	..	..	..	..	..	..	..	..
United States	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
<b>Total OECD</b>	<b>2377.8</b>	<b>2921.0</b>	<b>3351.4</b>	<b>3668.2</b>	<b>4261.2</b>	<b>..</b>	<b>4021.9</b>	<b>4860.9</b>	<b>5858.8</b>	<b>6363.7</b>	<b>5822.8</b>	<b>..</b>	<b>2377.8</b>	<b>2921.0</b>	<b>3351.4</b>	<b>3668.2</b>	<b>4261.2</b>	<b>..</b>	<b>4021.9</b>	<b>4860.9</b>	<b>5858.8</b>	<b>6363.7</b>	<b>5822.8</b>	<b>..</b>

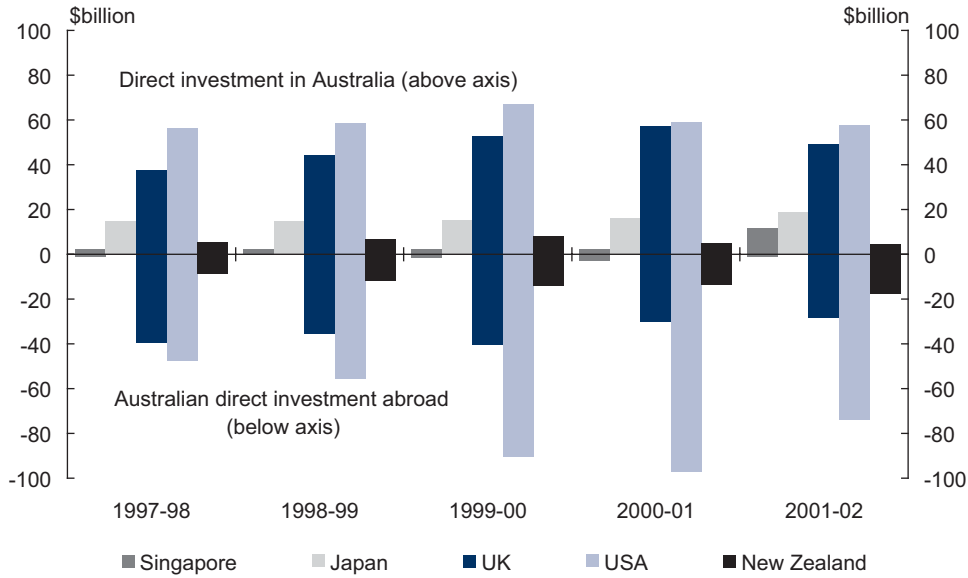
Source is IMF for: Japan 1990-95, Denmark 1992, 1993, 1995 and 1997 and OECD International direct investment database for all other data.

p Provision data.

e Expected outcomes.

.. Statistics unavailable.

**Chart 4.1: Level of foreign direct investment by country at 30 June 2002 (\$billion)**



Source: ABS 5352.0 International Investment Position, Australia, Supplementary Country Statistics, 2001 02.

### Foreign investment levels by country

Chart 4.1 shows the level of FDI between Australia and other major sources of FDI, namely, the US, the UK, Japan, New Zealand and Singapore for the period 30 June 1998 to 30 June 2002.

The stock of FDI in Australia from the US, the UK, Japan and New Zealand fell from 30 June 2001 to 2002. Interestingly, the stock of FDI from Singapore increased by 363 percent, from \$2.5 billion in 2001 to \$11.5 billion in 2002.

The US is the single largest source of FDI in Australia and the largest destination for Australian FDI abroad. The stock of

Australian direct investment in the US at 30 June 2002 was \$74 billion, some \$16 billion greater than the stock of US direct investment in Australia on the same date. In comparison, Australian direct investment in the US on 30 June 1998 was \$9 billion less than the stock of US direct investment in Australia.

The UK was the other major source of direct investment in Australia increasing by 31 per cent over the five year period from \$38 billion to \$49 billion. Australian FDI into the UK has decreased over the period, from \$40 billion in 1998 to \$28 billion in 2002.

Investment in Australia by Japan has steadily increased over the five year period from \$15 billion to \$19 billion (26 per cent). The level of direct investment from New Zealand fell from \$5.4 billion at 30 June 1998 to \$4.4 billion at 30 June 2002.

### **Foreign investment flows**

Foreign investment transactions involve changes in the levels of Australian foreign assets and liabilities (including the creation or extinction of foreign assets and liabilities). A current account deficit in Australia's balance of payments is balanced by a surplus on the capital and financial account, after allowing for errors and omissions. The balance on the financial account represents net financial transactions with the rest of the world, that is, the inflow of foreign investment into Australia, minus the outflow of Australian investment abroad.

International investment statistics are divided into 'direct', 'portfolio', 'financial derivatives', 'other investment' and 'reserve assets'. Under the international standards used to compile ABS foreign investment statistics, direct investment represents capital invested in an enterprise by an investor in another country which gives the investor a 'significant influence' (either potentially or actually exercised) over the key policies of the enterprise. Ownership of 10 per cent or more of the ordinary shares or voting stock of an enterprise is considered, under the ABS framework, to indicate 'significant influence' by an investor. Portfolio investment is the cross-border investment in equity and debt securities (other than

direct investment). Other investment is a residual group that comprises many different kinds of investment. Reserve assets are those external financial assets available to and controlled by the Reserve Bank of Australia or the Commonwealth Treasury for use in financing payment imbalances or intervention in foreign exchange markets.

**Table 4.3: Foreign investment flows (\$billion)<sup>(a)</sup>**

	1998-99	1999-00	2000-01	2001-02	2002-03
<b>Australian investment abroad</b>					
Direct investment					
Equity & reinvested earnings	-4.6	-5.2	-2.8	-25.7	-8.7
Other capital	1.3	1.8	-6.9	5.5	-2.6
Portfolio investment					
Equity	-6.5	-14.8	-17.2	-21.6	-13.7
Debt	-4.5	-2.8	-7.9	-5.8	-0.6
Derivatives(b)		-0.9	0.9	-0.7	5.4
Other investment(c)	-5.0	0.0	-6.1	-5.5	-0.6
Reserve assets	-0.4	-2.6	-8.9	0.8	-5.6
<i>Total Australian investment abroad</i>	<i>-19.7</i>	<i>-24.5</i>	<i>-48.9</i>	<i>-53.0</i>	<i>-26.4</i>
<b>Foreign investment in Australia</b>					
Direct investment					
Equity & reinvested earnings	9.1	8.7	7.1	18.1	15.3
Other capital	-1.1	4.5	5.1	6.1	6.1
Portfolio investment					
Equity	18.4	4.5	18.7	9.4	2.0
Debt	-1.0	26.1	24.2	26.8	31.5
Derivatives(b)		1.3	-1.4	1.0	-5.5
Other investment(c)	21.5	10.1	10.4	12.7	15.9
<i>Total Foreign investment in Australia</i>	<i>46.9</i>	<i>55.2</i>	<i>64.2</i>	<i>74.1</i>	<i>65.2</i>
<b>Net Foreign Investment(b)</b>	<b>27.2</b>	<b>30.7</b>	<b>15.3</b>	<b>21.1</b>	<b>38.8</b>

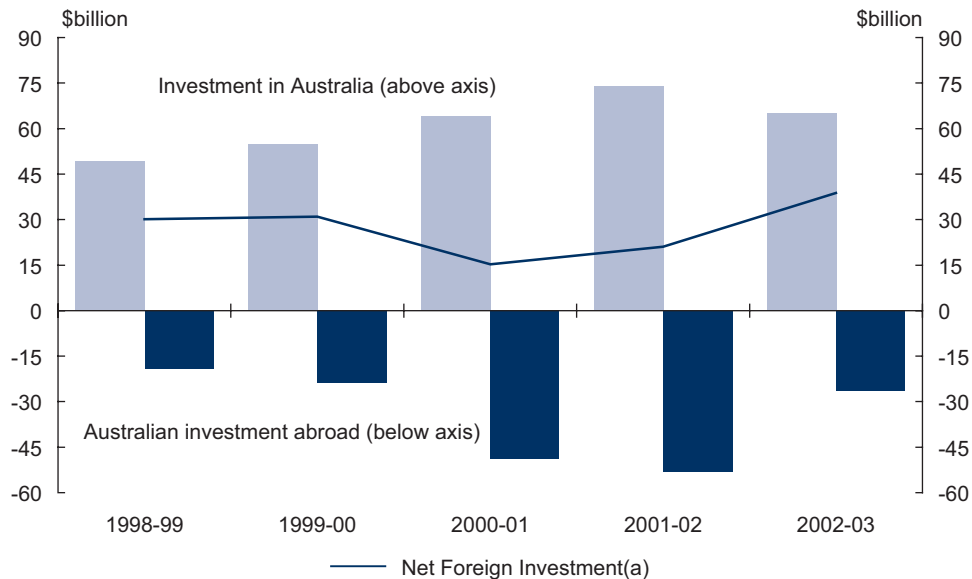
Note: Figures may not add due to rounding.

(a) In keeping with balance of payment conventions, credit entries are shown without sign and debit items are shown as negative entries. Thus, investment flows going from Australia to offshore destinations are shown as a negative.

(b) Derivatives were included in other investments prior to 2000.

(c) Other investment includes all other investment.

Source: ABS 5302.0 Balance of Payments and International Investment Position, Australia, September Qtr 2003.

**Chart 4.2: Foreign investment flows**

(a) The net foreign investment figure has been derived from determining the difference between foreign investment in Australia and Australian investment abroad.

Source: ABS 5302.0 Balance of Payments and International Investment Position, Australia, September Qtr 2003.

Table 4.3 provides a breakdown of the flow of foreign investment over the past five years measured by ABS statistics. Chart 4.2 provides a summary of the major trends in foreign investment flows from the same data.

These highlight the annual fluctuations of foreign investment flows into and out of Australia over the past five financial years.

Continued structural change within a maturing Australian economy over the past two decades has significantly changed the pattern and direction of investment flows, including direct investment. The trend over the five years to 30 June 2003 shows the flows of Australian direct investment abroad have increased by

245 per cent, from \$3.3 billion in 1998-99 to \$11.4 billion in 2002-03. Flows of FDI into Australia increased by 168 per cent, from \$8 billion to \$21.4 billion over the same period.

Flows of total investment abroad increased by 34 per cent over the five year period, from \$19.7 billion to \$26.4 billion at 30 June 2003. Flows of total investment in to Australia increased by approximately 39 per cent, from \$46.9 billion to \$65.2 billion.

#### Foreign investment by sector

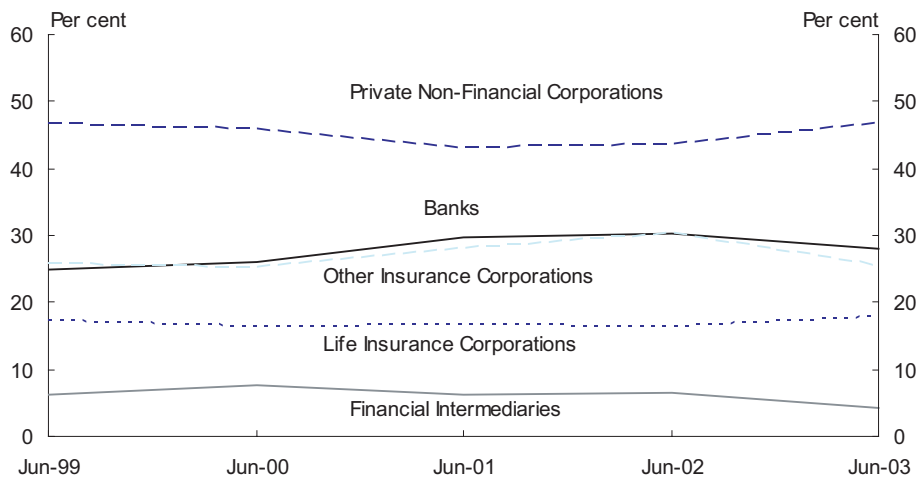
Over the period 30 June 2002 to 30 June 2003, the percentage of foreign ownership of Australian equity increased

for private non-financial corporations and life insurance corporations but decreased for all other sectors (Chart 4.3).

Foreign ownership of private non-financial corporations and life insurance corporations increased by 3 per cent and 1.5 per cent respectively, from 43.5 per cent in 2001-02 to 46.5 per cent in 2002-03 and 16.4 per cent to 17.9 per cent. Foreign ownership of banks and financial intermediaries decreased by around 2 per cent each, while other

insurance corporations decreased by 4.7 per cent. Of the total equity on issue at 30 June 2003, non-residents held equity valued at \$359 billion (30 per cent), while residents held equity valued at \$824 billion (70 per cent). This represents a 1 per cent increase in equity held by non-residents from 29 per cent in both 2001 and 2002. The total value of equity on issue has remained relatively steady at \$1,181 billion in 2003 (\$1,083 billion in 2002).

**Chart 4.3: Foreign ownership of Australian equity by sector**



Source: ABS 5232.0 Financial Accounts, Australia, June Qtr 2003.

## Useful references on international investment issues

### Websites

Organisation	Address
Asia-Pacific Economic Cooperation (APEC)	< <a href="http://www.apec.org.sg">www.apec.org.sg</a> >
Attorney-General's Department	< <a href="http://www.ag.gov.au">www.ag.gov.au</a> >
Australian Bureau of Statistics	< <a href="http://www.abs.gov.au">www.abs.gov.au</a> >
Australian Competition and Consumer Commission	< <a href="http://www.accc.gov.au">www.accc.gov.au</a> >
Australian National Contact Point for the OECD Guidelines for Multinational Enterprises	< <a href="http://www.ausncp.gov.au">www.ausncp.gov.au</a> >
Australian Prudential Regulatory Authority	< <a href="http://www.apra.gov.au">www.apra.gov.au</a> >
Australian Securities and Investment Commission	< <a href="http://www.asic.gov.au">www.asic.gov.au</a> >
Business and Industry Advisory Committee to the OECD	< <a href="http://www.biac.org">www.biac.org</a> >
Commonwealth Treasurer	< <a href="http://www.treasurer.gov.au">www.treasurer.gov.au</a> >
Department of Foreign Affairs and Trade	< <a href="http://www.dfat.gov.au">www.dfat.gov.au</a> >
Department of Immigration and Multicultural and Indigenous Affairs	< <a href="http://www.immi.gov.au">www.immi.gov.au</a> >
Department of Treasury	< <a href="http://www.treasury.gov.au">www.treasury.gov.au</a> >
Foreign Investment Review Board	< <a href="http://www.firb.gov.au">www.firb.gov.au</a> >
International Monetary Fund	< <a href="http://www.imf.org">www.imf.org</a> >
Invest Australia	< <a href="http://www.investaustralia.gov.au">www.investaustralia.gov.au</a> >
OECD Guidelines for Multinational Enterprises	< <a href="http://www.oecd.org">www.oecd.org</a> >
Organisation for Economic Co-operation and Development (OECD)	< <a href="http://www.oecd.org">www.oecd.org</a> >
Scale Plus (Australian law online)	< <a href="http://www.scaleplus.law.gov.au">www.scaleplus.law.gov.au</a> >
United Nations	< <a href="http://www.un.org">www.un.org</a> >
World Trade Organization (WTO)	< <a href="http://www.wto.org">www.wto.org</a> >

### Specific documents

Document title	Available at:
Code of Liberalisation of Capital Movements	< <a href="http://www.oecd.org">www.oecd.org</a> >
Economic Round Up (Treasury series)	< <a href="http://www.treasury.gov.au">www.treasury.gov.au</a> >
General Agreement on Tariffs in Trade (GATT)	< <a href="http://www.wto.org">www.wto.org</a> >
General Agreement on Trade in Services (GATS)	< <a href="http://www.wto.org">www.wto.org</a> >
Guide to the Investment Regimes of the APEC Member Economies	< <a href="http://www.apec.org.sg">www.apec.org.sg</a> >
International Direct Investment Statistics Yearbook	< <a href="http://www.oecd.org">www.oecd.org</a> >
International Investment Agreements (UNCTAD series)	< <a href="http://www.un.org">www.un.org</a> >
OECD Code of Liberalisation of Current Invisible Operations	< <a href="http://www.oecd.org">www.oecd.org</a> >
OCED Declaration on International Investment and Multinational Enterprises	< <a href="http://www.ausncp.gov.au">www.ausncp.gov.au</a> >
OECD Guidelines for Multinational Enterprises	< <a href="http://www.ausncp.gov.au">www.ausncp.gov.au</a> >
Policies and International Integration: Influences on Trade and Foreign Direct Investment (OECD Study)	< <a href="http://www.oecd.org">www.oecd.org</a> >
The Trade and Investment Effects of Preferential Trading Arrangements – Old and New Evidence (Australian Productivity Commission – Staff Working Paper)	< <a href="http://www.pc.gov.au">www.pc.gov.au</a> >
Treasury Annual Report	< <a href="http://www.treasury.gov.au">www.treasury.gov.au</a> >
UNCTAD Series on Issues in International Investment Agreements	< <a href="http://www.un.org">www.un.org</a> >
UNCTAD World Investment Directory	< <a href="http://www.un.org">www.un.org</a> >
UNCTAD World Investment Report	< <a href="http://www.un.org">www.un.org</a> >



# Appendix A

Summary of Australia's Foreign  
Investment Policy as at 30 June 2003





# Summary of Australia's Foreign Investment Policy as at 30 June 2003

## General

The Government's approach to foreign investment policy is to encourage foreign investment consistent with community interests. In recognition of the contribution that foreign investment has made and continues to make to the development of Australia, the general stance of policy is to welcome foreign investment. Foreign investment provides scope for higher rates of economic activity and employment than could be achieved from domestic levels of savings. Foreign direct investment also provides access to new technology, management skills and overseas markets.

2. The Government recognises community concerns about foreign ownership of Australian assets. One of the objectives of the Government's foreign investment policy is to balance these concerns against the strong economic benefits to Australia that arise from foreign investment.

3. The foreign investment policy provides for Government scrutiny of many proposed foreign purchases of Australian businesses and properties. The Government has the power under the *Foreign Acquisitions and Takeovers Act 1975* (the Act) to block proposals that are determined to be contrary to the national interest. The Act also provides legislative backing for ensuring compliance with the policy.

4. In August and September 1999, the Government announced a number

of changes to its foreign investment policy (and the Foreign Acquisitions and Takeovers Regulations), designed to reduce notification obligations on business and to streamline the administration of foreign investment policy, while continuing to ensure that foreign investment is consistent with the interests of the Australian community. These changes are outlined in the Treasurer's Press Release of 3 September 1999 which is available through the Treasury website. The changes have been incorporated in this policy statement.

5. In the majority of industry sectors, smaller proposals are exempt from notification and larger proposals are approved unless judged contrary to the national interest. The screening process undertaken by the Foreign Investment Review Board (FIRB) enables comments to be obtained from relevant parties and other Government agencies in considering whether larger or more sensitive foreign investment proposals are contrary to the national interest.

6. The Government determines what is 'contrary to the national interest' by having regard to the widely held community concerns of Australians. Reflecting community concerns, specific restrictions on foreign investment are in force in more sensitive sectors such as the media and developed residential real estate. The screening process provides a clear and simple mechanism for reviewing

the operations of foreign investors in Australia whenever they seek to establish or acquire new business interests or purchase additional properties. In this way the Government is able to put pressure on foreign investors to operate in Australia as good corporate citizens if they wish to extend their activities in Australia.

7. By far the largest number of foreign investment proposals involves the purchase of real estate. The Government seeks to ensure that foreign investment in residential real estate increases the supply of residences and is not speculative in nature. The Government's foreign investment policy, therefore, seeks to channel foreign investment in the housing sector into activity that directly increases the supply of new housing (that is, new developments — house and land, home units, townhouses, etc) and brings benefits to the local building industry and their suppliers.

8. The effect of the more restrictive policy measures on developed residential real estate is twofold. First, it helps reduce the possibility of excess demand building up in the existing housing market and secondly, it aims to encourage the supply of new dwellings, many of which would become available to Australian residents, either for purchase or rent. The cumulative effect should therefore be to maintain greater stability of house prices and the affordability of housing for the benefit of Australian residents.

Prior approval

9. The types of proposals by foreign interests to invest in Australia, which require prior approval and therefore should

be notified to the Government, are as follows:

- acquisitions of substantial interests in existing Australian businesses with total assets over \$50 million or where the proposal values the business at over \$50 million;
- proposals to establish new businesses involving a total investment of \$10 million or more;
- portfolio investments in the media of 5 per cent or more and all non-portfolio investments irrespective of size;
- takeovers of offshore companies whose Australian subsidiaries or assets are valued at \$50 million or more, or account for more than 50 per cent of the target company's global assets;
- direct investments by foreign governments or their agencies irrespective of size;
- acquisitions of interests in urban land (including interests that arise via leases, financing and profit sharing arrangements and the acquisition of interests in urban land corporations and trusts) that involve the:
  - acquisition of developed non-residential commercial real estate, where the property is subject to heritage listing, valued at \$5 million or more;
  - acquisition of developed non-residential commercial real estate, where the property is not subject to heritage listing, valued at \$50 million or more;

- acquisition of accommodation facilities irrespective of value;
- acquisition of vacant urban real estate irrespective of value;
- acquisition of residential real estate irrespective of value; or
- proposals where any doubt exists as to whether they are notifiable. (Funding arrangements that include debt instruments having quasi-equity characteristics will be treated as direct foreign investment.)

10. A foreign interest is defined as:

- a natural person not ordinarily resident in Australia;
- a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest;
- a corporation in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest;
- the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or
- the trustee of a trust estate in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.

A substantial foreign interest occurs when a single foreigner (and any associates) has 15 per cent or more of the ownership or

several foreigners (and any associates) have 40 per cent or more in aggregate of the ownership of any corporation, business or trust.

11. Below is an outline of the Government's foreign investment policy and the examination guidelines for the various industry sectors. The majority of proposals will fall within these guidelines. However, some may not. The latter proposals will be examined on a case-by-case basis.

## Examination by sector

12. The *Foreign Acquisitions and Takeovers Act 1975* (the Act) applies to most examinable proposals and provides penalties for non-compliance.

*Rural Businesses and Rural Land, Agriculture, Forestry, Fishing, Resource Processing, Oil & Gas, Mining, Manufacturing, Non-Bank Financial Institutions, Insurance, Sharebroking, Tourism, Most Other Services.*

*(Rural Land is defined as land that is used wholly and exclusively for carrying on a substantial business of primary production. Acquisitions of vacant land that has a rural zoning, 'hobby farms' and 'rural residential' blocks by foreign interests are included within the urban land category.)*

13. In relation to investments by foreign interests in these sectors, all proposals above certain thresholds need prior approval and therefore need to be notified. Notification thresholds are over \$50 million for acquisitions of substantial interests in all existing businesses, \$10 million or more for the establishment

of new businesses and \$50 million or more for offshore takeovers.

14. All tourism proposals, which incorporate an accommodation facility, irrespective of value, need to be notified.

15. The Government registers, but normally raises no objections to, proposals above the notification thresholds where the relevant total assets/total investment falls below \$100 million. However, proposals in sensitive sectors or those which raise specific national interest issues may be subject to more detailed examination.

16. The Government fully examines proposals to acquire existing businesses (with total assets of \$100 million or more) or establish new businesses (with a total investment of \$100 million or more) and raises no objections to those proposals unless they are contrary to the national interest.

17. Approvals of proposals may be made subject to the parties meeting certain conditions. In practice, such conditions relate almost entirely to the time period for real estate development or to environmental requirements.

### Urban land<sup>1</sup>

18. Proposed acquisitions of residential real estate are exempt from examination in the case of:

- Australian citizens living abroad purchasing either in their own name or through an Australian corporation or trust;
  - foreign nationals purchasing (as joint tenants) with their Australian citizen spouse; and
  - foreign nationals who are the holders of permanent resident visas or are holders, or are entitled to hold, a 'special category visa' purchasing either in their own name or through an Australian corporation or trust.
19. Proposed acquisitions of real estate for development are normally approved subject to a specific condition requiring continuous substantial construction to commence within 12 months. Once construction is complete, the parties are required to provide the completion date and actual development expenditure.
20. Foreign interests are normally given approval to buy:
- vacant residential land, including house and land packages where construction has not commenced, (on condition that continuous construction of a dwelling is commenced within 12 months); and
  - house and land packages where construction has commenced, home units, townhouses, etc 'off the plan', under construction or newly constructed but never occupied or previously sold. 'Off the plan' sales to foreigners are only permitted for new development projects or extensively refurbished commercial structures, which have been converted to residential, on condition that no more than half the dwellings in any one development are sold to foreign interests.
21. Proposed acquisitions of residential property (both vacant land and existing dwellings) which are within the bounds of a resort that the Treasurer had designated

1 This is a brief summary of the urban land policy. Further details of the urban land policy are provided in the document Foreign Investment Policy — Urban Land (available at <http://www.firb.gov.au>).

as an 'Integrated Tourism Resort' (ITR) prior to September 1999 are exempt from examination. For resorts designated as ITRs from September 1999, the exemption only applies to developed residential property, which is subject to a long term (10 years or more) lease to the resort/hotel operator, making it available for tourist accommodation when not occupied by the owner. All other property, including vacant land for development, within the ITR would be subject to the normal foreign investment restrictions. Strict conditions must be fully met to qualify for Integrated Tourism Resort status.

22. Certain categories of foreign nationals, temporarily resident in Australia continuously for more than 12 months, may be given approval to purchase developed residential real estate for use as their principal place of residence (that is, not for rental purposes) while in Australia. This category includes long-stay retirees. A condition of such purchases is that the residence must be sold when the foreign nationals' temporary resident visas expire, they leave Australia, or the property is no longer used as their principal place of residence.

23. All other proposals by foreign interests to acquire developed residential real estate are examinable and are not normally approved, except in the case of foreign companies, with an established substantial business in Australia, buying for named senior executives resident in Australia for periods longer than 12 months, provided the accommodation is sold when no longer required for this purpose. Whether a company is eligible, and the number of

properties that may be acquired under this category, will depend upon the extent of the foreign company's operations and assets in Australia. Unless there are special circumstances, foreign companies normally will not be permitted to buy more than two houses under this category. Foreign companies would not be eligible under this category where the property would represent a significant proportion of its assets in Australia.

24. Proposed acquisitions of developed non-residential commercial real estate are normally approved unless they are contrary to the national interest.

25. Proposed acquisitions of hotels and motels operating under one title are normally approved (unless considered contrary to the national interest) under the tourism sector policy. Proposed acquisitions of strata titled hotel accommodation may be approved in certain designated hotels. Full details of the requirements for designated hotels are contained in the Australian urban land policy summary. Other accommodation facilities such as guesthouses, holiday flats and undesignated strata titled hotels and motels are examined under policy applying to the residential real estate sector.

## Banking

26. Foreign investment in the banking sector needs to be consistent with the *Banking Act 1959*, the *Financial Sector (Shareholdings) Act 1998* and banking policy, including prudential requirements. Any proposed foreign takeover or acquisition of an Australian bank will be considered on a case-by-case basis and judged on its merits.

27. The Government will permit the issue of new banking authorities to foreign owned banks where the Australian Prudential Regulation Authority (APRA) is satisfied the bank and its home supervisor are of sufficient standing, and where the bank agrees to comply with APRA's prudential supervision arrangements.

## Civil aviation

### Domestic services

28. Foreign persons (including foreign airlines) can generally expect approval to acquire up to 100 per cent of the equity in an Australian domestic airline, unless this is contrary to the national interest.

### International services

29. Foreign persons (including foreign airlines) can generally expect approval to acquire up to 49 per cent of the equity in an Australian international carrier (other than Qantas) individually or in aggregate provided the proposal is not contrary to the national interest. In the case of Qantas, total foreign ownership is restricted to a maximum of 49 per cent in aggregate, with individual holdings limited to 25 per cent and aggregate ownership by foreign airlines limited to 35 per cent. In addition, a number of national interest criteria must be satisfied, relating to the nationality of Board members and operational location of the enterprise.

## Airports

30. Foreign investment proposals for acquisitions of interests in Australian airports are subject to case-by-case examination in accordance with the standard notification requirements. In relation to the airports offered for sale by

the Commonwealth, the *Airports Act 1996* stipulates a 49 per cent foreign ownership limit, a 5 per cent airline ownership limit and cross ownership limits between Sydney airport (together with Sydney West) and Melbourne, Brisbane and Perth airports.

## Shipping

31. The *Shipping Registration Act 1981* requires that, for a ship to be registered in Australia, it must be majority Australian-owned (that is, owned by an Australian citizen, a body corporate established by or under law of the Commonwealth or of a State or Territory of Australia), unless the ship is designated as chartered by an Australian operator.

## Media

32. All direct (that is, non-portfolio) proposals by foreign interests to invest in the media sector irrespective of size are subject to prior approval under the Government's foreign investment policy. Proposals involving portfolio share holdings of 5 per cent or more must also be submitted for examination.

## Broadcasting

33. While proposals for a foreign person to acquire an interest in an existing broadcasting service or to establish a new broadcasting service are subject to case-by-case examination under foreign investment policy, the following criteria also must be satisfied. A broadcasting regulatory regime, enacted through the *Broadcasting Services Act 1992* (BSA), stipulates that:

- Foreign interests in commercial television broadcasting services continue to be limited to a 15 per cent

company interest for individuals and a 20 per cent company interest in aggregate. A foreign person may not be in a position to exercise control of a commercial television broadcasting licence. No more than 20 per cent of directors may be foreign persons.

- For all subscription television broadcasting services licences, foreign interests are limited to a 20 per cent company interest for an individual and a 35 per cent company interest in aggregate.

34. There are no foreign ownership and control limits on commercial radio or on other broadcasting services under the BSA.

## Newspapers

35. Foreign investment in mass circulation national, metropolitan, suburban and provincial newspapers is restricted. All proposals by foreign interests to acquire an interest of 5 per cent or more in an existing newspaper or to establish a new newspaper in Australia are subject to case-by-case examination. The maximum permitted aggregate foreign interest (non-portfolio) investment/involvement in national and metropolitan newspapers is 30 per cent with any single foreign shareholder limited to a maximum interest of 25 per cent (and in that instance unrelated foreign interests would be allowed to have aggregate (non-portfolio) shareholdings of a further 5 per cent). Aggregate foreign interest direct involvement in provincial and suburban newspapers is limited to less than 50 per cent for non-portfolio shareholdings.

## Telecommunications

36. Telstra Corporation Ltd (Telstra) is predominantly owned by the Commonwealth of Australia. Since October 1997, the Government has partially privatised Telstra through the sale of 49.9 per cent of its equity to institutional and individual investors. Aggregate foreign ownership of Telstra is restricted to 35 per cent of that privatised equity and individual foreign investors are only allowed to acquire a holding of no more than 5 per cent of that privatised equity.

37. Prior approval is required for foreign involvement in the establishment of new entrants to the telecommunications sector or investment in existing businesses in the telecommunications sector. Proposals above the notification thresholds will be dealt with on a case-by-case basis and will normally be approved unless judged contrary to the national interest.

## Approval period

38. Approval under the Government's foreign investment policy is normally only given for a specific transaction which is expected to be completed in a timely manner. If an approved transaction does not proceed at that time and/or the parties enter into new agreements at a later date, or if a transaction is not completed within 12 months, further approval must be sought for the transaction.

39. Approvals for share acquisitions involving a full or partial bid under Corporations Law only apply to the shares acquired during the bid period. For example, if approval is given for a full bid

and the bidder only acquires 60 per cent of the shares, but then subsequently wishes to proceed to acquire further shares on market using the creep provisions of Corporations Law or to acquire the balance of the shares through a subsequent bid, further prior approval must be sought.

40. Where a proposal involves option agreements for the purchase of shares, assets or property, prior approval is required to acquire the options. Normally, approvals for options will also extend to the exercise of those options, provided the option is exercised within 12 months of approval. Subsequent approval for the exercise of the options may be sought on an annual basis.

41. The time period for an approval may be varied where it can be shown that an extended period is fundamental to the success of a proposal and that extending the timing of the proposal does not involve an activity (for example, real estate speculation) that would be contrary to the national interest. In this situation the extended period will be stated in the approval.

## Applications

42. The information normally required to enable foreign investment proposals to be processed is set out below. Copies of relevant annual reports for the most recent financial year should accompany the application. There is no statutory charge for processing applications.

43. All applications should be addressed in writing to:

The Executive Member  
Foreign Investment Review Board  
c/- The Treasury  
CANBERRA ACT 2600

44. The Government recognises the commercial-in-confidence sensitivity of much of the information provided to the Board. The Government respects this confidential status and ensures that appropriate security is given to it. Where third parties outside of Government seek to obtain access to confidential information held by the Government, it will not be made available without the permission of the applicant, except upon the order of a court of competent jurisdiction. In this respect, the Government will pursue the defence of this policy through the judicial system.

45. In addition, the Government is obligated to respect the privacy of personal information that is provided by applicants to the Foreign Investment Review Board in accordance with the requirements of the *Privacy Act 1988*. In accordance with that Act, the Government advises that in situations where the applicant has breached, or is strongly suspected of having breached the Act, the Board may seek the assistance of other Government agencies in its efforts to ensure applicants comply with the Act. In seeking such assistance, the Board may pass relevant personal information to those government agencies. Most commonly these agencies will be the Department of Immigration and Multicultural Affairs, the Australian Tax Office or the Australian Federal Police.

46. The requirements set out below are supplementary to those of the notification provisions of sections 25, 26 and 26A of the Act (for which there are prescribed forms).

### **Takeovers of enterprises with total assets of (or valued at) \$100 million and over**

#### **A. Parties to the proposal**

For both the purchaser and target business

- name
- location of major establishments
- major activities
- major subsidiaries and associated companies
- financial details for the most recent year, namely, total assets, net tangible assets and pre-tax profits (with the most recent financial statements)
- details of Australian/overseas ownership (including identity of ultimate or beneficial owners)
- country of ultimate control of purchaser

#### **B. Type of proposal**

- acquisition/issue of shares
  - the number, class and voting rights of shares, including the percentage of the total equity involved
- acquisition of assets
  - description of the assets involved
- agreements/arrangements entered into or terminated; alteration of a constituent document
  - full details, supported by copies of appropriate documents or relevant extracts therefrom

#### **C. Consideration**

- amounts involved
- type of funds (equity/loan), source of funds (from overseas associate companies, from Australian capital market, etc)

#### **D. Reason(s) for the proposal**

- from viewpoints of the vendor, target and purchaser

#### **E. Brief description of the purchaser's future intentions for the business, including amount of development expenditure proposed**

### **Takeovers of enterprises with total assets of (or valued at) less than \$100 million**

#### **A. Parties to the proposal**

For both the purchaser and target business

- name
- location of major establishments
- major activities
- details of total assets (with relevant balance sheets)
- country of ultimate control of purchaser

#### **B. Type of proposal**

- describe whether it involves shares or assets of an existing business
- if it is a reorganisation of shares/assets or other arrangements within a corporate group
- if it is a rural property, and, if so, the number of hectares, current and proposed use of the property

#### **C. Consideration and proposed expenditure**

- amounts involved including proposed development expenditure, if any

### **New business or project involving total investment (including debt) during the establishment phase of \$100 million and above**

#### **A. Parties to the proposal**

- name, location, major activities and scale of each, major affiliates (Australian/overseas)
- financial details for the most recent year, namely, total assets, net tangible assets and pre-tax profits together with relevant balance sheets and profit and loss and trading accounts

#### **B. The proposal**

- description of proposal: total funds to be invested and the proportion of these to be provided as equity capital, the sources of the loan and equity capital (from overseas associates, Australian capital market, etc), the proposed location of the investment, the purpose of the investment

#### **C. Ownership of the proposed business**

- details of proposed beneficial ownership (identify shareholdings by associated interests) and the corresponding pattern of voting rights held, board representation rights, and other rights concerning management and control

#### **D. Industry information**

- a description of the industry in which the new venture will be engaged and its expected position in the industry, other significant members of the industry, their ownership and respective shares of the market

#### **E. Other considerations**

- information should also be provided on any patents, royalty and licensing arrangements and export franchises

held by the applicant and which might be made available to the local firm and the basis on which these would be made available; what restrictions, if any, will be placed on the new venture together with any plans for local research and development

- describe the environmental impact, if any, of the proposal, and provide details of any environmental studies undertaken
- describe efforts, if any, made to obtain Australian participation in the proposal
- for mining proposals, describe plans, if any, for value adding activity in Australia or any value adding opportunities which may flow from the project

### **New business or project involving total investment (including debt) during the establishment phase of less than \$100 million**

#### **A. Parties to the proposal**

- name, location, major activities and scale of each, major affiliates (Australian/overseas)
- financial details for the most recent year, that is, total assets, together with relevant balance sheets

#### **B. The proposal**

- description of proposal: total funds to be invested and a description of the industry in which the new venture will be engaged

#### **C. Ownership of the proposed business**

- details of proposed beneficial ownership (identify shareholdings by associated interests)

## Urban real estate acquisitions

Please refer to the separate summary of the policy applying to the acquisition of interests in Australian urban land (available at: <http://www.firb.gov.au>).

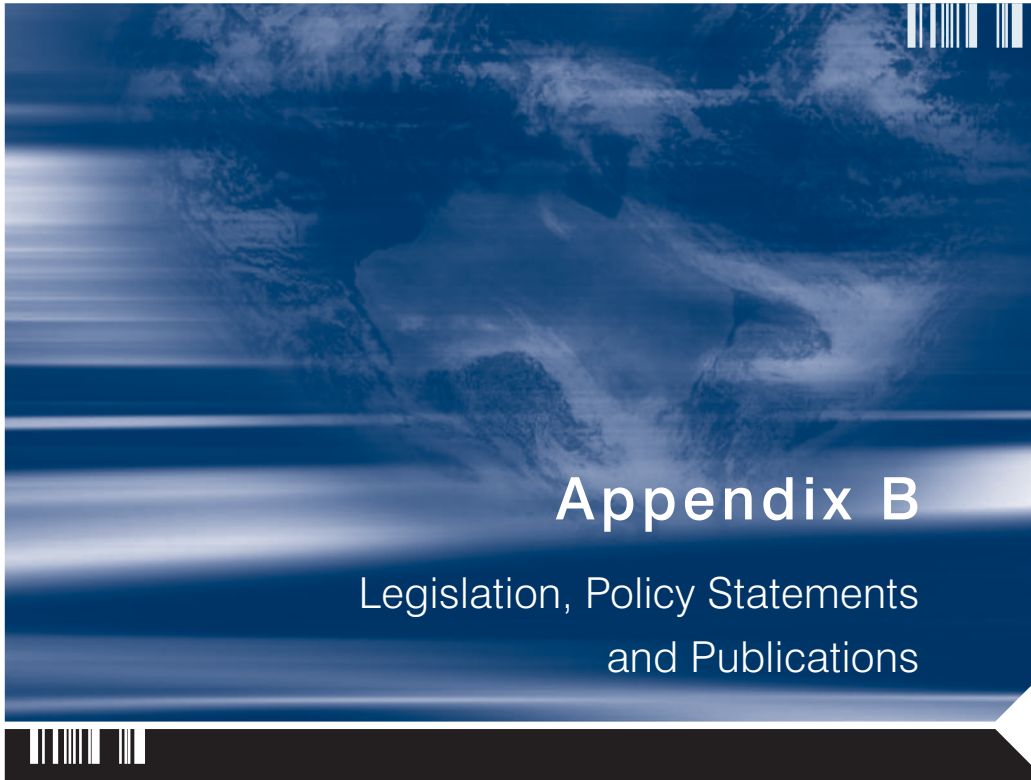
## Further enquiries

Should you have any further enquiries contact please contact the Executive on:

General enquiries	(02) 6263 3795
Fax	(02) 6263 2940
From overseas	
General enquiries	61-2-6263 3795
Fax	61-2-6263 2940
E-mail	<a href="mailto:firb@treasury.gov.au">firb@treasury.gov.au</a>

Further information on Australia's foreign investment policy may be found at:  
<http://www.firb.gov.au>





# Appendix B

Legislation, Policy Statements  
and Publications





# Legislation, Policy Statements and Publications

## Legislation

1. Foreign Acquisitions and Takeovers Regulations (Amendment), No 199 — **10 September 1999**.
2. Foreign Acquisitions and Takeovers Regulations (Amendment), No 416 — **17 January 1996**.
3. Foreign Acquisitions and Takeovers Regulations (Amendment), No 295 — **31 August 1994**.
4. Foreign Acquisitions and Takeovers Regulations (Amendment), No 302 — **24 September 1991**.
5. Foreign Takeovers Amendment Act 1989, No 14 of 1989 — **August 1989**.
6. Commonwealth Functions (Statutes Review) Act 1981, No 74 of 1981 — **June 1981**.
7. Statutory Rules 1976, No 203 — **September 1976**.
8. Foreign Takeovers Amendment Act 1976, No 93 of 1976 — **September 1976**.
9. Statutory Rules 1975, No 226 — **December 1975**.
10. Foreign Takeovers Act 1975, No 92 of 1975 — **August 1975** (now known as the Foreign Acquisitions and Takeovers Act 1975 as amended).
11. Companies (Foreign Take-overs) Act 1973, No 199 of 1973 — **December 1973**.
12. Companies (Foreign Take-overs) Act 1972, No 134 of 1972 — **November 1972**.

## Policy statements

1. Statement by the Treasurer, the Hon. P. Costello, MP — Xstrata Plc — No Objections Raised to the Acquisition of MIM Holdings Ltd — **28 May 2003**
2. Statement by the Treasurer, the Hon. P. Costello, MP — No objections raised to Mitsui's Acquisition of Remaining Interest in Moura Mine — **12 April 2002**.
3. Statement by the Treasurer, the Hon. P. Costello, MP — Singapore Telecommunications Limited — Acquisition of Cable & Wireless Optus Limited — **28 August 2001**.
4. Statement by the Treasurer, the Hon. P. Costello, MP — Singapore Telecommunications Limited — Application for Foreign Investment Approval to Acquire Cable & Wireless Optus Limited — **22 August 2001**.
5. Statement by the Treasurer, the Hon. P. Costello, MP — Foreign Investment Approval of Brambles Industries Limited — GKN Plc — **26 July 2001**.
6. Statement by the Treasurer, the Hon. P. Costello, MP — Foreign Investment Approval of BHP Limited-Billiton Plc Merger — **4 June 2001**.

7. Statement by the Treasurer, the Hon. P. Costello, MP — Foreign Investment Proposal — Shell Australia Investments Limited's Acquisition of Woodside Petroleum Limited — **23 April 2001.**
8. Statement by the Treasurer, the Hon. P. Costello, MP — Foreign Investment Case: Acquisition by Air New Zealand Limited of the News Corporation's 50 per cent interest in Ansett Holdings Limited — **13 June 2000.**
9. Statement by the Assistant Treasurer, Senator the Hon. Rod Kemp — Virgin receives Foreign Investment Approval — **7 December 1999.**
10. Statement by the Treasurer, the Hon. P. Costello, MP — Foreign Investment Policy Changes — **3 September 1999.**
11. Statement by the Treasurer, the Hon. P. Costello, MP — Foreign Investment Case: Tyndall Australia Ltd's Portfolio Investment in John Fairfax Holdings Ltd — **4 August 1998.**
12. Statement by the Treasurer, the Hon. P. Costello, MP — Foreign Investment Policy: Ownership structure for the Ten Group Ltd (TGL) — Canwest/TNQ Float Proposal — **6 March 1998.**
13. Statement by the Treasurer, the Hon. P. Costello, MP — Release of the Report of the Financial System Inquiry and Initial Government Response on Mergers Policy — **9 April 1997.**
14. Statement by the Assistant Treasurer, Senator the Hon. Rod Kemp, — Foreign Investment Policy: Forced Divestiture of Residential Real Estate involving Australian Trustee — **11 December 1996.**
15. Statement by the Treasurer, the Hon. P. Costello, MP — Uranium Sector — **19 November 1996.**
16. Statement by the Treasurer, the Hon. P. Costello, MP — Rationalisation of Notification Thresholds for Portfolio Investments in the Media Sector — **18 September 1996.**
17. Statement by the Treasurer, the Hon. R. Willis, MP — Government Response to the Reports by the Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in Relation to the Print Media — **26 September 1995.**
18. Statement by the Treasurer, the Hon. J. Dawkins, MP — Foreign Investment Policy: Mass Circulation Newspapers — **20 April 1993.**
19. Statement by the Treasurer, the Hon. J. Dawkins, MP — Modification to Foreign Investment Policy. Residential Real Estate and Developed Non-Commercial Real Estate — **1 April 1993.**
20. Statement by the Treasurer, the Hon. J. Dawkins, MP — Economic Statement: Foreign Investment Policy Changes — **26 February 1992.**
21. Statement by the Treasurer, the Hon. J. Kerin, MP — Foreign Investment in the Print Media — **10 October 1991.**

22. Statement by the Treasurer, the Hon. J. Kerin, MP — Foreign Investment Policy: Integrated Tourism Resorts — **25 July 1991**.
23. Statement by the Treasurer, the Hon. Paul Keating, MP — Proclamation of Foreign Takeovers Amendment Act 1989 and Gazettal of Foreign Acquisitions and Takeovers Regulations — **6 July 1989**.
24. Statement by the Treasurer, the Hon. Paul Keating, MP — Foreign Investment Policy: New Oil and Gas Developments — **20 January 1988**.
25. Statement by the Treasurer, the Hon. Paul Keating, MP — Foreign Investment Policy: Developed Residential Real Estate — **29 September 1987**.
26. Statement by the Treasurer, the Hon. Paul Keating, MP — Thin Capitalisation and Corporate Restructures in relation to Foreign Investment Policy — **30 April 1987**.
27. Statement by the Treasurer, the Hon. Paul Keating, MP — Further Liberalisation of Foreign Investment Policy — **30 April 1987**.
28. Statement by the Treasurer, the Hon. Paul Keating, MP — Foreign Investment Policy Relaxations — **28 July 1986**.
29. Statement by the Acting Treasurer, the Hon. Chris Hurford, MP — Economic and Rural Policy Statement — **15 April 1986**.
30. Statement by the Acting Treasurer, the Hon. Chris Hurford, MP — Review of Foreign Investment Policy — **29 October 1985**.
31. Statement by the Treasurer, the Hon. Paul Keating, MP — New Banking Authorities — **27 February 1985**.
32. Statement by the Treasurer, the Hon. Paul Keating, MP — Foreign Investment Policy and Stockbroking — **18 December 1984**.
33. Statement by the Treasurer, the Hon. Paul Keating, MP — Participation in Banking in Australia and Other Issues of Financial Deregulation — **10 September 1984**.
34. Statement by the Treasurer, the Hon. Paul Keating, MP — Foreign Investment Policy and Stockbroking — **18 April 1984**.
35. Statement by the Treasurer, the Hon. Paul Keating, MP — Review of Foreign Investment Policy — **20 December 1983**.

## Publications

- Foreign Investment Review Board Reports: 1977 to 2002.
- Australia's Foreign Investment Policy — A Guide for Investors, Revised September 1992.
- Foreign Investment Policy and Administration — Outline for Conference of Australian Institute of Company Directors held in Adelaide 13-14 May 1999.

- Guidelines relating to Australia's Foreign Investment Policy:
  - General Summary;
  - Urban Land; and
  - Primary Production Businesses and Rural Land.

(updated regularly)

Current information on Australia's foreign investment policy is available on the internet at: <<http://www.firb.gov.au>>



# Appendix C

Press Releases — 2002-03



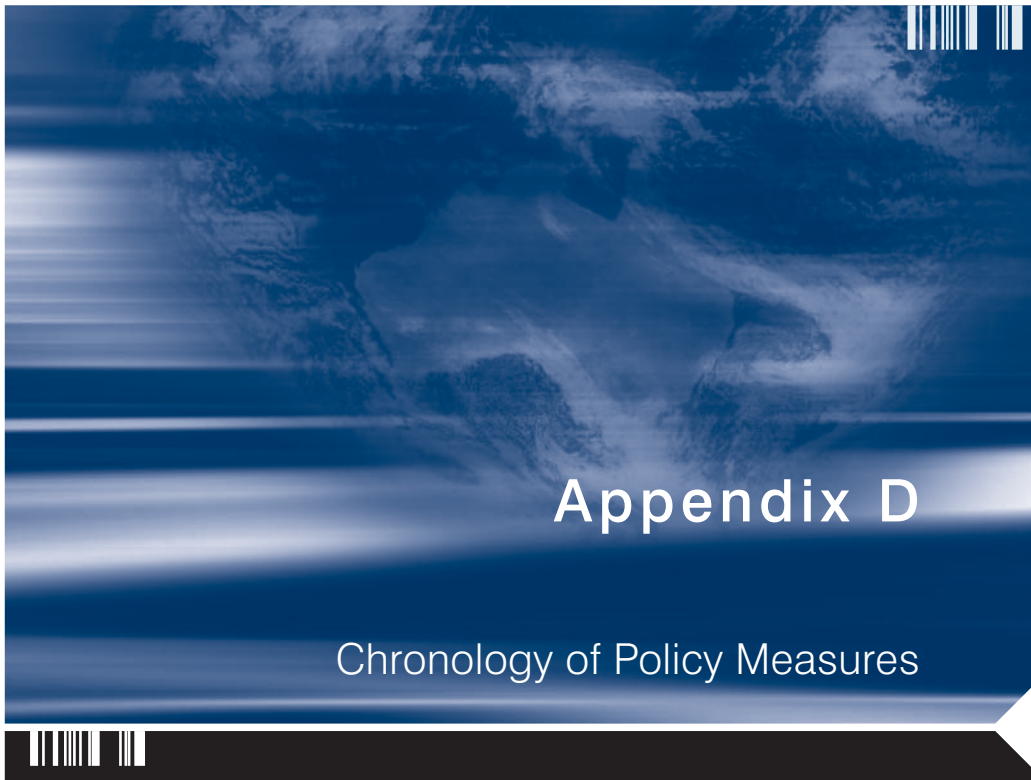


## Press Releases — 2002-03

No. 2002/063 Statement by the  
Parliamentary Secretary  
to the Treasurer, Senator  
the Hon. Ian Campbell  
— 2001-2002 Foreign  
Investment Review Board  
Report Released —  
**23 December 2002.**

No. 2003/046 Statement by the  
Treasurer, the  
Hon. P. Costello, MP  
— Xstrata Plc — No  
Objections Raised to  
the Acquisition of MIM  
Holdings Ltd —  
**28 May 2003.**





# Appendix D

## Chronology of Policy Measures





# Chronology of Policy Measures

## 3 May 2000

The Aviation Legislation Amendment Bill (No. 1) 2000 increased the maximum percentage of equity permitted by a foreign airline in an Australian international carrier (other than Qantas) to 49 per cent. Previously a foreign airline was permitted to own up to 25 per cent.

Note: In the case of Qantas, total foreign ownership is restricted to a maximum of 49 per cent in aggregate, with individual holdings limited to 25 per cent and aggregate ownership by foreign airlines limited to 35 per cent. In addition, a number of national interest criteria must be satisfied, relating to the nationality of Board members and operational location of the enterprise.

## 29 October 1999

The Government amended the policy concerning domestic civil aviation to allow foreign persons, including foreign airlines, to acquire up to 100 per cent of the equity of an Australian domestic airline, unless the acquisition is contrary to the national interest. Previously, foreign airlines flying to Australia were permitted to own up to 25 per cent of the equity in a domestic carrier individually or up to 40 per cent in aggregate.

## 10 September 1999

Numerous changes were made to the Foreign Acquisitions and Takeovers Regulations 1989. These included

changes to the notification thresholds, that is:

- increases in the notification threshold for foreign investment in existing businesses from \$5 million (\$3 million for rural businesses) to \$50 million;
- an increase in the notification threshold from \$20 million to \$50 million for the Australian assets of an offshore company where it is to be acquired by another offshore company;
- an increase in the notification threshold applying to the acquisition of developed non-residential commercial real estate (including certain lease arrangements) from \$5 million to \$50 million except where such properties are subject to heritage listing (in that case the threshold remains at \$5 million).

Other amendments to regulations specify:

- an exemption so that Australian citizens and their foreign spouses purchasing as joint tenants are no longer required to seek approval for purchases of residential real estate in Australia;
- an exemption to remove foreign investment approval requirements for individuals who hold, or are entitled to hold, a special category visa, or who hold a permanent visa and invest in Australian residential real estate through Australian companies and trusts;

- an exemption for the acquisition of interests in Australian urban land by foreign owned responsible entities of managed investment funds (under section 601EB of the Corporations Law) provided such investment is primarily for the benefit of scheme members ordinarily resident in Australia;
- rules to permit the acquisition by foreign interests of strata-titled hotel rooms in designated hotels where each room is subject to a long-term (10 years or more) hotel management agreement and where management retains ownership of the common property;
- rules to limit the exemption provided by newly designated Integrated Tourist Resorts so that the exemption from the normal foreign investment restrictions only applies to foreign purchasers of developed property which is subject to a long term lease to the resort/hotel operator making it available for tourist accommodation when not occupied by the owner; and
- rules to clarify the scope of a certificate of exemption issued by the Treasurer for foreign interests acquiring real estate off-the-plan, as provided in the existing regulation 3(e).

## 1 April 1999

The policy relating to applications by developers seeking advanced approval to sell up to 50 per cent of a development to foreign investors was altered so that only developers with ten or more (previously four or more) dwellings could

apply for advanced approval (in special circumstances, advance approval may be given for developments consisting of between four and ten dwellings). The other change affecting this category was that the reporting requirements were relaxed so that developers are required to report all sales (that is, Australian and foreign) to the Board every twelve months (previously every six months) until all the dwellings in the development have been sold or occupied.

## 14 August 1997

The Treasurer announced the removal of foreign ownership restrictions that were specific to Optus and Vodafone. From 14 August 1997, all proposals by foreign interests to invest in Optus and Vodafone are subject only to the generally applicable provisions of foreign investment policy. These general provisions also apply to new entrants to the telecommunications sector or investment in existing businesses in that sector. The announcement did not affect in any way the ownership restrictions in relation to Telstra.

## 9 April 1997

In releasing the Final Report of the Financial System Inquiry, the Treasurer announced the removal of the blanket prohibition on a foreign takeover of any of the major banks and that any proposed foreign takeover or acquisition will need to be assessed, like any other proposed foreign takeover or acquisition, on the basis of its merits in accordance with the *Foreign Acquisitions and Takeovers Act 1975*. In making these assessments,

however, the Government will apply the principle (as concluded by the Inquiry) that any large scale transfer of Australian ownership of the financial system to foreign hands would be contrary to the national interest.

## 19 December 1996

The *Telstra (Dilution of Public Ownership) Act 1996* was assented to. The Act places limits on foreign ownership. Aggregate foreign ownership is to be restricted to 35 per cent of the one third equity to be sold and individual foreign investors will be allowed to acquire a holding of no more than 5 per cent of that one third equity.

## 19 November 1996

The Treasurer announced the Government's decision that foreign investment policy in relation to the uranium sector will be the policy that currently applies to the mining sector generally. This means that foreign investment above the notification thresholds in the uranium sector, such as the establishment of a new mine, will be subjected to the well established 'contrary to the national interest' test and that no specific investment restrictions will apply.

## 9 October 1996

The *Airports Act 1996* was assented to on 9 October 1996. This Act limits foreign ownership of airport operator companies to 49 per cent.

## 18 September 1996

The Treasurer announced the Government's decision to lift to 5 per cent, with immediate effect, the notification threshold that applies to portfolio investments by foreign interests in the media sector. This change rationalised the notification thresholds for the media sector so that all portfolio investments, not only in John Fairfax Holdings Ltd, are subject to the same 5 per cent notification threshold.

## 26 September 1995

The Treasurer announced that the limit on foreign ownership of provincial and suburban newspapers had been increased from 30 per cent to less than 50 per cent for non-portfolio shareholdings.

## 20 April 1993

The Treasurer announced the Government's decision to increase the maximum permitted aggregate foreign interest direct investment (that is, non-portfolio) involvement in mass circulation newspapers to 30 per cent with any single foreign shareholder limited to a maximum of 25 per cent (and in that instance unrelated foreign interests would be allowed to have aggregate (non-portfolio) shareholdings of a further 5 per cent).

## 1 April 1993

The Treasurer announced two changes to foreign investment policy:

- 'off the plan' acquisitions to include acquisitions that are part of extensively refurbished buildings subject to the

building's use changing from non-residential to residential and the costs of refurbishment to be equivalent to at least 50 per cent of total acquisition costs; and

- proposals by foreign interests to acquire developed non-residential commercial real estate were no longer required to have 50 per cent Australian equity. Prior to this change, acquisitions by foreign interests of developed non-residential commercial real estate were normally approved, unless judged contrary to the national interest, on the condition that the acquisition was being made with 50 per cent Australian equity participation. Where it could be demonstrated that 50 per cent Australian equity was not available on reasonable terms and conditions, proposals providing up to 100 per cent were approved.

## 26 February 1992

As part of the Government's One Nation Economic Statement, further policy liberalisations were announced, namely:

- the Government would register, but normally raise no objections to proposals above the notification thresholds where the relevant total assets/total investment falls below \$50 million. Notification thresholds are \$3 million for purchases of rural properties, \$5 million for acquisitions of substantial interests in other existing businesses, \$10 million for the establishment of new businesses and \$20 million for offshore takeovers;
- the 50 per cent Australian equity and control guideline for participation in new mining projects, and the economic benefits test for takeovers of existing mining businesses, were abolished; and
- that new banking authorities would be issued to foreign owned banks where the Reserve Bank is satisfied the bank and its home supervisor are of sufficient standing, and where the bank agrees to comply with Reserve Bank prudential supervision and arrangements. Moreover, foreign owned banks will be allowed to bid for the smaller banks (if available for sale), that is, for banks other than the four majors.

## 25 July 1991

The Government decided that foreign investors may acquire any residential real estate (vacant land for development, units off the plan, or established properties) within a designated Integrated Tourism Resort (ITR) without the need to seek approval under the *Foreign Acquisitions and Takeovers Act 1975*. The ITR exemption would only apply to residential real estate within resorts that have applied for and been designated exempt by the Treasurer.

## 6 July 1989

The Treasurer announced the proclamation, on 1 August 1989, of the Foreign Takeovers Amendment Act 1975 and the gazettal of the Foreign Acquisitions and Takeovers Regulations. The amended legislation, to be known as the Foreign Acquisitions and Takeovers Act 1975, gave legislative effect to the

changes to residential real estate policy announced in September 1987.

## 20 January 1988

The Government announced that the Australian participation guidelines for foreign investment in respect of new mining projects over \$10 million would no longer apply to new oil and gas developments which could now be approved with 100 per cent foreign equity, provided they were not considered contrary to the national interest.

## 29 September 1987

The Government decided to restrict substantially foreign acquisitions of developed residential real estate and to introduce legislation to require compliance with the amended policy. The \$600,000 examination threshold was abolished and approvals of developed residential real estate were to be restricted to Australian citizens resident abroad, intending migrants and foreign companies buying for their senior executives resident in Australia.

## 30 April 1987

The Treasurer announced a number of further liberalisations including:

- passing amendments to the *Foreign Takeovers Act 1975* providing for the exemption from notification of takeovers below \$5 million (\$3 million for rural businesses);
- extending the national interest based test (applied to manufacturing, tourism and non-bank finance sectors since

July 1986) to other sectors namely resource processing, services, insurance, sharebroking and rural properties; and

- improvements to the benefits associated with naturalised or naturalising status, namely, that all takeovers or new businesses involving naturalised or naturalising companies (including new mines where at least 50 per cent is owned by the naturalised or naturalising company) would be approved unless contrary to the national interest.

The Government also announced that it would introduce legislation to replace the thin capitalisation and corporate restructuring conditions of approval that had been imposed on foreign investors under foreign investment policy.

## 28 July 1986

The Treasurer announced a number of significant relaxations to policy including:

- the net economic benefits test and Australian equity requirements for takeovers and new businesses in the manufacturing, tourism and non-bank finance sectors were suspended and proposals were to be automatically approved unless contrary to the national interest;
- the minimum Australian equity requirements for real estate for development (both for retention or resale), and service industry real estate (hotels and motels, tourism resorts) were abolished;
- acquisitions of developed commercial real estate were to be allowed provided

there was 50 per cent Australian equity (previously there was a virtual prohibition); and

- the policy test on rural property acquisitions over \$3 million was relaxed such that approval would now be granted where it could be demonstrated by the intending investor that proposed on-farm development expenditure would be at least one-third of the acquisition price.

## 15 April 1986

As part of the Government's Economic and Rural Policy Statement, it announced the relaxation of the rules applying to foreign investment in rural land such that only proposals over \$3 million (previously \$1 million) would be subject to the stricter test of providing effective Australian participation or benefits of national or regional significance to gain approval.

## 29 October 1985

The Acting Treasurer announced a number of modifications to policy aimed at streamlining existing procedures, the most significant of which were:

- the practice of requiring the demonstration of specific opportunities for Australians to purchase interests available for sale (the 'opportunities test') was discontinued;
- the administrative threshold below which takeovers were normally approved, in the absence of special circumstances, was increased from \$2 million to \$5 million;
- the notification threshold for new businesses (except in the media or civil aviation) was increased from \$5 million to \$10 million;
- the notification threshold for foreign investment in real estate was increased from \$350,000 to \$600,000;
- the liberalised stance in relation to merchant banks was extended to other non-bank financial intermediaries;
- the need for 50 per cent Australian equity for land bought for development and subsequent resale was to be applied only to developments costing \$10 million or more; and
- the exemption threshold for offshore takeovers was increased from \$3 million to \$20 million.

## 22 May 1985

The *Banks (Shareholdings) Act 1972* (which limits the size of shareholdings in banks authorised under the *Banking Act 1959*) was amended to facilitate the establishment of new banks in Australia. The major amendments were an increase in the size of individual shareholdings in a bank which might be held without the Governor-General's approval from 10 to 15 per cent, and allowing the Governor-General to grant exemptions from the new higher limit in the national interest.

## 27 February 1985

The Treasurer announced that the Government had selected 16 new banks, which would be invited to establish operations in Australia. Each would be required to proceed with discussions with

the Reserve Bank and the Treasury with a view to developing their proposals.

## 18 December 1984

The Treasurer announced the Government's decision to increase to 50 per cent the maximum permitted shareholding in Australian stockbroking businesses that might be held by foreign interests. This revised the previous limitations announced on 18 April 1984.

## 10 September 1984

The Government invited applications from domestic or foreign interests for a limited number of banking authorities and decided to initiate proceedings to enable the Bank of China to open a branch in Australia.

The Treasurer also announced the temporary waiving (for one year) of some sections of its foreign investment policy relating to the merchant banking sector. The 'Australian opportunities test' (that is, the requirement that Australians be given the opportunity to bid on market terms for interests available for sale) and the 'substantial economic benefits' test of foreign investment policy were to be set aside for a period of 12 months in respect of merchant bank restructuring proposals.

## 18 April 1984

Following a Trade Practices Commission (TPC) ruling that allowed stockbroking firms to incorporate, the Treasurer announced the results of a review of foreign investment policy as applied to the stockbroking industry (prior to the TPC ruling, non-residents were

precluded from having an interest in unincorporated stockbroking firms). Under the revised policy, proposals by foreign interests to acquire shareholdings in stockbroking businesses would only be allowed to proceed, where they involved the acquisition of less than 15 per cent of shares by a single foreign interest or of less than 40 per cent by two or more foreign interests.





# Appendix E

*Foreign Acquisitions and  
Takeovers Act 1975*





# *Foreign Acquisitions and Takeovers Act 1975*



## **Foreign Acquisitions and Takeovers Act 1975**

### **Act No. 92 of 1975 as amended**

This compilation was prepared on 15 December 2001 taking into account amendments up to Act No. 31 of 2001

The text of any of those amendments not in force on that date is appended in the Notes section

Prepared by the Office of Legislative Drafting,  
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### Notes

## An Act relating to the foreign acquisition of certain land interests and to the foreign control of certain business enterprises and mineral rights

### Part I—Preliminary

#### 1 Short title [see Note 1]

This Act may be cited as the *Foreign Acquisitions and Takeovers Act 1975*.

#### 2 Commencement [see Note 1]

This Act shall come into operation on a date to be fixed by Proclamation.

#### 3 Transitional provisions

- (1) The *Companies (Foreign Take-overs) Act 1972*, the *Companies (Foreign Take-overs) Act 1973* and the *Companies (Foreign Take-overs) Act 1974* are repealed.
- (2) Notwithstanding the repeal of the *Companies (Foreign Take-overs) Act 1972-1974*, that Act, other than section 17 shall be deemed to continue in force in relation to:
  - (a) an offer (including an offer constituting, or made in pursuance of an invitation constituting, a take-over offer) to sell or purchase shares that was accepted before the date of commencement of this Act; and
  - (b) an issue of shares that occurred before that date.
- (3) Without limiting the generality of subsection (2), orders may be made

under sections 14 and 15 of the repealed Act in pursuance of that subsection.

- (4) For the purposes of this Act, but without limiting the operation of subsection (2):
  - (b) an order in force under subsection 13(6) of the repealed Act immediately before that date has effect on and after that date as if it were an order made under section 22 of this Act;
  - (c) an order in force under paragraph 13(2)(c) or (3)(c) of the repealed Act immediately before that date has effect on and after that date as if it were an order made under subsection 18(2) of this Act; and
  - (d) an order in force under paragraph 13(2)(d) or (3)(d) of the repealed Act immediately before that date has effect on and after that date as if it were an order made under subsection 18(3) of this Act.
- (4A) For the purposes of the institution, after the commencement of this subsection, of proceedings for an offence referred to in section 21 of the *Companies (Foreign Take-overs) Act 1972*, the reference in that section to the Commonwealth Industrial Court shall be read as a reference to the Federal Court of Australia.
- (5) Nothing in this section affects the operation of section 8 of the *Acts Interpretation Act 1901-1973*.
- (6) Expressions used in this section have the same respective meanings as they had in the repealed Act.

#### 4 Additional operation of Act

- (1) Without prejudice to its effect apart from this subsection, this Act also has, by force of this subsection, the effect it would have if references in sections 19 and 21 to an Australian business carried on solely by a prescribed corporation or prescribed corporations were references to an Australian business carried on by a prescribed corporation or prescribed corporations together with any other person or persons.
- (2) Without prejudice to its effect apart from this subsection, this Act also has, by force of this subsection, the effect it would have if references in sections 19 and 21 to an Australian business carried on solely by a prescribed corporation or prescribed corporations were references to an Australian business carried on solely by a person other than a prescribed corporation or persons other than prescribed corporations.
- (3) Without prejudice to its effect apart from this subsection, this Act also has, by force of this subsection, the effect it would have if references in sections 19 and 21 to a foreign person were references to:

- (a) a natural person not ordinarily resident in Australia;
  - (b) a corporation (other than a foreign corporation) in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest;
  - (c) a corporation (other than a foreign corporation) in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest;
  - (d) the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or
  - (e) the trustee of a trust estate in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.
- (4) Without prejudice to its effect apart from this subsection, this Act also has, by force of this subsection, the effect it would have if:
- (a) references in sections 19 and 21 to a foreign person were references to:
    - (i) a natural person not ordinarily resident in Australia;
    - (ii) a corporation (other than a foreign corporation) in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest;
    - (iii) a corporation (other than a foreign corporation) in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest;
    - (iv) the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or
    - (v) the trustee of a trust estate in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest; and
  - (b) references in those sections to an Australian business carried on solely by a prescribed corporation or prescribed corporations were references to an Australian business carried on by a prescribed corporation or prescribed corporations together with any other person or persons.
- (5) Without prejudice to its effect apart from this subsection, this Act also has, by force of this subsection, the effect it would have if:
- (a) references in sections 19 and 21 to a foreign person were

references to:

- (i) a natural person not ordinarily resident in Australia;
  - (ii) a corporation (other than a foreign corporation) in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest;
  - (iii) a corporation (other than a foreign corporation) in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest;
  - (iv) the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or
  - (v) the trustee of a trust estate in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest; and
- (b) references in those sections to an Australian business carried on solely by a prescribed corporation or prescribed corporations were references to an Australian business carried on solely by a person other than a prescribed corporation or persons other than prescribed corporations.
- (6) Without prejudice to its effect apart from this subsection, this Act also has, by force of this subsection, the effect it would have if references in section 21A to a foreign person were references to:
- (a) a natural person not ordinarily resident in Australia;
  - (b) a corporation (other than a foreign corporation) in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest;
  - (c) a corporation (other than a foreign corporation) in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest;
  - (d) the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or
  - (e) the trustee of a trust estate in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.

## 5 Interpretation

- (1) In this Act, unless the contrary intention appears:

**acquisition** includes an agreement to acquire, but does not include an acquisition:

- (a) by will or by devolution by operation of law; or
- (b) by way of enforcement of a security held solely for the purposes of a moneylending agreement.

**agreement** means any agreement, whether formal or informal and whether express or implied, other than a moneylending agreement.

**asset** includes an interest in an asset.

**Australia** includes the external Territories to which this Act extends.

**Australian corporation** means a corporation of a kind referred to in paragraph 13(1)(a), (b) or (c).

**Australian rural land** means land situated in Australia that is used wholly and exclusively for carrying on a business of primary production.

**Australian urban land** means land situated in Australia that is not Australian rural land.

**Australian urban land corporation** means a corporation to which section 13C applies.

**Australian urban land trust estate** means a trust estate to which section 13D applies.

**balance-sheet** includes a statement of assets and liabilities or any similar document.

**constituent document**, in relation to a corporation, means the constitution of the corporation or any rules or other document constituting the corporation or governing its activities.

**debenture** includes debenture stock, bonds, notes and any other document evidencing or acknowledging indebtedness of a corporation, whether constituting a charge on the assets of the corporation or not.

**director** includes any person occupying the position of director of a corporation, by whatever name called.

**financial corporation** means a financial corporation to which paragraph 51(xx) of the Constitution is applicable, and includes a corporation formed within the limits of Australia that carries on as its sole or principal business the business of banking or insurance, other than banking or insurance to which paragraph 51(xiii) or (xiv) of the

Constitution, as the case may be, is not applicable.

***foreign corporation*** means a foreign corporation to which paragraph 51(xx) of the Constitution is applicable or a corporation that is incorporated in an external Territory to which this Act does not extend.

***foreign person*** means:

- (a) a natural person not ordinarily resident in Australia;
- (b) a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest;
- (c) a corporation in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest;
- (d) the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or
- (e) the trustee of a trust estate in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.

***interest in Australian urban land*** has the meaning given by section 12A.

***land*** includes a building or other structure, or a part of a building or other structure.

***lease*** includes a sub-lease.

***mineral right*** means:

- (a) a right (however described) under a law of the Commonwealth or of a State or Territory to recover minerals, other than a right to recover minerals for the purposes of prospecting or exploring for minerals;
- (b) a lease by virtue of which the lessee has a right falling within paragraph (a); or
- (c) an interest in a right falling within paragraph (a) or in a lease falling within paragraph (b).

***moneylending agreement*** means an agreement entered into in good faith in the ordinary course of carrying on a business of lending money, not being an agreement dealing with any matter unrelated to the carrying on of that business.

***officer***, in relation to a corporation, includes:

- (a) a director, secretary or employee of the corporation;
- (b) a receiver and manager of any part of the undertaking of the corporation appointed under a power contained in any instrument; or
- (c) a liquidator of the corporation appointed in a voluntary winding up.

**primary production** has the same meaning as in the *Income Tax Assessment Act 1936*.

**profit and loss account** includes any statement of profits and losses or any similar document.

**repealed Act** means the *Companies (Foreign Take-overs) Act 1972-1974*.

**share**, in relation to a corporation, means a share in the share capital of the corporation, and:

- (a) includes stock into which all or any of the share capital of the corporation has been converted; and
- (b) except in section 11 or 26, includes an interest in such a share or in such stock.

**Territory** means an internal Territory or an external Territory to which this Act extends.

**trading corporation** means a trading corporation to which paragraph 51(xx) of the Constitution is applicable.

- (2) In this Act, a reference to the determination of the policy of a business of exploiting a mineral right includes a reference to the determination of questions relating to the disposal of the right.
- (3) In this Act:
  - (a) a reference to a person proposing to acquire shares or assets includes:
    - (i) a reference to a person making an offer to acquire shares or assets;
    - (ii) a reference to a person making or publishing a statement, however expressed, that expressly or impliedly invites a holder of shares or assets to offer to dispose of shares or assets; and
    - (iii) a reference to a person taking part in, or proposing to take part in, negotiations with a view to the acquisition of shares or assets;
  - (aa) a reference to a person proposing to acquire an interest in

Australian urban land includes:

- (i) a reference to a person making an offer to acquire such an interest;
  - (ii) a reference to a person making or publishing a statement, however expressed, that expressly or impliedly invites a holder of such an interest to offer to dispose of that interest; and
  - (iii) a reference to a person taking part in, or proposing to take part in, negotiations with a view to the acquisition of such an interest;
- (b) a reference to a person proposing to enter into an agreement or arrangement includes a reference to a person taking part in, or proposing to take part in, negotiations with a view to entering into an agreement or arrangement; and
  - (c) a reference to a person proposing to terminate an arrangement includes a reference to a person taking part in, or proposing to take part in, negotiations with a view to terminating an arrangement.
- (4) In this Act, a reference to entering into an arrangement is a reference to entering into any formal or informal scheme, arrangement or understanding, whether expressly or by implication, and, without limiting the generality of the foregoing, includes a reference to:
- (a) entering into an agreement, other than a moneylending agreement;
  - (b) creating a trust, whether express or implied; and
  - (c) entering into a transaction;
- and references to an arrangement shall be construed accordingly.
- (5) In this Act, a reference to entering into an agreement or arrangement includes a reference to altering or varying an agreement or arrangement.
- (6) In this Act, an act done or proposed to be done by an agent on behalf of his principal shall be deemed to be done or proposed to be done by his principal.
- (8) A reference in this Act to an offence against this Act or against a particular provision of this Act includes a reference to an offence consisting of an attempt to commit such an offence.

## **5A Ordinarily resident non-citizens**

- (1) For the purposes of this Act, a natural person who is not an Australian citizen is ordinarily resident in Australia at a particular time if and

only if:

- (a) the person has actually been in Australia during 200 or more days in the period of 12 months immediately preceding that time; and
  - (b) at that time, either:
    - (i) the person is in Australia and the person's continued presence in Australia is not subject to any limitation as to time imposed by law; or
    - (ii) the person is not in Australia but, immediately before the person's most recent departure from Australia, the person's continued presence in Australia was not subject to any limitation as to time imposed by law.
- (2) For the purposes of paragraph (1)(b), but without otherwise limiting the generality of that paragraph, a person's continued presence in Australia is subject to a limitation as to time imposed by law if the person is an unlawful non-citizen within the meaning of the *Migration Act 1958*.

## 6 Associates

For the purposes of this Act, the following persons are associates of a person:

- (a) the person's spouse or a parent or remoter lineal ancestor, son, daughter or remoter issue, brother or sister of the person;
- (b) any partner of the person;
- (c) any corporation of which the person is an officer;
- (d) where the person is a corporation—any officer of the corporation;
- (e) any employee or employer of the person;
- (f) any officer of any corporation of which the person is an officer;
- (g) any employee of a natural person of whom the person is an employee;
- (h) any corporation whose directors are accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the person or, where the person is a corporation, of the directors of the person;
- (i) any corporation in accordance with the directions, instructions or wishes of which, or of the directors of which, the person is accustomed or under an obligation, whether formal or informal, to act;
- (j) any corporation in which the person holds a substantial interest;
- (k) where the person is a corporation—a person who holds a

- substantial interest in the corporation;
- (ka) the trustee of a trust estate in which the person holds a substantial interest;
- (kb) where the person is the trustee of a trust estate—a person who holds a substantial interest in the trust estate;
- (l) any person who is, by virtue of this section, an associate of any other person who is an associate of the person (including a person who is an associate of the person by another application or other applications of this paragraph).

## **7 Australian business**

- (1) A reference in this Act to an Australian business is a reference to a business that is carried on wholly or partly in Australia in anticipation of profit or gain.
- (2) For the purposes of this Act, the holder of a mineral right shall, by virtue of his holding that right, be deemed to carry on in Australia, in anticipation of profit or gain, a business of exploiting that right, and that right shall be deemed to be an asset of that business.
- (3) A reference in this Act, other than this section, to an Australian business does not include a reference to a business that is, or is deemed to be, carried on by any of the following persons, whether alone or together with any other person or persons:
  - (a) the Commonwealth, a State or a Territory;
  - (b) a corporation constituted for a public purpose by a law of the Commonwealth or of a State or Territory; or
  - (c) a local governing body.

## **8 Control of voting power**

A reference in this Act to control of the voting power in a corporation is a reference to control that is direct or indirect, including control that is exercisable as a result or by means of arrangements or practices, whether or not having legal or equitable force, and whether or not based on legal or equitable rights.

## **9 Substantial and controlling interests in corporations**

- (1) For the purposes of this Act:
  - (a) a person shall be taken to hold a substantial interest in a corporation if the person, alone or together with any associate or associates of the person, is in a position to control not less than 15 per centum of the voting power in the corporation or

holds interests in not less than 15 per centum of the issued shares in the corporation; and

- (b) 2 or more persons shall be taken to hold an aggregate substantial interest in a corporation if they, together with any associate or associates of any of them, are in a position to control not less than 40 per centum of the voting power in the corporation or hold interests in not less than 40 per centum of the issued shares in the corporation.

(2) Where:

- (a) a person holds a substantial interest in a corporation; or
- (b) 2 or more persons hold an aggregate substantial interest in a corporation;

that person shall be taken to hold a controlling interest in the corporation, or those persons shall be taken to hold an aggregate controlling interest in the corporation, as the case may be, unless the Treasurer is satisfied that, having regard to all the circumstances, that person together with the associate or associates (if any) of that person is not, or those persons together with the associate or associates (if any) of each of them are not, in a position to determine the policy of the corporation.

## 9A Substantial interests in trust estates

(1) For the purposes of this Act:

- (a) a person shall be taken to hold a substantial interest in a trust estate if the person, alone or together with an associate or associates, holds a beneficial interest in not less than 15% of the corpus or income of the trust estate; or
- (b) 2 or more persons shall be taken to hold an aggregate substantial interest in a trust estate if the persons, together with an associate or associates, hold, in the aggregate, beneficial interests in not less than 40% of the corpus or income of the trust estate.

(2) Where, under the terms of a trust, a trustee has a power or discretion as to the distribution of the income or corpus of the trust estate to beneficiaries, each beneficiary shall, for the purposes of subsection (1), be taken to hold a beneficial interest in the maximum percentage of income or corpus of the trust estate that the trustee is empowered to distribute to that beneficiary.

## 10 Holding corporations and subsidiaries

(1) For the purposes of this Act, but subject to subsection (2):

- (a) a corporation shall be deemed to be a subsidiary of another corporation if that other corporation:
    - (i) is in a position to control more than one-half of the voting power in the first-mentioned corporation; or
    - (ii) holds more than one-half of the issued shares in the first-mentioned corporation (excluding any shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital); and
  - (b) a corporation shall be deemed to be a subsidiary of another corporation if the first-mentioned corporation is a subsidiary of any corporation that is that other corporation's subsidiary (including a corporation that is that other corporation's subsidiary by another application or other applications of this paragraph).
- (2) In determining whether a corporation is a subsidiary of another corporation:
- (a) any shares held or power exercisable by that other corporation in a fiduciary capacity shall be treated as not held or exercisable by it;
  - (b) subject to paragraphs (c) and (d), any shares held or power exercisable:
    - (i) by any person as a nominee for that other corporation (except where that other corporation is concerned only in a fiduciary capacity); or
    - (ii) by, or by a nominee for, a subsidiary of that other corporation, not being a subsidiary that is concerned only in a fiduciary capacity;
 shall be treated as held or exercisable by that other corporation;
  - (c) any shares held or power exercisable by any person by virtue of the provisions of any debentures of the first-mentioned corporation, or of a trust deed for securing any issue of such debentures, shall be disregarded; and
  - (d) any shares held or power exercisable by, or by a nominee for, that other corporation or its subsidiary (not being held or exercisable as mentioned in paragraph (c)) shall be treated as not held or exercisable by that other corporation if the ordinary business of that other corporation or its subsidiary, as the case may be, includes the lending of money and the shares are held or the power is exercisable solely by way of security for the purposes of a moneylending agreement.
- (3) A reference in this Act to a holding corporation of another corporation is a reference to a corporation of which that other corporation is a subsidiary.

## 11 Interests in shares

- (1) Subject to this section, a person holds an interest in a share if he has any legal or equitable interest in that share.
- (2) Without limiting the generality of subsection (1), where a person:
  - (a) has entered into a contract to purchase a share;
  - (b) has a right, otherwise than by reason of having an interest under a trust, to have a share transferred to himself or to his order, whether the right is exercisable presently or in the future and whether on the fulfilment of a condition or not;
  - (c) has the right to acquire a share, or an interest in a share, under an option, whether the right is exercisable presently or in the future and whether on the fulfilment of a condition or not; or
  - (d) is entitled (otherwise than by reason of his having been appointed a proxy or representative to vote at a meeting of members of a corporation or of a class of its members) to exercise or control the exercise of a right attached to a share, not being a share of which he is the registered holder;

that person shall be deemed to hold an interest in that share.
- (3) A person shall not be deemed not to hold an interest in a share by reason only that he holds the interest in the share jointly with another person.
- (4) It is immaterial, for the purpose of determining whether a person holds an interest in a share, that the interest cannot be related to a particular share.
- (5) There shall be disregarded:
  - (a) an interest in a share of a person whose ordinary business includes the lending of money if he holds the interest solely by way of security for the purposes of a moneylending agreement;
  - (b) an interest of a person in a share, being an interest held by him by reason of his holding a prescribed office; and
  - (c) an interest of a prescribed kind in a share, being an interest of such person, or of the persons included in such class of persons, as is prescribed.
- (6) An interest in a share shall not be disregarded by reason only of:
  - (a) its remoteness;
  - (b) the manner in which it arose; or
  - (c) the fact that the exercise of a right conferred by the interest is or is capable of being made subject to restraint or restriction.
- (7) In relation to a corporation the whole or a portion of the share capital of

which consists of stock, an interest of a person in any such stock shall be deemed to be an interest in an issued share in the corporation having the same nominal amount as the amount of that stock and having attached to it the same rights as are attached to that stock.

## 12 Interests in assets

For the purpose of determining whether a person holds an interest in an asset, the provisions of section 11 (other than paragraph (2)(d), subsection (4), paragraphs (5)(b) and (c) and subsection (7)) have effect as if references in those provisions to a share were references to an asset.

### 12A Interests in Australian urban land

- (1) In this Act, *interest in Australian urban land* means:
  - (a) a legal or equitable interest in Australian urban land, other than an interest under a lease or licence or in a unit in a unit trust estate;
  - (b) an interest in a share in a company that owns Australian urban land, being a share that entitles the holder to a right to occupy a dwelling of a kind known as a flat or home unit situated on the land;
  - (c) an interest as lessee or licensee in a lease or licence giving rights to occupy Australian urban land where the term of the lease or licence (including any extension) is reasonably likely, at the time the interest is acquired, to exceed 5 years;
  - (d) an interest in an arrangement involving the sharing of profits or income from the use of, or dealings in, Australian urban land;
  - (e) an interest in a share in an Australian urban land corporation;
  - (f) an interest in a unit in an Australian urban land trust estate; or
  - (g) if the trustee of an Australian urban land trust estate is a corporation—an interest in a share in that corporation.
- (2) For the purposes of this Act, an interest is an interest in Australian urban land even if it is the only interest that exists in the land or other thing concerned.
- (3) For the purposes of this Act, a person acquires an interest in Australian urban land even if:
  - (a) the person acquires the interest jointly with another person or persons;
  - (b) the person has previously acquired an interest in Australian urban land; or
  - (c) the interest is an increase in the amount of an existing interest of the person in Australian urban land.

- (4) For the purposes of this Act, where a person:
- (a) enters into an agreement; or
  - (b) acquires an option;
- to acquire an interest in Australian urban land, the person shall be taken to have acquired that interest in Australian urban land.
- (5) For the purposes of this Act, a person shall be taken not to acquire an interest in Australian urban land if the person acquires the interest:
- (a) solely to hold as security for the purposes of a moneylending agreement; or
  - (b) by way of enforcement of a security held solely for the purposes of a moneylending agreement.
- (6) For the purposes of this Act, a person shall be taken not to acquire an interest in Australian urban land if the person acquires the interest by will or by devolution by operation of law.
- (7) A reference in this Act to the acquisition of an interest in Australian urban land does not include a reference to the acquisition of an interest in Australian urban land from:
- (a) the Commonwealth, a State or a Territory;
  - (b) a corporation constituted for a public purpose by a law of the Commonwealth or of a State or Territory; or
  - (c) a local governing body.
- (8) Where the regulations provide that this Act, or a specified provision or provisions of this Act, does not or do not apply in relation to an acquisition, of a kind specified in the regulations, of an interest in Australian urban land, this Act, or the provision or provisions, does not or do not so apply.

## **12B Interests in trust estates**

- (1) For the purposes of this Act, a reference to a person holding an interest in a trust estate is a reference to a person holding a beneficial interest in the corpus or income of the trust estate.
- (2) For the purposes of this Act, where a person:
- (a) has entered into a contract to purchase a beneficial interest in the corpus or income of a trust estate;
  - (b) has a right, otherwise than by reason of holding an interest in a trust estate, to have such an interest transferred to the person or to the person's order (whether the right is exercisable presently or in the future) and whether on the fulfilment of a condition or not; or
  - (c) has the right to acquire such an interest under an option (whether

the right is exercisable presently or in the future) and whether on the fulfilment of a condition or not;

the person shall be taken to hold that interest in the trust estate.

- (3) For the purposes of this Act, a person holds an interest in a trust estate even if the person holds the interest jointly with another person.
- (4) For the purposes of this Act, a person shall be taken not to hold an interest in a trust estate if:
  - (a) the person holds the interest solely by way of security for the purposes of a moneylending agreement; and
  - (b) the ordinary business of the person includes the lending of money.
- (5) For the purposes of this Act, a person holds an interest in a trust estate despite:
  - (a) its remoteness;
  - (b) the manner in which it arose; or
  - (c) the fact that the exercise of a right conferred by the interest is, or is capable of being made, subject to restraint or restriction.

## 12C Tracing of substantial interests in corporations and trust estates

Where:

- (a) a person holds a substantial interest, or 2 or more persons hold an aggregate substantial interest, (including a substantial interest held by that person, or an aggregate substantial interest held by those persons, by another application or other applications of this subsection) in a corporation or a trust estate (which corporation or the trustee of which trust estate is in this section called the *first level entity*); and
- (b) the first level entity:
  - (i) is in a position to control all or any of the voting power, or holds interests in all or any of the issued shares, in a corporation (in this section called the *second level corporation*); or
  - (ii) holds an interest in a trust estate (in this section called the *second level trust estate*);

the following provisions have effect for the purposes of this Act:

- (c) where subparagraph (b)(i) applies—the person or those persons together shall be taken to be in a position to control so much of the voting power of the second level corporation as the first level entity is in a position to control or to hold the interests in the issued shares in the second level corporation that the first level entity holds, as the case may be;

- (d) where subparagraph (b)(ii) applies—the person or those persons together shall be taken to hold the interest in the second level trust estate that the first level entity holds.

### 13 Prescribed corporations

- (1) A reference in this Act to a prescribed corporation is a reference to:
  - (a) a trading corporation;
  - (b) a financial corporation;
  - (c) a corporation incorporated in a Territory under the law in force in that Territory relating to companies;
  - (d) a foreign corporation that, on its last accounting date, held assets the sum of the values of which exceeded \$20,000,000 or such other amount as is prescribed, being assets consisting of all or any of the following:
    - (i) land situated in Australia (including legal and equitable interests in such land);
    - (ii) mineral rights;
    - (iii) shares in a corporation incorporated in Australia;
  - (e) a foreign corporation that was, on its last accounting date, a holding corporation of an Australian corporation or Australian corporations, where the sum of the values on that date of the assets of the Australian corporation or Australian corporations exceeded \$20,000,000 or such other amount as is prescribed;
  - (f) a corporation that was, on its last accounting date, a holding corporation of a foreign corporation referred to in paragraph (d) or (e);
  - (g) a foreign corporation that, on its last accounting date, held assets of a kind or kinds referred to in paragraph (d), where the sum of the values on that date of those assets was not less than one-half of the sum of the values on that date of the assets of that corporation and of all the subsidiaries of that corporation; or
  - (h) a foreign corporation that was, on its last accounting date, a holding corporation of an Australian corporation or Australian corporations, where the sum of the values on that date of the assets of that Australian corporation or those Australian corporations was not less than one-half of the sum of the values on that date of the assets of the foreign corporation and of all the subsidiaries of that corporation.
- (2) For the purposes of subsection (1), the assets of a corporation shall be deemed not to include any shares in a subsidiary of that corporation.
- (3) In this section, *last accounting date*, in relation to a corporation, means

the date of the expiration of the most recent period in relation to which a profit and loss account of the corporation has been laid before it in general meeting, including an account so laid before it before the commencement of this Act.

- (4) For the purposes of this section, the value on a particular date of an asset of a corporation shall be taken to be:
  - (a) the value of that asset as shown in the last balance-sheet of the corporation that was prepared and audited before that date; or
  - (b) if no balance-sheet of the corporation was prepared and audited before that date, the value of that asset as shown on that date in the accounting records of the corporation.

### 13A Exempt dealings

- (1) Sections 18 and 26 do not apply to shares in an exempt corporation.
- (2) Section 20 does not apply to the control of an exempt corporation.
- (3) Sections 19 and 21 do not apply to the control of an exempt business.
- (4) For the purposes of this section:

*exempt corporation* means a corporation:

- (a) that is of a kind referred to in paragraph 13(1)(a), (b), (c), (g) or (h); and
- (b) the value of whose total assets, determined under section 13B, does not exceed:
  - (i) if more than 50% of the value of those assets is attributable to Australian rural land—\$3,000,000 or such other amount as is prescribed; or
  - (ii) in any other case—\$5,000,000 or such other amount as is prescribed;

*exempt business* means a business the value of whose total assets, determined under section 13B, does not exceed:

- (a) if more than 50% of the value of those assets is attributable to Australian rural land—\$3,000,000 or such other amount as is prescribed; or
- (b) in any other case—\$5,000,000 or such other amount as is prescribed.

### 13B Valuation of assets for purposes of section 13A

- (1) In determining whether a corporation is an exempt corporation in relation to the application of section 18 or 26, the value of its total assets

at a particular time is:

- (a) where the corporation is not a holding corporation:
    - (i) the value of those assets as shown in the last balance-sheet of the corporation audited before that time or, if no balance-sheet was audited before that time, as shown at that time in the accounting records of the corporation; or
    - (ii) if the value of the issued shares of the corporation determined under subsection (2) or (3) is greater—that greater value; or
  - (b) where the corporation is a holding corporation:
    - (i) the aggregate value of the assets of the corporation, and of each of its subsidiaries that is a prescribed corporation carrying on an Australian business, determined, in each case, under subparagraph (a)(i); or
    - (ii) if the aggregate value of the issued shares of the corporation and each of those subsidiaries determined under subsection (2) or (3) is greater—that greater value.
- (2) For the purposes of subparagraphs (1)(a)(ii) and (b)(ii) in relation to the application of section 18, the value of the issued shares of a corporation, or the aggregate value of the issued shares of a group of corporations, is the value ascertained under the formula:

$$\frac{C \times TS}{NS}$$

where:

**C** is:

- (a) where the transaction referred to in section 18 is the proposed acquisition of shares—the total consideration for the acquisition; or
- (b) where the transaction is the issue of shares—the total issue price of all the shares to be issued;

**TS** is the total number of issued shares, immediately before the proposed acquisition or issue, of the corporation or group of corporations, as the case may be; and

**NS** is the number of shares proposed to be acquired or issued, as the case may be.

- (3) For the purposes of subparagraphs (1)(a)(ii) and (b)(ii) in relation to the application of section 26, the value of the issued shares of a corporation, or the aggregate value of the issued shares of a group of corporations, is the value ascertained under the formula:

$$\frac{C \times TS}{NS}$$

where:

*C* is the consideration for the shares acquired or proposed to be acquired under the agreement referred to in section 26;

*TS* is the total number of issued shares, immediately before the acquisition or proposed acquisition, of the corporation or group of corporations, as the case may be; and

*NS* is the number of shares to which the agreement relates.

- (4) In determining whether a business is an exempt business in relation to the application of section 19, the value of its total assets is the consideration for the acquisition referred to in that section.
- (5) In determining whether a corporation is an exempt corporation in relation to the application of section 20, the value of its total assets at a particular time is:
  - (a) where the corporation is not a holding corporation—the value of those assets as shown in the last balance-sheet of the corporation audited before that time or, if no balance-sheet was audited before that time, as shown at that time in the accounting records of the corporation; or
  - (b) where the corporation is a holding corporation—the aggregate value of the assets of the corporation, and of each of its subsidiaries that is a prescribed corporation carrying on an Australian business, determined, in each case, under paragraph (a).
- (6) In determining whether a business is an exempt business in relation to the application of section 21, the value of its total assets at a particular time is the value determined by a person who was at the time of the valuation a suitably qualified valuer acting at arm's length in relation to the valuation where:
  - (a) the valuation was made at the particular time; or
  - (b) the valuation was made not more than 12 months before the particular time and the value had not increased significantly between the time of the valuation and the particular time.

### 13C Australian urban land corporations

- (1) For the purposes of this Act, a corporation is an Australian urban land corporation if:
  - (a) where the corporation is not a holding corporation—the value of its eligible land assets exceeds 50% of the value of its total assets; or
  - (b) where the corporation is a holding corporation—the sum of the values of the eligible land assets of the corporation and of each of

its subsidiaries exceeds 50% of the sum of the values of the total assets of the corporation and of each of its subsidiaries.

- (2) Where a reasonable value of the eligible land assets or of the total assets of a corporation is:
- (a) shown in the last audited balance-sheet of the corporation; or
  - (b) if not shown in the last audited balance-sheet—shown in the accounting records of the corporation;

the value of those assets as shown shall be taken to be their value for the purposes of subsection (1).

- (3) For the purposes of determining the values referred to in paragraph (1)(b), any asset of a corporation that consists of shares in any subsidiary of the corporation shall be disregarded.

- (4) In this section:

*eligible land assets*, in relation to a corporation, means so much of the corporation's total assets as consists of interests in Australian urban land.

### 13D Australian urban land trust estates

- (1) For the purposes of this Act, a trust estate is an Australian urban land trust estate if it is a unit trust estate and the value of so much of its total assets as consists of interests in Australian urban land exceeds 50% of the value of its total assets.
- (2) Where a reasonable value of the particular assets or of the total assets of a trust estate is given in a valuation, that value shall be taken to be their value at a particular time for the purposes of subsection (1) if:
- (a) the person giving the valuation was at the time of the valuation a suitably qualified valuer acting at arm's length in relation to the valuation;
  - (b) the valuation was made not more than 12 months before the particular time; and
  - (c) the value of those assets had not increased significantly between the time of the valuation and the particular time.

## 14 Voting power

In this Act, a reference to the voting power in a corporation is a reference to the maximum number of votes that might be cast at a general meeting of the corporation.

## 15 Application of Act

This Act does not apply in relation to:

- (a) an acquisition of shares or assets, or an issue of shares, that occurred before the date of commencement of this Act;
- (b) an arrangement that was entered into before that date; or
- (c) an acquisition of shares or assets occurring on or after that date, where notice in writing was issued by the Commonwealth Government before that date to the effect that the Commonwealth Government did not object to the acquisition or, in the case of an acquisition occurring by way of the exercise of an option, that it did not object to the acquisition of the option or to the acquisition of those shares or assets in pursuance of the option.

## 16 Extra-territorial operation of Act

This Act applies both within and outside Australia and extends to every external Territory other than Papua New Guinea.

## 17 Persons obliged to comply with Act

The obligation to comply with this Act extends to all natural persons, whether resident in Australia or not and whether Australian citizens or not, and to all corporations, whether incorporated or carrying on business in Australia or not.

# Part II—Control of takeovers and other transactions

## 18 Acquisitions of shares

- (1) In this section, *corporation* means:
  - (a) a prescribed corporation that carries on an Australian business, whether alone or together with any other person or persons; or
  - (b) a holding corporation (other than a foreign corporation that is not a prescribed corporation) of such a prescribed corporation.
- (2) Where the Treasurer is satisfied that:
  - (a) a person proposes, or persons propose, to acquire shares in a corporation or a corporation proposes to issue shares;
  - (b) the proposed acquisition or acquisitions or the proposed issue would have the result that:
    - (i) in the case of a corporation not controlled by foreign

persons—the corporation would be controlled by foreign persons; or

- (ii) in the case of a corporation controlled by foreign persons—the corporation would continue to be controlled by foreign persons, but those persons would include a person who is not, or would not include a person who is, one of the foreign persons first referred to in this subparagraph; and

(c) that result would be contrary to the national interest;

the Treasurer may make an order prohibiting the proposed acquisition or all or any of the proposed acquisitions, or the proposed issue, as the case may be.

- (3) Where the Treasurer makes an order under subsection (2) prohibiting a proposed acquisition of shares in a corporation, he may also make an order in relation to a specified foreign person, or in relation to a specified foreign person and specified associates, or the persons included in a specified class of associates, of that person, directing that that person shall not, or none of those persons shall, whether alone or together with any other or others of them:

- (a) be in a position to control more of the total voting power in the corporation than:

- (i) such proportion of the total voting power in the corporation as is equal to the proportion of the total voting power in the corporation at the time of the coming into operation of the first-mentioned order that that foreign person, together with any associate or associates of that person, was in a position to control at that time; or

- (ii) such greater proportion (if any) of the total voting power in the corporation as is specified in the order; or

- (b) hold interests in a number of issued shares in the corporation exceeding:

- (i) the number that bears to the total number of issued shares in the corporation the same proportion as the number of issued shares in the corporation in which that foreign person, together with any associate or associates of that person, held interests at the time of the coming into operation of the first-mentioned order bears to the total number of issued shares in the corporation at that time; or

- (ii) such greater number (if any) as is specified in the order.

- (4) Where a person has acquired shares in a corporation, and the Treasurer is satisfied that:

- (a) the acquisition has had the result that:

- (i) in the case of a corporation that, before the acquisition,

was not controlled by foreign persons—the corporation is controlled by foreign persons; or

- (ii) in the case of a corporation that, before the acquisition, was controlled by foreign persons—the corporation continues to be controlled by foreign persons, but those persons include a person who is not, or do not include a person who is, one of the foreign persons first referred to in this subparagraph; and

(b) that result is contrary to the national interest;

the Treasurer may make an order directing the person who acquired the shares to dispose of those shares within a specified time to any person or persons approved in writing by the Treasurer.

- (5) Before the expiration of the time specified in an order made under subsection (4) or of that time as extended under this subsection, the Treasurer may, by writing signed by him, extend or further extend that time or that time as so extended, and in that event the order has effect as if the time as so extended or further extended had been specified in the order.
- (6) The Treasurer shall not refuse to approve a person for the purposes of subsection (4) unless he is satisfied that the person is a foreign person and that it would be contrary to the national interest for that person to acquire the shares concerned.
- (7) For the purposes of this section:
  - (a) a corporation shall be taken to be controlled by foreign persons if, and only if, a foreign person holds a controlling interest in the corporation or 2 or more foreign persons hold an aggregate controlling interest in the corporation;
  - (b) where, by virtue of paragraph (a), a corporation is taken to be controlled by foreign persons by reason that a foreign person, together with an associate or associates, is in a position to control not less than 15 per centum of the voting power in the corporation or holds interests in not less than 15 per centum of the issued shares in the corporation, references to the foreign persons who control the corporation include references to that associate or those associates, whether or not that associate is, or those associates are, in fact foreign persons; and
  - (c) where, by virtue of paragraph (a), a corporation is taken to be controlled by foreign persons by reason that 2 or more foreign persons, together with an associate or associates of any of them, are in a position to control not less than 40 per centum of the voting power in the corporation or hold interests in not less than 40 per centum of the issued shares in the corporation, references to the foreign persons who control the corporation are references to any

foreign persons, and any associates of foreign persons (whether or not those associates are in fact foreign persons), each of whom is in a position to control any of the voting power in the corporation or holds interests in any of the issued shares in the corporation.

## 19 Acquisitions of assets

- (1) In this section, *foreign person* means:
  - (a) a foreign corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest; or
  - (b) a foreign corporation in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest.
- (2) Where the Treasurer is satisfied that:
  - (a) a person proposes, or persons propose, to acquire assets of an Australian business carried on solely by a prescribed corporation or prescribed corporations;
  - (b) the proposed acquisition or acquisitions would have the result that:
    - (i) in the case of a business not controlled by foreign persons—the business would be controlled by foreign persons; or
    - (ii) in the case of a business controlled by foreign persons—the business would continue to be controlled by foreign persons, but those persons would include a person who is not, or would not include a person who is, one of the foreign persons first referred to in this subparagraph; and
  - (c) that result would be contrary to the national interest;

the Treasurer may make an order prohibiting the proposed acquisition or all or any of the proposed acquisitions, as the case may be.
- (3) Where the Treasurer makes an order under subsection (2) prohibiting a proposed acquisition of assets of an Australian business, he may also make an order in relation to a specified foreign person, or in relation to a specified foreign person and specified associates, or the persons included in a specified class of associates, of that person, directing that that person shall not, or none of those persons shall, whether alone or together with any other or others of them, acquire any interests in assets of that business, or acquire any such interests except to a specified extent.
- (4) Where a person has acquired assets of an Australian business carried on solely by a prescribed corporation or prescribed corporations, and the Treasurer is satisfied that:
  - (a) the acquisition has had the result that:

- (i) in the case of a business that, before the acquisition, was not controlled by foreign persons—the business is controlled by foreign persons; or
    - (ii) in the case of a business that, before the acquisition, was controlled by foreign persons—the business continues to be controlled by foreign persons, but those persons include a person who is not, or do not include a person who is, one of the foreign persons first referred to in this subparagraph; and
  - (b) that result is contrary to the national interest;
- the Treasurer may make an order directing the person who acquired the assets to dispose of those assets within a specified time to any person or persons approved in writing by the Treasurer.
- (5) Before the expiration of the time specified in an order made under subsection (4) or of that time as extended under this subsection, the Treasurer may, by writing signed by him, extend or further extend that time or that time as so extended, and in that event the order has effect as if the time as so extended or further extended had been specified in the order.
  - (6) The Treasurer shall not refuse to approve a person for the purposes of subsection (4) unless he is satisfied that the person is a foreign person and that it would be contrary to the national interest for that person to acquire the assets concerned.
  - (7) For the purposes of this section:
    - (a) an Australian business shall be taken to be controlled by foreign persons if, and only if, the Treasurer is satisfied that a foreign person or foreign persons, alone or together with an associate or associates of that foreign person or of any of those foreign persons, is or are in a position to determine the policy of the business; and
    - (b) where an Australian business is so taken to be controlled by foreign persons by reason that a foreign person or foreign persons, together with an associate or associates, are in a position to determine the policy of the business, references to the foreign persons who control the business include references to that associate or those associates, whether or not that associate is, or those associates are, in fact foreign persons.

## 20 Arrangements relating to directorate of corporations

- (1) In this section, *corporation* means:
  - (a) an Australian corporation that carries on an Australian business, whether alone or together with any other person or persons; or
  - (b) a holding corporation (other than a foreign corporation) of such an

Australian corporation.

- (2) Where the Treasurer is satisfied that:
- (a) a person proposes to enter into an agreement in relation to the affairs of a corporation or it is proposed to alter a constituent document of a corporation;
  - (b) under the proposed agreement or in consequence of the proposed alteration, a director or directors of the corporation will be under an obligation to act in accordance with the directions, instructions or wishes of a foreign person who holds a substantial interest in the corporation or of an associate of such a foreign person;
  - (c) the proposed agreement or alteration would have the result that:
    - (i) in the case of a corporation not controlled by foreign persons—the corporation would be controlled by foreign persons; or
    - (ii) in the case of a corporation controlled by foreign persons—the corporation would continue to be controlled by foreign persons, but those persons would include a person who is not, or would not include a person who is, one of the foreign persons first referred to in this subparagraph; and
  - (d) that result would be contrary to the national interest;
- the Treasurer may make an order prohibiting the entering into of the proposed agreement or prohibiting the proposed alteration, as the case may be.
- (3) Where an agreement has been entered into in relation to the affairs of a corporation, or an alteration has been made to a constituent document of a corporation, and the Treasurer is satisfied that:
- (a) the agreement or alteration has had, or will have, the result that:
    - (i) in the case of a corporation that, before the agreement was entered into or the alteration was made, was not controlled by foreign persons—the corporation is or will be controlled by foreign persons; or
    - (ii) in the case of a corporation that, before the agreement was entered into or the alteration was made, was controlled by foreign persons—the corporation continues or will continue to be controlled by foreign persons, but those persons include or will include a person who is not, or do not or will not include a person who is, one of the foreign persons first referred to in this subparagraph; and
  - (b) that result is or will be contrary to the national interest;
- the Treasurer may, for the purpose of restoring the control of the corporation as closely as possible to the position in which it was before

the agreement was entered into or the alteration was made or for the purpose of preventing the occurrence of a change in the control of the corporation of a kind mentioned in paragraph (a), as the case may be, make orders directing specified persons to do within a specified time, or refrain from doing, specified acts or acts of a specified kind.

- (4) Where a time is specified in an order made under subsection (3), the Treasurer may, before the expiration of that time or of that time as extended under this subsection, by writing signed by him, extend or further extend that time or that time as so extended, and in that event the order has effect as if the time as so extended or further extended had been specified in the order.
- (5) For the purposes of this section:
  - (a) a corporation shall be taken to be controlled by foreign persons if, and only if, the Treasurer is satisfied that a foreign person or foreign persons, alone or together with an associate or associates of that foreign person or of any of those foreign persons, is or are in a position to determine the policy of the corporation; and
  - (b) where an Australian business is so taken to be controlled by foreign persons by reason that a foreign person or foreign persons, together with an associate or associates, are in a position to determine the policy of the corporation, references to the foreign persons who control the corporation include references to that associate or those associates, whether or not that associate is, or those associates are, in fact foreign persons.

## 21 Arrangements relating to control of Australian businesses

- (1) In this section:

***arrangement***, in relation to an Australian business, means an arrangement relating to the leasing or letting on hire of, or the granting of other rights to use, assets of such a business or relating to the participation by a person in the profits or management of such a business;

***foreign person*** means:

- (a) a foreign corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest; or
  - (b) a foreign corporation in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest.
- (2) Where the Treasurer is satisfied that:

- (a) a person proposes to enter into an arrangement in relation to an Australian business carried on solely by a prescribed corporation or prescribed corporations or proposes to terminate an arrangement that exists in relation to such an Australian business;
- (b) the proposal, if carried out, would have the result that:
  - (i) in the case of a business not controlled by foreign persons—the business would be controlled by foreign persons; or
  - (ii) in the case of a business controlled by foreign persons—the business would continue to be controlled by foreign persons, but those persons would include a person who is not, or would not include a person who is, one of the foreign persons first referred to in this subparagraph; and
- (c) that result would be contrary to the national interest;

the Treasurer may make an order prohibiting the entering into of the proposed arrangement or prohibiting the termination of the existing arrangement, as the case may be.

- (3) Where an arrangement has been entered into in relation to an Australian business carried on solely by a prescribed corporation or prescribed corporations or an arrangement that existed in relation to such an Australian business has been terminated, and the Treasurer is satisfied that:
  - (a) the entering into or the termination of the arrangement has had, or will have, the result that:
    - (i) in the case of a business that, before the entering into or termination of the arrangement, was not controlled by foreign persons—the business is or will be controlled by foreign persons; or
    - (ii) in the case of a business that, before the entering into or termination of the arrangement, was controlled by foreign persons—the business continues or will continue to be controlled by foreign persons, but those persons include or will include a person who is not, or do not or will not include a person who is, one of the foreign persons first referred to in this subparagraph; and
  - (b) that result is or will be contrary to the national interest;

the Treasurer may, for the purpose of restoring the control of the business as closely as possible to the position in which it was before the arrangement was entered into or terminated or for the purpose of preventing the occurrence of a change in the control of the business of a kind referred to in paragraph (a), as the case may be, make orders directing specified persons to do within a specified time, or refrain from doing, specified acts or acts of a specified kind.

- (4) Where a time is specified in an order made under subsection (3), the Treasurer may, before the expiration of that time or of that time as extended under this subsection, by writing signed by him, extend or further extend that time or that time as so extended, and in that event the order has effect as if the time as so extended or further extended had been specified in the order.
- (5) For the purposes of this section:
  - (a) an Australian business shall be taken to be controlled by foreign persons if, and only if, the Treasurer is satisfied that a foreign person or foreign persons, alone or together with an associate or associates of that foreign person or of any of those foreign persons, is or are in a position to determine the policy of the business; and
  - (b) where an Australian business is so taken to be controlled by foreign persons by reason that a foreign person or foreign persons, together with an associate or associates, are in a position to determine the policy of the business, references to the foreign persons who control that business include references to that associate or those associates, whether or not that associate is, or those associates are, in fact foreign persons.

## 21A Acquisitions of interests in Australian urban land

- (1) In this section:
 

*foreign person* means:

  - (a) a foreign corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or
  - (b) a foreign corporation in which 2 or more persons, each of whom is a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.
- (2) Where the Treasurer is satisfied that:
  - (a) a foreign person proposes to acquire an interest in Australian urban land; and
  - (b) the proposed acquisition would be contrary to the national interest; the Treasurer may make an order prohibiting the proposed acquisition.
- (3) Where the Treasurer makes such an order in relation to an interest in Australian urban land, he or she may also make an order in relation to:
  - (a) a specified foreign person; or
  - (b) a specified foreign person and specified associates, or the persons

included in a specified class of associates, of that person;  
directing that that person shall not, or none of those persons shall,  
whether alone or together with any other or others of them, acquire:

- (c) any interest in the land or other thing concerned; or
  - (d) any such interest except to a specified extent.
- (4) Where a foreign person has acquired an interest in Australian urban land and the Treasurer is satisfied that the acquisition is contrary to the national interest, the Treasurer may make an order directing the foreign person to dispose of that interest within a specified period to any person or persons approved in writing by the Treasurer.
- (5) Before the end of the period specified in the order or of that period as extended under this subsection, the Treasurer may, by writing signed by the Treasurer, extend or further extend that period or that period as so extended, and in that event the order has effect as if the period as so extended or further extended had been specified in the order.
- (6) For the purposes of subsection (4), but without limiting the generality of that subsection:
- (a) a foreign person shall be taken to have acquired an interest in Australian urban land if the person becomes, with or without the knowledge of the person, a beneficiary in a trust estate (other than a deceased estate) that consists of or includes an interest in Australian urban land; and
  - (b) where paragraph (a) applies and the trust estate is a discretionary trust estate—a reference to the disposal of the interest of the foreign person is a reference to the disposal of such assignable benefits in relation to that trust estate as may ultimately vest in that foreign person.
- (7) The Treasurer shall not refuse to approve a person for the purposes of subsection (4) unless the Treasurer is satisfied that the person is a foreign person and that it would be contrary to the national interest for that person to acquire the interest concerned.

## 22 Interim orders

- (1) For the purpose of enabling due consideration to be given to the question whether an order should be made under subsection 18(2), 19(2), 20(2), 21(2) or 21A(2), the Treasurer may make an order of the kind that he would be empowered to make under that subsection if it were applicable.
- (2) An order made under this section has effect for such period, not exceeding 90 days after the coming into operation of the order, as is specified in the order.

## 23 Revocation of orders

The Treasurer may at any time make an order revoking an order made under section 18, 19, 20, 21, 21A or 22 or an order referred to in subsection 3(4).

## 24 Publication of orders

An order made by the Treasurer under this Part shall be made in writing signed by him, shall be published in the *Gazette* within 10 days after the date on which it is made, and comes into operation:

- (a) except in a case to which paragraph (b) applies—on the date of publication; or
- (b) in the case of an order under subsection 18(3) or (4), 19(4), 20(3), 21(3) or 21A(3) or (4)—on such date as is specified in the order, being a date not earlier than 30 days after the date of publication.

## 25 Effect of notification of transactions

- (1) This section has effect where the Treasurer receives:
  - (a) a notice from a person stating that the person proposes to acquire shares, assets or interests or to enter into an agreement or enter into or terminate an arrangement;
  - (b) a notice from a corporation stating that the corporation proposes to issue shares; or
  - (c) a notice from a corporation stating that it is proposed to alter a constituent document of the corporation.
- (1A) Where the Treasurer is empowered to make an order under subsection 18(2), 19(2), 20(2), 21(2) or 21A(2) in relation to the acquisition, agreement, arrangement, issue or alteration specified in the notice, the Treasurer may, instead of making such an order, decide that the Commonwealth Government has no objection to the proposal specified in the notice, provided that the person or corporation complies with conditions that the Treasurer, when making the decision, considers necessary in order that the proposal, if carried out, will not be contrary to the national interest.
- (1B) Where the Treasurer makes a decision under subsection (1A), the person or corporation shall be given advice in writing of the decision, being advice that includes a statement of the conditions to be complied with, before the end of 10 days after the day on which the decision is made.
- (1C) If the person or corporation:
  - (a) is given an advice under subsection (1B) of a decision; and

- (b) carries out the proposal to which the decision relates; and
- (c) does or fails to do an act, resulting in a contravention of a condition set out in the advice;

the person or corporation is guilty of an offence punishable on conviction, by:

- (d) in the case of a natural person—a fine not exceeding 500 penalty units, or imprisonment for a period not exceeding 2 years, or both; or
- (e) in the case of a corporation—a fine not exceeding 2,500 penalty units.

(1D) If the person or corporation:

- (a) is given advice under subsection (1B) of a decision; and
- (b) carries out the proposal to which the decision relates:

the Treasurer may only make an order under subsection 18(4), 19(4), 20(3), 21(3) or 21A(4) in relation to the acquisition, agreement, arrangement, issue or alteration specified in the notice if:

- (c) the person or corporation is convicted of an offence against subsection (1C) in relation to a condition; or
- (d) an order is made under section 19B of the *Crimes Act 1914* in relation to the person or corporation in respect of such an offence.

(2) If 30 days pass after the day on which the Treasurer receives the notice and by the end of that period:

- (a) the Treasurer has not:
  - (i) made a decision under subsection (1A) in relation to the proposal specified in the notice, being a decision of which advice is given in writing to the person or corporation before the end of 10 days after the day on which the decision is made; or
  - (ii) made an order under this Part in relation to the acquisition, agreement, arrangement, issue or alteration specified in the notice, being an order published in the *Gazette* before the end of 10 days after the day on which the order is made; and
- (b) the person or corporation has not carried out the proposal; the Treasurer is not empowered:
- (c) to make an order under this Part in relation to the acquisition, agreement, arrangement, issue or alteration; or
- (d) to make a decision under subsection (1A) in relation to the proposal.

(3) If:

- (a) before the end of 30 days after the day on which the Treasurer

receives the notice, the Treasurer makes an order under section 22 in relation to the acquisition, agreement, arrangement, issue or alteration specified in the notice;

- (b) the order is published in the *Gazette* before the end of 10 days after the day on which the order is made; and
  - (c) 90 days pass after the day on which the order is published and by the end of that period:
    - (i) the Treasurer has not:
      - (A) made a decision under subsection (1A) in relation to the proposal specified in the notice, being a decision of which advice is given in writing to the person or corporation before the end of 10 days after the day on which the decision is made; or
      - (B) made any other order under this Part in relation to the acquisition, agreement, arrangement, issue or alteration, being an order published in the *Gazette* before the end of 10 days after the day on which the order is made; and
    - (ii) the person or corporation has not carried out the proposal;
- the Treasurer is not empowered:
- (d) to make a further order under this Part in relation to the acquisition, agreement, arrangement, issue or alteration; or
  - (e) to make a decision under subsection (1A) in relation to the proposal.

(4) For the purposes of this section, a notice stating that a person has an option to acquire shares or assets shall be taken to be a statement that the person proposes to acquire the shares or assets, and references in this section to the proposal and to the acquisition shall be construed accordingly.

(4A) For the purposes of this section but without limiting its generality, a person or corporation may be given advice in writing of a decision of the Treasurer in relation to a proposal if that advice in writing is given to the person or corporation at an address specified, in the notice containing the proposal, as the address for service of notices in relation to the proposal.

(5) In this section, *notice* includes a notice furnished under section 26 or 26A.

## 26 Compulsory notification of certain section 18 transactions

- (1) In this section, *person to whom this section applies* means:
  - (a) a natural person not ordinarily resident in Australia;

- (b) a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest;
  - (c) a corporation in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest;
  - (d) the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or
  - (e) the trustee of a trust estate in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.
- (2) Where a person to whom this section applies:
- (a) enters into an agreement by virtue of which he acquires a substantial shareholding in an Australian corporation and did not, before entering into the agreement, furnish to the Treasurer a notice stating his intention to enter into that agreement; or
  - (b) having furnished a notice to the Treasurer stating his intention to enter into an agreement by virtue of which he is to acquire a substantial shareholding in an Australian corporation, enters into that agreement before:
    - (i) the expiration of 40 days after the date on which the notice was received by the Treasurer; or
    - (ii) the date on which advice is given that the Commonwealth Government does not object to the person entering into that agreement (whether or not the advice is subject to conditions imposed under subsection 25(1A));
 whichever first occurs;
- the person is guilty of an offence and is punishable, on conviction, by a fine not exceeding 500 penalty units or imprisonment for a period not exceeding 2 years, or both.
- (3) Where:
- (a) a person enters into an agreement of a kind mentioned in subsection (2); and
  - (b) the provisions of the agreement that relate to the acquisition of the interests in the shares concerned do not become binding until the fulfilment of a condition or conditions set out in the agreement;
- the person shall not be taken, for the purposes of that subsection, to have entered into the agreement until the time when those provisions become binding.
- (4) Without affecting the operation of section 25, this section does not apply in relation to a shareholder of a corporation subscribing for shares in the corporation if:

- (a) the shares were subscribed for in pursuance of a resolution by the corporation or the directors of the corporation agreeing to make available a number of shares specified in, or ascertained in accordance with, the resolution for allotment to persons who were registered as the holders of shares in the corporation on a date specified in the resolution; and
  - (b) the number of shares for which the shareholder so subscribed bears to the total number of shares made available for allotment in pursuance of the resolution as nearly as practicable the same proportion as the number of issued shares in the corporation held by him immediately before the date specified in the resolution bears to the total number of issued shares in the corporation immediately before that date.
- (5) For the purposes of subsection (4), it is immaterial that the shares in the corporation comprise 2 or more classes of shares to which different rights are attached.
- (5A) Without affecting the operation of section 25, this section does not apply in relation to the acquisition of a substantial shareholding in an Australian corporation if that acquisition is also an acquisition of an interest in Australian urban land.
- (6) In this section, a reference to an agreement by virtue of which a person acquires a substantial shareholding in a corporation is a reference to an agreement by virtue of which the person acquires any interests in any shares in the corporation where:
- (a) he already holds a substantial interest in the corporation; or
  - (b) upon the acquisition by him of those interests, or of those interests and of any interests in other shares in the corporation, being interests that he has offered to acquire, he would hold a substantial interest in the corporation.
- (7) For the purposes of subsection (6), a reference to a person offering to acquire interests in shares includes a reference to a person making or publishing a statement, however expressed, that expressly or impliedly invites a holder of interests in shares to offer to dispose of interests in shares.

## **26A Compulsory notification of certain section 21A transactions**

- (1) In this section, *person to whom this section applies* means:
- (a) a natural person not ordinarily resident in Australia;
  - (b) a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest;

- (c) a corporation in which 2 or more persons, each of whom is a natural person not ordinarily resident in Australia or a foreign corporation hold an aggregate substantial interest;
- (d) the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or
- (e) the trustee of a trust estate in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.

(2) Where a person to whom this section applies:

- (a) enters into an agreement by virtue of which he or she acquires an interest in Australian urban land and did not, before entering into the agreement, furnish to the Treasurer a notice stating his or her intention to enter into that agreement; or
- (b) having furnished a notice to the Treasurer stating his or her intention to enter into an agreement by virtue of which he or she is to acquire an interest in Australian urban land, enters into that agreement before:
  - (i) the end of 40 days after the day on which the notice was received by the Treasurer; or
  - (ii) the day on which advice is given that the Commonwealth Government does not object to the person entering into that agreement (whether or not the advice is subject to conditions imposed under subsection 25(1A));

whichever first occurs;

the person is guilty of an offence and is punishable, on conviction, by a fine not exceeding 500 penalty units or imprisonment for a period not exceeding 2 years, or both.

(3) Where:

- (a) a person enters into an agreement by virtue of which he or she acquires an interest in Australian urban land; and
- (b) the provisions of the agreement that relate to the acquisition of the interest do not become binding until the fulfilment of a condition or conditions set out in the agreement;

the person shall not be taken, for the purposes of subsection (2), to have entered into the agreement until the time when those provisions become binding.

(4) Without affecting the operation of section 25, this section does not apply to an acquisition of an interest in Australian urban land if:

- (a) that interest is an interest in a share in a corporation;
- (b) the acquisition occurs because of a shareholder subscribing for shares in the corporation;

- (c) the shares were subscribed for in pursuance of a resolution by the corporation or the directors of the corporation agreeing to make available a number of shares specified in, or ascertained in accordance with, the resolution for allotment to persons who were registered as the holders of shares in the corporation on a day specified in the resolution; and
  - (d) the proportion of the total shares made available for allotment represented by the shares for which the shareholder so subscribed is as near as practicable to the proportion of the issued shares in the corporation, immediately before the day specified in the resolution, that were held by the shareholder immediately before that day.
- (5) For the purposes of subsection (4), it is immaterial that the shares in the corporation comprise 2 or more classes of shares to which different rights are attached.

## **27 Form of notification**

A notice does not have effect for the purposes of section 25, 26 or 26A unless it is in accordance with the prescribed form and complies with the directions set out in the form.

## **28 Notification of options**

A notice furnished in accordance with section 25 stating that a person proposes to acquire an option to acquire a share or asset has effect as if it included a statement that the person proposes to exercise that option.

# **Part III—Miscellaneous**

## **30 Offences**

- (1) A person who contravenes or fails to comply with an order made under Part II is guilty of an offence against this section.
- (2) Where a person has been convicted of an offence consisting of a contravention, or failure to comply with, an order made under Part II and the contravention or failure continues after he has been so convicted, the person is guilty of a further offence against this section.
- (3) Where an order made under Part II requires a person to do anything within a particular time and the person fails to do that thing within that time, the person shall be deemed to continue to fail to comply with the order until he does that thing.

- (4) A person who is convicted of an offence against this section is punishable by a fine not exceeding 500 penalty units or imprisonment for a period not exceeding 2 years, or both.

### 31 Offences by officers of corporations

- (1) Where an offence against a provision of this Act is committed by a corporation, an officer of the corporation who is in default is guilty of an offence against this section and is punishable on conviction by the penalty provided in that provision.
- (2) A reference in subsection (1) to an officer who is in default, in relation to an offence committed by a corporation, includes a reference to an officer who authorizes or permits the commission of the offence.

### 35 Powers of court to enforce Treasurer's orders

- (1) Where a person (in this section referred to as *the offender*) has contravened or failed to comply with an order in force under Part II, the Supreme Court of a State or Territory may, on the application of the Treasurer, whether or not that contravention of failure still continues, and whether or not other proceedings in respect of that contravention or failure have been or are to be instituted, make such order or orders as it thinks fit for the attainment of the purpose for which the order was made by the Treasurer.
- (2) The orders that may be made under subsection (1) in relation to a change in the control of a corporation other than a foreign corporation (in this section referred to as *the corporation concerned*) or a change in the control of an Australian business (in this section referred to as *the business concerned*) include, but are not limited to:
- (a) an order restraining the exercise of any rights attached to shares or assets held by the offender;
  - (b) an order prohibiting or deferring the payment of any sums due to the offender in respect of shares or assets held by the offender;
  - (c) an order directing the disposal of shares or assets held by the offender;
  - (d) an order that any exercise of rights attached to shares or assets held by the offender be disregarded;
  - (e) an order prohibiting a person from acting as a director of the corporation concerned or from being involved in the management of the corporation or business concerned; and
  - (f) an order directing the corporation concerned to make such alterations of any of its constituent documents as are specified in the order.

- (3) For the purpose of subsection (2):
  - (a) a reference to shares is a reference to shares in the corporation concerned; and
  - (b) a reference to assets is a reference to assets of the corporation or business concerned.
  
- (4) The orders that may be made under subsection (1) in relation to a change in the control of a foreign corporation include, but are not limited to:
  - (a) an order restraining the exercise of any rights attached to shares held by the foreign corporation in an Australian subsidiary;
  - (b) an order prohibiting or deferring the payment of any sums due to the foreign corporation in respect of shares held by it in an Australian subsidiary;
  - (c) an order directing the disposal of shares in, or assets of, an Australian subsidiary of the foreign corporation;
  - (d) an order directing the disposal of assets of the foreign corporation that consist of assets of an Australian business carried on by the foreign corporation (whether alone or together with any other person or persons) or prohibiting or deferring the payment of any sums due to the foreign corporation in respect of any such assets;
  - (e) an order that any exercise of rights attached to shares held by the foreign corporation in an Australian subsidiary be disregarded;
  - (f) an order that any exercise of rights attached to assets of the foreign corporation of a kind referred to in paragraph (d) be disregarded;
  - (g) an order prohibiting a person from acting as a director of, or from being concerned in the management of, an Australian subsidiary of the foreign corporation; and
  - (h) an order directing an Australian subsidiary of the foreign corporation to make such alterations of any of its constituent documents as are specified in the order.
  
- (4A) The orders that may be made under subsection (1) in relation to the acquisition of an interest in Australian urban land include, but are not limited to:
  - (a) an order restraining the exercise of any rights attached to any interest held by the offender in the land or other thing concerned;
  - (b) an order prohibiting or deferring the payment of any sums due to the offender in respect of any such interest held by the offender;
  - (c) an order directing the disposal of any such interest held by the offender; and
  - (d) an order that any exercise of rights attached to any such interest held by the offender be disregarded.

- (5) In addition to the powers conferred on a Court by subsections (1), (2), (4) and (4A), the Court:
  - (a) has power, for the purpose of securing compliance with any other order made under this section, to make an order directing any person to do or refrain from doing a specified act; and
  - (b) has power to make an order containing such ancillary or consequential provisions as the Court thinks just.
- (6) The Court may, before making an order under this section, direct that notice of the application be given to such persons as it thinks fit or be published in such manner as it thinks fit, or both.
- (7) The Court may, by order, rescind, vary or discharge an order made by it under this section or suspend the operation of such an order.
- (10) In this section, *Australian subsidiary*, in relation to a foreign corporation, means a corporation incorporated in Australia that is a subsidiary of that foreign corporation.

### 36 Treasurer may require information

- (1) Where the Treasurer has reason to believe that a person is capable of giving information or producing documents relating to matters that are relevant to the exercise by the Treasurer of his powers under this Act, he may, by notice in writing served on that person, require that person:
  - (a) to furnish, within the time and in the manner specified in the notice, any such information to him by writing signed by that person or, in the case of a corporation, by a competent officer of the corporation; or
  - (b) to produce, in accordance with the notice, any such documents to him or to a person specified in the notice acting on his behalf.
- (2) A person who does not comply with a notice under subsection (1) is guilty of an offence punishable, on conviction, by a fine not exceeding 20 penalty units or imprisonment for 12 months, or both.
- (2A) Subsection (2) does not apply if the person complies with the notice to the extent to which the person is capable of complying with it.
 

Note: A defendant bears an evidential burden in relation to the matter in subsection (2A), (see subsection 13.3(3) of the Criminal Code).
- (3) A person is not excused from furnishing information or producing a document in pursuance of this section on the ground that the information or document might tend to incriminate him, but his answer to any question asked in the notice, or his furnishing of any other information in pursuance of the notice, is not admissible in evidence against him in any criminal proceedings other than proceedings under this Act.

### 37 Effect of Act on other laws

It is the intention of the Parliament that this Act shall not apply to the exclusion of any law of a State or Territory to the extent that that law is capable of operating concurrently with this Act.

### 38 Validity of acts done in contravention of Act

An act is not invalidated by the fact that it constitutes an offence against this Act.

### 38A Anti-avoidance

- (1) In this section, *scheme* means:
  - (a) any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings; and
  - (b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.
- (2) Where:
  - (a) a person or persons enter into, commence to carry out or carry out a scheme (other than a scheme entered into before the commencement of this section);
  - (b) it would be concluded that the person, or any of the persons, who entered into, commenced to carry out or carried out the scheme or any part of the scheme did so for the sole or dominant purpose of avoiding the application of any provision of this Act in relation to any person or persons (whether or not a person or persons who entered into, commenced to carry out or carried out the scheme or any part of the scheme); and
  - (c) the scheme or the part of the scheme has achieved, or apart from this section, would achieve, that purpose;

the Treasurer may make any order under this Act that the Treasurer would have been able to make if the scheme or the part of the scheme had not achieved that purpose.
- (3) Subsection (2) does not authorise the making of an order prohibiting a person from doing any thing that has already been done by the person before the order is made.

### **39 Regulations**

The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters required or permitted by this Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to this Act.





# Appendix F

Foreign Acquisitions and Takeovers  
Regulations 1989 and (Notices) Regulations





# Foreign Acquisitions and Takeovers (Notices) Regulations 1989



## Foreign Acquisitions and Takeovers Regulations 1989

**Statutory Rules 1989 No. 177 as amended**

made under the

*Foreign Acquisitions and Takeovers Act 1975*

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Consolidated as in force on 20 September 1999

(includes amendments up to SR 1999 No. 199)

Prepared by the Office of Legislative Drafting,  
Attorney-General's Department

### Contents

- 1 Name of Regulations [*see* Note 1]
- 2 Interpretation
- 3 Exempt acquisitions of interests in Australian urban land
- 4 Prescribed corporations — value of assets of foreign corporation
- 5 Exempt dealings — value of assets

## Notes

### 1 **Name of Regulations** [see Note 1]

These regulations are the *Foreign Acquisitions and Takeovers Regulations 1989*.

### 2 **Interpretation**

In these regulations, unless the contrary intention appears:

**accommodation facility** means premises used, or suitable for use, as accommodation of persons on either a long-term or short-term basis, including, in particular, hotels, motels, hostels, guesthouses, serviced apartments and holiday units.

**charitable institution** means:

- (a) any charitable, religious, scientific or educational institution (including an institution providing residential accommodation wholly or principally for full-time students attending an educational institution);
- (b) any institution being, or carrying on, a hospital; and
- (c) any institution the sole or principal purpose of which is to assist in the saving of life, or the prevention of loss or damage to property, whether at sea or otherwise;

being an institution which is not carried on for the purpose of profit or gain to its individual members and which is not empowered to make any distribution, whether in money, property or otherwise, to its members.

**foreign person** includes a person to whom section 26A of the Act applies.

**spouse**, in relation to a person, includes another person who, although not legally married to the person, lives with the person on a *bona fide* domestic basis as the husband or wife of the person.

**the Act** means the *Foreign Acquisitions and Takeovers Act 1975*.

### 3 Exempt acquisitions of interests in Australian urban land

The Act does not apply in relation to an acquisition of an interest in Australian urban land of each of the following kinds, namely, the acquisition of such an interest by a foreign person:

- (a) that is:
  - (i) a charitable institution operating in Australia primarily for the benefit of persons ordinarily resident in Australia; or
  - (ii) a trustee of a foreign-controlled trust established for charitable or benevolent purposes, where the beneficiaries of the trust are persons ordinarily resident in Australia;
- (b) that is a life insurance company operating in Australia and the acquisition is made by way of investment of its statutory funds within the meaning of the *Life Insurance Act 1945* primarily for the benefit of policy holders ordinarily resident in Australia;
- (c) that is an insurance company (other than a life insurance company) operating in Australia and the acquisition:
  - (i) is made from the reserves of the company; and
  - (ii) is consistent with the company's obligations under the *Insurance Act 1973*;
- (d) that is a corporation operating in Australia that maintains a superannuation fund for its employees, within the meaning of the *Occupational Superannuation Standards Act 1987*, for the benefit of the members of the fund or their dependents, being persons ordinarily resident in Australia, and the acquisition is made as an investment of all or part of the assets of that fund;
- (e) where:
  - (i) the acquisition is of an interest in land on which a dwelling will be or is being constructed; and
  - (ii) the Treasurer has certified that the sale of that interest, (whether or not the certificate also refers to other interests) by a specified real estate developer to foreign persons is not contrary to the national interest; and
  - (ia) the conditions (if any) set out in the certificate are satisfied; and
  - (iii) the real estate developer provides the foreign person with a copy of that certificate;
- (f) where:
  - (i) the land is being used, or is able to be used immediately and in its present state, for industrial or non-residential commercial purposes; and

- (ii) the acquisition is wholly incidental to the conduct of the existing or proposed business activities of the foreign person (other than business activities that include acquisitions of land or the development of, or investment in, land or the development or operation of any form of accommodation facility);
- (g) where the acquisition is of an interest in a time share scheme and the entitlement of the foreign person and any of that person's associates is not in the aggregate greater than 4 weeks in any year;
- (h) where:
  - (i) the Treasurer has certified that a programme of land acquisitions by a foreign person in respect of a year is not contrary to the national interest; and
  - (ii) the acquisition is an acquisition referred to in that certificate;
- (i) where the acquisition is of shares as a consequence of which the foreign person holds less than a substantial interest in an Australian urban land corporation less than 10 per cent of the real estate assets of which are in the form of developed residential real estate that the corporation has not developed itself, being an Australian urban land corporation that is:
  - (i) publicly listed on an Australian Stock Exchange; and
  - (ii) primarily involved in the development of land;
- (j) where the acquisition is of shares as a consequence of which the foreign person holds less than a substantial interest in an Australian urban land corporation less than 10 per cent of the real estate assets of which are in the form of developed residential real estate, being an Australian urban land corporation that is publicly listed on an Australian Stock Exchange, or, where 2 or more foreign persons hold interests in the Australian urban land corporation, those foreign persons hold less than an aggregate substantial interest in that corporation;
- (k) who is an Australian citizen not ordinarily resident in Australia;
- (l) that is a corporation in which the government of an overseas country within the meaning of the *Diplomatic Privileges and Immunities Act 1967* holds a substantial interest and the acquisition is of an interest in land where the land is to be used exclusively for the purposes of the diplomatic mission of that country or as a diplomatic residence;
- (m) that is an Australian corporation that is a foreign person only because of direct interests held in it by Australian citizens not ordinarily resident in Australia;

- (n) that is a trustee of a trust estate, where the trustee is a foreign person only because of direct interests held in the trust estate by Australian citizens not ordinarily resident in Australia;
- (o) where the acquisition is of units in a unit trust as a consequence of which:
  - (i) the foreign person holds less than a substantial interest in an Australian urban land trust estate:
    - (A) that is a unit trust that accepts funds from the public on the basis of a prospectus approved by the Corporate Affairs Commission of a State or Territory;
    - (B) that has at least 100 unit holders;
    - (C) that is primarily engaged in the development of land; and
    - (D) that has less than 10 per cent of its real estate assets in the form of developed residential real estate that the trust has not developed itself; or
  - (ii) the foreign person holds less than a substantial interest in an Australian urban land trust estate:
    - (A) that is a unit trust that accepts funds from the public on the basis of a prospectus approved by the Corporate Affairs Commission of a State or Territory;
    - (B) that has at least 100 unit holders; and
    - (C) that has less than 10 per cent of its real estate assets in the form of developed residential real estate;

or, where 2 or more foreign persons hold interests in the Australian urban land trust estate, those foreign persons hold less than an aggregate substantial interest in that trust estate;
- (p) if:
  - (i) the land is non-residential commercial land valued at:
    - (A) for land the whole or part of which is entered in the Register of the National Estate — less than \$5,000,000; and
    - (B) in any other case — less than \$50,000,000; and
  - (ii) the land is not:
    - (A) vacant land; or
    - (B) land the whole or part of which comprises an accommodation facility;

- (q) where the acquisition is of an interest in land that is zoned as residential property and the person:
  - (i) is, at the time of acquisition, the holder of a permanent visa within the meaning of the *Migration Act 1958*; or
  - (ii) is, at the time of acquisition, the holder of a special category visa within the meaning of that Act; or
  - (iii) if he or she had entered Australia lawfully immediately before the time of acquisition, would have been entitled to the grant, on presentation of a passport, of a special category visa within the meaning of that Act; or
  - (iv) is an Australian corporation that is a foreign person only because of a direct interest held in it by a person to whom subparagraph (i), (ii) or (iii) applies; or
  - (v) is the trustee of a trust estate, where the trustee is a foreign person only because of a direct interest held in the trust estate by a person to whom subparagraph (i), (ii) or (iii) applies;
- (r) if:
  - (i) the acquisition is of an interest in land on which a dwelling exists that is, or may be, used for residential purposes, other than land that is part of a subdivided building in which hotel services are provided; and
  - (ii) the Treasurer has certified that the sale of an interest of that kind to foreign persons is not contrary to the national interest; and
  - (iii) the conditions (if any) set out in the certificate are satisfied; and
  - (iv) the person who intends to dispose of the interest gives the foreign person a copy of the certificate;
- (s) if:
  - (i) the acquisition is of an interest in land that is, or would be, part of a subdivided building:
    - (A) that exists or may be constructed; and
    - (B) in which hotel services are, or would be, provided; and
  - (ii) the Treasurer has certified that the sale of an interest of that kind to foreign persons is not contrary to the national interest; and
  - (iii) the conditions (if any) set out in the certificate are satisfied; and
  - (iv) the person who intends to dispose of the interest gives the

- foreign person a copy of the certificate;
- (t) where the acquisition is of an interest in land that is zoned as residential property and:
    - (i) the person is the spouse of an Australian citizen; and
    - (ii) the interest is held by the person and his or her spouse as joint tenants;
  - (u) that is the responsible entity of a managed investment scheme registered under section 601EB of the Corporations Law and the acquisition is primarily for the benefit of scheme members ordinarily resident in Australia.

#### **4 Prescribed corporations — value of assets of foreign corporation**

- (1) For paragraph 13 (1) (d) of the Act, the amount of \$50,000,000 is prescribed.
- (2) For paragraph 13 (1) (e) of the Act, the amount of \$50,000,000 is prescribed.

#### **5 Exempt dealings — value of assets**

- (1) For subparagraph (b) (i) of the definition of *exempt corporation* in subsection 13A (4) of the Act, the amount of \$50,000,000 is prescribed.
- (2) For subparagraph (b) (ii) of the definition of *exempt corporation* in subsection 13A (4) of the Act, the amount of \$50,000,000 is prescribed.
- (3) For paragraph (a) of the definition of *exempt business* in subsection 13A (4) of the Act, the amount of \$50,000,000 is prescribed.
- (4) For paragraph (b) of the definition of *exempt business* in subsection 13A (4) of the Act, the amount of \$50,000,000 is prescribed.



# Foreign Acquisitions and Takeovers (Notices) Regulations

Statutory Rules 1975 No. 226 as amended

made under the

*Foreign Acquisitions and Takeovers Act 1975*

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This compilation was prepared on 20 November 2000  
taking into account amendments up to SR 1989 No. 197

Prepared by the Office of Legislative Drafting,  
Attorney-General's Department, Canberra

## Contents

- 1 Citation [*see* Note 1]
- 2 Commencement [*see* Note 1]
- 3 Interpretation
- 4 Prescribed forms of notice
- 5 Balance sheet and profit and loss account to be furnished by corporation
- 6 Documents relating to agreement or arrangement
- 7 Constituent document
- 8 Person signing notice

## Schedule

## Notes

### 1. Citation [*see* Note 1]

These Regulations may be cited as the Foreign Acquisitions and Takeovers (Notices) Regulations.

### 2 Commencement [*see* Note 1]

These Regulations shall come into operation on the date of commencement of the Act.

### 3 Interpretation

In these Regulations, *the Act* means the *Foreign Acquisitions and Takeovers Act 1975*.

### 4 Prescribed forms of notice

- (1) The prescribed form of notice under section 25 of the Act is Form 1 in the Schedule.
- (2) The prescribed form of notice under section 26 of the Act is Form 2 in the Schedule.
- (3) The prescribed form of notice under section 26A of the Act is Form 3 in the Schedule.

## 5 **Balance sheet and profit and loss account to be furnished by corporation**

Where a corporation furnishes a notice under section 25 of the Act stating that:

- (a) the corporation proposes to enter into an agreement, being an agreement in relation to the affairs of the corporation;
- (b) the corporation proposes to enter into or terminate an arrangement, being an arrangement in relation to an Australian business of the corporation;
- (c) the corporation proposes issue shares; or
- (d) it is proposed to alter a constituent document of the corporation;

the corporation shall annex to the notice a copy of the balance sheet and a copy of the profit and loss account of the corporation for each period in relation to which a profit and loss account of the corporation has been laid before it in general meeting during the preceding four years.

## 6 **Documents relating to agreement or arrangement**

Where a person furnishes:

- (a) a notice under section 25 of the Act stating that the person proposes to enter into an agreement, being an agreement of the kind referred to in section 20 of the Act, or to enter into or terminate an arrangement, being an arrangement of the kind referred to in section 21 of the Act; or
- (b) a notice under section 26 or 26A of the Act;

the person shall annex to the notice copies of all documents and other papers in the person's possession or control relating to or evidencing the agreement or arrangement to which the notice relates.

## 7 **Constituent document**

Where a corporation furnishes a notice under section 25 of the Act stating that it is proposed to alter a constituent document of the corporation, the corporation shall annex to the notice a copy of that constituent document.

## 8 **Person signing notice**

- (1) A notice under section 25, 26 or 26A of the Act furnished by a natural person shall be signed:
  - (a) if the person is not ordinarily resident in Australia — by that

- person or by his Australian agent; or
- (b) in any other case — by the person furnishing the notice.
- (2) A notice under section 25, 26 or 26A of the Act furnished by a corporation shall be signed by a person authorized in writing by the corporation to sign the notice for and on behalf of the corporation.





# Appendix G

OECD Guidelines for  
Multinational Enterprises





# OECD Guidelines for Multinational Enterprises

## OECD Declaration on International Investment and Multinational Enterprises

Australia has associated itself with a declaration and a number of procedural decisions made by the member countries of the Organisation for Economic Co-operation and Development (OECD) in June 1976, on international investment and multinational enterprises. The text of the 1976 Declaration as amended is as follows:

### The Governments of OECD Member Countries

#### CONSIDERING:

- That international investment has assumed increased importance in the world economy and has considerably contributed to the development of their countries;
- That multinational enterprises play an important role in the investment process;
- That co-operation by Member economies can improve the foreign investment climate, encourage the positive contribution which multinational enterprises can make to economic and social progress, and minimise and resolve difficulties which may arise from their various operations;
- That, while continuing endeavours within the OECD may lead to

further international arrangements and agreements in this field, it seems appropriate at this stage to intensify their co-operation and consultation on issues relating to international investment and multinational enterprises through inter-related instruments each of which deals with a different aspect of the matter and together constitute a framework within which the OECD will consider these issues;

#### DECLARE:

#### Guidelines for Multinational Enterprises

- I. That they jointly recommend to multinational enterprises operating in their territories the observance of the Guidelines as set forth in Annex I hereto having regard to the considerations and understandings which introduce the Guidelines and are an integral part of them;

#### National Treatment

- II.1. That Member countries should, consistent with their needs to maintain public order, to protect their essential security interests and to fulfill commitments relating to international peace and security, accord to enterprises operating in their territories and owned and controlled directly or indirectly by nationals of another Member country (hereinafter referred to as 'Foreign Controlled

- Enterprises’) treatment under their laws, regulations and administrative practices, consistent with international law and no less favourable treatment than that is accorded in like situations to domestic enterprises (hereinafter referred to as ‘National Treatment’);
2. That Member countries will consider applying ‘National Treatment’ in respect of countries other than Member countries;
  3. That Member countries will endeavour to ensure that their territorial subdivisions apply ‘National Treatment’;
  4. That this Declaration does not deal with the right of Member countries to regulate the entry of foreign investment or the conditions of established foreign enterprises;

#### Conflicting Requirements

- III. That they will co-operate with a view to avoiding or minimising the imposition of conflicting requirements in multinational enterprises and that they will take into account the general considerations and practical approaches as set forth in Annex 2 hereto.

#### International Enterprises Incentives and Disincentives

- IV.1. That they recognise the need to strengthen their co-operation in the Field of international direct investment;
2. That they thus recognise the need

to give due weight to the interests of Member countries affected by specific laws, regulations and administrative practices in this field (hereinafter called ‘measures’) providing official incentives and disincentives to international direct investment;

3. That Member countries will endeavour to make such measures as transparent as possible, so that their importance and purpose can be ascertained and that information on them can be readily available;

#### Consultation Procedures

- V. That they are prepared to consult one another on the above matters in conformity with the Decisions of the Council on the Guidelines for Multinational Enterprises, on National Treatment and on International Investment Incentives and Disincentives;

#### Review

- VI. That they will review the above matters within three years with a view to improving the effectiveness of international economic co-operation among Member countries on issues relating to international investment and multinational enterprises.

## Annex 1: Guidelines for Multinational Enterprises

### Revised in 2000

#### Preface

1. The *OECD Guidelines for Multinational Enterprises* (the *Guidelines*) were revised in 2000. The *Guidelines*

are recommendations addressed by governments to multinational enterprises. They provide voluntary principles and standards for responsible business conduct consistent with applicable laws. The Guidelines aim to ensure that the operations of these enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by multinational enterprises. The Guidelines are part of the OECD Declaration on International Investment and Multinational Enterprises the other elements of which relate to national treatment, conflicting requirements on enterprises, and international investment incentives and disincentives.

2. International business has experienced far-reaching structural change and the *Guidelines* themselves have evolved to reflect these changes. With the rise of service and knowledge-intensive industries, service and technology enterprises have entered the international marketplace. Large enterprises still account for a major share of international investment, and there is a trend toward large-scale international mergers. At the same time, foreign investment by small- and medium-sized enterprises has also increased and these enterprises now play a significant role on the international scene. Multinational enterprises, like their domestic counterparts, have evolved to encompass a broader range of business arrangements and organisational forms.

Strategic alliances and closer relations with suppliers and contractors tend to blur the boundaries of the enterprise.

3. The rapid evolution in the structure of multinational enterprises is also reflected in their operations in the developing world, where foreign direct investment has grown rapidly. In developing countries, multinational enterprises have diversified beyond primary production and extractive industries into manufacturing, assembly, domestic market development and services.

4. The activities of multinational enterprises, through international trade and investment, have strengthened and deepened the ties that join OECD economies to each other and to the rest of the world. These activities bring substantial benefits to home and host countries. These benefits accrue when multinational enterprises supply the products and services that consumers want to buy at competitive prices and when they provide fair returns to suppliers of capital. Their trade and investment activities contribute to the efficient use of capital, technology and human and natural resources. They facilitate the transfer of technology among the regions of the world and the development of technologies that reflect local conditions. Through both formal training and on-the-job learning enterprises also promote the development of human capital in host countries.

5. The nature, scope and speed of economic changes have presented new strategic challenges for enterprises and their stakeholders. Multinational enterprises have the opportunity to implement best practice policies for

sustainable development that seek to ensure coherence between social, economic and environmental objectives. The ability of multinational enterprises to promote sustainable development is greatly enhanced when trade and investment are conducted in a context of open, competitive and appropriately regulated markets.

6. Many multinational enterprises have demonstrated that respect for high standards of business conduct can enhance growth. Today's competitive forces are intense and multinational enterprises face a variety of legal, social and regulatory settings. In this context, some enterprises may be tempted to neglect appropriate standards and principles of conduct in an attempt to gain undue competitive advantage. Such practices by the few may call into question the reputation of the many and may give rise to public concerns.

7. Many enterprises have responded to these public concerns by developing internal programmes, guidance and management systems that underpin their commitment to good corporate citizenship, good practices and good business and employee conduct. Some of them have called upon consulting, auditing and certification services, contributing to the accumulation of expertise in these areas. These efforts have also promoted social dialogue on what constitutes good business conduct. The *Guidelines* clarify the shared expectations for business conduct of the governments adhering to them and provide a point of reference for enterprises. Thus, the *Guidelines* both complement and reinforce

private efforts to define and implement responsible business conduct.

8. Governments are co-operating with each other and with other actors to strengthen the international legal and policy framework in which business is conducted. The post-war period has seen the development of this framework, starting with the adoption in 1948 of the Universal Declaration of Human Rights. Recent instruments include the ILO Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and Agenda 21 and the Copenhagen Declaration for Social Development.

9. The OECD has also been contributing to the international policy framework. Recent developments include the adoption of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and of the OECD Principles of Corporate Governance, the OECD *Guidelines* for Consumer Protection in the Context of Electronic Commerce, and ongoing work on the OECD *Guidelines* on Transfer Pricing for Multinational Enterprises and Tax Administrations.

10. The common aim of the governments adhering to the *Guidelines* is to encourage the positive contributions that multinational enterprises can make to economic, environmental and social progress and to minimise the difficulties to which their various operations may give rise. In working towards this goal, governments find themselves in partnership with the many businesses, trade unions and other non-governmental

organisations that are working in their own ways toward the same end. Governments can help by providing effective domestic policy frameworks that include stable macroeconomic policy, non-discriminatory treatment of firms, appropriate regulation and prudential supervision, an impartial system of courts and law enforcement and efficient and honest public administration. Governments can also help by maintaining and promoting appropriate standards and policies in support of sustainable development and by engaging in ongoing reforms to ensure that public sector activity is efficient and effective. Governments adhering to the *Guidelines* are committed to continual improvement of both domestic and international policies with a view to improving the welfare and living standards of all people.

## I. Concepts and principles

1. The *Guidelines* are recommendations jointly addressed by governments to multinational enterprises. They provide principles and standards of good practice consistent with applicable laws. Observance of the *Guidelines* by enterprises is voluntary and not legally enforceable.

2. Since the operations of multinational enterprises extend throughout the world, international co-operation in this field should extend to all countries. Governments adhering to the *Guidelines* encourage the enterprises operating on their territories to observe the *Guidelines* wherever they operate, while taking into account the particular circumstances of each host country.

3. A precise definition of multinational enterprises is not required for the purposes of the *Guidelines*. These usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed. The *Guidelines* are addressed to all the entities within the multinational enterprise (parent companies and/or local entities). According to the actual distribution of responsibilities among them, the different entities are expected to co-operate and to assist one another to facilitate observance of the *Guidelines*.

4. The *Guidelines* are not aimed at introducing differences of treatment between multinational and domestic enterprises; they reflect good practice for all. Accordingly, multinational and domestic enterprises are subject to the same expectations in respect of their conduct wherever the *Guidelines* are relevant to both.

5. Governments wish to encourage the widest possible observance of the *Guidelines*. While it is acknowledged that small- and medium-sized enterprises may not have the same capacities as larger enterprises, governments adhering to the *Guidelines* nevertheless encourage them to observe the *Guidelines* recommendations to the fullest extent possible.

6. Governments adhering to the *Guidelines* should not use them for protectionist purposes nor use them in a way that calls into question the comparative advantage of any country where multinational enterprises invest.
7. Governments have the right to prescribe the conditions under which multinational enterprises operate within their jurisdictions, subject to international law. The entities of a multinational enterprise located in various countries are subject to the laws applicable in these countries. When multinational enterprises are subject to conflicting requirements by adhering countries, the governments concerned will co-operate in good faith with a view to resolving problems that may arise.
8. Governments adhering to the *Guidelines* set them forth with the understanding that they will fulfil their responsibilities to treat enterprises equitably and in accordance with international law and with their contractual obligations.
9. The use of appropriate international dispute settlement mechanisms, including arbitration, is encouraged as a means of facilitating the resolution of legal problems arising between enterprises and host country governments.
10. Governments adhering to the *Guidelines* will promote them and encourage their use. They will establish National Contact Points that promote the *Guidelines* and act as a forum for discussion of all matters relating to the *Guidelines*. The adhering Governments will also participate in appropriate review

and consultation procedures to address issues concerning interpretation of the *Guidelines* in a changing world.

## II. General policies

Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard, enterprises should:

1. Contribute to economic, social and environmental progress with a view to achieving sustainable development.
2. Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.
3. Encourage local capacity building through close co-operation with the local community, including business interests, as well as developing the enterprise's activities in domestic and foreign markets, consistent with the need for sound commercial practice.
4. Encourage human capital formation, in particular by creating employment opportunities and facilitating training opportunities for employees.
5. Refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to environmental, health, safety, labour, taxation, financial incentives, or other issues.
6. Support and uphold good corporate governance principles and develop and apply good corporate governance practices.
7. Develop and apply effective self-regulatory practices and management

systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.

8. Promote employee awareness of, and compliance with, company policies through appropriate dissemination of these policies, including through training programmes.

9. Refrain from discriminatory or disciplinary action against employees who make *bona fide* reports to management or, as appropriate, to the competent public authorities, on practices that contravene the law, the *Guidelines* or the enterprise's policies.

10. Encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the *Guidelines*.

11. Abstain from any improper involvement in local political activities.

### III. Disclosure

1. Enterprises should ensure that timely, regular, reliable and relevant information is disclosed regarding their activities, structure, financial situation and performance. This information should be disclosed for the enterprise as a whole and, where appropriate, along business lines or geographic areas. Disclosure policies of enterprises should be tailored to the nature, size and location of the enterprise, with due regard taken of costs, business confidentiality and other competitive concerns.

2. Enterprises should apply high quality standards for disclosure, accounting, and audit. Enterprises are also encouraged to apply high quality standards for non-financial information including environmental and social reporting where they exist. The standards or policies under which both financial and non-financial information are compiled and published should be reported.

3. Enterprises should disclose basic information showing their name, location, and structure, the name, address and telephone number of the parent enterprise and its main affiliates, its percentage ownership, direct and indirect in these affiliates, including shareholdings between them.

4. Enterprises should also disclose material information on:

- (a) The financial and operating results of the company;
- (b) Company objectives;
- (c) Major share ownership and voting rights;
- (d) Members of the board and key executives, and their remuneration;
- (e) Material foreseeable risk factors;
- (f) Material issues regarding employees and other stakeholders; and
- (g) Governance structures and policies.

5. Enterprises are encouraged to communicate additional information that could include:

- (a) Value statements or statements of business conduct intended for public disclosure including information on

the social, ethical and environmental policies of the enterprise and other codes of conduct to which the company subscribes. In addition, the date of adoption, the countries and entities to which such statements apply and its performance in relation to these statements may be communicated;

- (b) Information on systems for managing risks and complying with laws, and on statements or codes of business conduct; and
- (c) Information on relationships with employees and other stakeholders.

#### **IV. Employment and industrial relations**

1. Enterprises should, within the framework of applicable law, regulations and prevailing labour relations and employment practices:

- (a) Respect the right of their employees to be represented by trade unions and other bona fide representatives of employees, and engage in constructive negotiations, either individually or through employers' associations, with such representatives with a view to reaching agreements on employment conditions;
- (b) Contribute to the effective abolition of child labour;
- (c) Contribute to the elimination of all forms of forced or compulsory labour; and
- (d) Not discriminate against their employees with respect to employment or occupation on such grounds as race, colour, sex, religion, political opinion, national extraction or social

origin, unless selectivity concerning employee characteristics furthers established governmental policies which specifically promote greater equality of employment opportunity or relates to the inherent requirements of a job.

- 2. (a) Provide facilities to employee representatives as may be necessary to assist in the development of effective collective agreements;
- (b) Provide information to employee representatives which is needed for meaningful negotiations on conditions of employment; and
- (c) Promote consultation and co-operation between employers and employees and their representatives on matters of mutual concern.
- 3. Provide information to employees and their representatives which enables them to obtain a true and fair view of the performance of the entity or, where appropriate, the enterprise as a whole.
- 4. (a) Observe standards of employment and industrial relations not less favourable than those observed by comparable employers in the host country; and
- (b) Take adequate steps to ensure occupational health and safety in their operations.
- 5. In their operations, to the greatest extent practicable, employ local personnel and provide training with a view to improving skill levels, in co-operation with employee representatives and, where appropriate, relevant governmental authorities.

6. In considering changes in their operations which would have major effects upon the livelihood of their employees, in particular in the case of the closure of an entity involving collective lay-offs or dismissals, provide reasonable notice of such changes to representatives of their employees, and, where appropriate, to the relevant governmental authorities, and co-operate with the employee representatives and appropriate governmental authorities so as to mitigate to the maximum extent practicable adverse effects. In light of the specific circumstances of each case, it would be appropriate if management were able to give such notice prior to the final decision being taken. Other means may also be employed to provide meaningful co-operation to mitigate the effects of such decisions.

7. In the context of bona fide negotiations with representatives of employees on conditions of employment, or while employees are exercising a right to organise, not threaten to transfer the whole or part of an operating unit from the country concerned nor transfer employees from the enterprises' component entities in other countries in order to influence unfairly those negotiations or to hinder the exercise of a right to organise.

8. Enable authorised representatives of their employees to negotiate on collective bargaining or labour-management relations issues and allow the parties to consult on matters of mutual concern with representatives of management who are authorised to take decisions on these matters.

## V. Environment

Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development. In particular, enterprises should:

1. Establish and maintain a system of environmental management appropriate to the enterprise, including:
  - (a) Collection and evaluation of adequate and timely information regarding the environmental, health, and safety impacts of their activities;
  - (b) Establishment of measurable objectives and, where appropriate, targets for improved environmental performance, including periodically reviewing the continuing relevance of these objectives; and
  - (c) Regular monitoring and verification of progress toward environmental, health, and safety objectives or targets.
2. Taking into account concerns about cost, business confidentiality, and the protection of intellectual property rights:
  - (a) Provide the public and employees with adequate and timely information on the potential environment, health and safety impacts of the activities of the enterprise, which could include reporting on progress in improving environmental performance; and

(b) Engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation.

3. Assess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle. Where these proposed activities may have significant environmental, health, or safety impacts, and where they are subject to a decision of a competent authority, prepare an appropriate environmental impact assessment.

4. Consistent with the scientific and technical understanding of the risks, where there are threats of serious damage to the environment, taking also into account human health and safety, not use the lack of full scientific certainty as a reason for postponing cost-effective measures to prevent or minimise such damage.

5. Maintain contingency plans for preventing, mitigating, and controlling serious environmental and health damage from their operations, including accidents and emergencies; and mechanisms for immediate reporting to the competent authorities.

6. Continually seek to improve corporate environmental performance, by encouraging, where appropriate, such activities as:

(a) Adoption of technologies and operating procedures in all parts of the enterprise that reflect standards

concerning environmental performance in the best performing part of the enterprise;

(b) Development and provision of products or services that have no undue environmental impacts; are safe in their intended use; are efficient in their consumption of energy and natural resources; can be reused, recycled, or disposed of safely;

(c) Promoting higher levels of awareness among customers of the environmental implications of using the products and services of the enterprise; and

(d) Research on ways of improving the environmental performance of the enterprise over the longer term.

7. Provide adequate education and training to employees in environmental health and safety matters, including the handling of hazardous materials and the prevention of environmental accidents, as well as more general environmental management areas, such as environmental impact assessment procedures, public relations, and environmental technologies.

8. Contribute to the development of environmentally meaningful and economically efficient public policy, for example, by means of partnerships or initiatives that will enhance environmental awareness and protection.

## **VI. Combating bribery**

Enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage. Nor should enterprises be

solicited or expected to render a bribe or other undue advantage. In particular, enterprises should:

1. Not offer, nor give in to demands, to pay public officials or the employees of business partners any portion of a contract payment. They should not use subcontracts, purchase orders or consulting agreements as means of channelling payments to public officials, to employees of business partners or to their relatives or business associates.
2. Ensure that remuneration of agents is appropriate and for legitimate services only. Where relevant, a list of agents employed in connection with transactions with public bodies and state-owned enterprises should be kept and made available to competent authorities.
3. Enhance the transparency of their activities in the fight against bribery and extortion. Measures could include making public commitments against bribery and extortion and disclosing the management systems the company has adopted in order to honour these commitments. The enterprise should also foster openness and dialogue with the public so as to promote its awareness of and co-operation with the fight against bribery and extortion.
4. Promote employee awareness of and compliance with company policies against bribery and extortion through appropriate dissemination of these policies and through training programmes and disciplinary procedures.
5. Adopt management control systems that discourage bribery and corrupt practices, and adopt financial and tax

accounting and auditing practices that prevent the establishment of ‘off the books’ or secret accounts or the creation of documents which do not properly and fairly record the transactions to which they relate.

6. Not make illegal contributions to candidates for public office or to political parties or to other political organisations. Contributions should fully comply with public disclosure requirements and should be reported to senior management.

## VII. Consumer interests

When dealing with consumers, enterprises should act in accordance with fair business, marketing and advertising practices and should take all reasonable steps to ensure the safety and quality of the goods or services they provide. In particular, they should:

1. Ensure that the goods or services they provide meet all agreed or legally required standards for consumer health and safety, including health warnings and product safety and information labels.
2. As appropriate to the goods or services, provide accurate and clear information regarding their content, safe use, maintenance, storage, and disposal sufficient to enable consumers to make informed decisions.
3. Provide transparent and effective procedures that address consumer complaints and contribute to fair and timely resolution of consumer disputes without undue cost or burden.
4. Not make representations or omissions, nor engage in any other

practices, that are deceptive, misleading, fraudulent, or unfair.

5. Respect consumer privacy and provide protection for personal data.
6. Co-operate fully and in a transparent manner with public authorities in the prevention or removal of serious threats to public health and safety deriving from the consumption or use of their products.

### **VIII. Science and technology**

Enterprises should:

1. Endeavour to ensure that their activities are compatible with the science and technology (S&T) policies and plans of the countries in which they operate and as appropriate contribute to the development of local and national innovative capacity.
2. Adopt, where practicable in the course of their business activities, practices that permit the transfer and rapid diffusion of technologies and know-how, with due regard to the protection of intellectual property rights.
3. When appropriate, perform science and technology development work in host countries to address local market needs, as well as employ host country personnel in an S&T capacity and encourage their training, taking into account commercial needs.
4. When granting licenses for the use of intellectual property rights or when otherwise transferring technology, do so on reasonable terms and conditions and in a manner that contributes to the long term development prospects of the host country.

5. Where relevant to commercial objectives, develop ties with local universities, public research institutions, and participate in co-operative research projects with local industry or industry associations.

### **IX. Competition**

Enterprises should, within the framework of applicable laws and regulations, conduct their activities in a competitive manner. In particular, enterprises should:

1. Refrain from entering into or carrying out anti-competitive agreements among competitors:
  - (a) To fix prices;
  - (b) To make rigged bids (collusive tenders);
  - (c) To establish output restrictions or quotas; or
  - (d) To share or divide markets by allocating customers, suppliers, territories or lines of commerce;
2. Conduct all of their activities in a manner consistent with all applicable competition laws, taking into account the applicability of the competition laws of jurisdictions whose economies would be likely to be harmed by anti-competitive activity on their part.
3. Co-operate with the competition authorities of such jurisdictions by, among other things and subject to applicable law and appropriate safeguards, providing as prompt and complete responses as practicable to requests for information.
4. Promote employee awareness of the importance of compliance with all applicable competition laws and policies.

## X. Taxation

It is important that enterprises contribute to the public finances of host countries by making timely payment of their tax liabilities. In particular, enterprises should comply with the tax laws and regulations in all countries in which they operate and should exert every effort to act in accordance with both the letter and spirit of those laws and regulations. This would include such measures as providing to the relevant authorities the information necessary for the correct determination of taxes to be assessed in connection with their operations and conforming transfer pricing practices to the arm's length principle.

### Annex 2: Conflicting requirements imposed on multinational enterprises: General considerations and practical approaches

*These considerations and approaches are embodied in Annex 2 to the Declaration on International Investment and Multinational Enterprises, adopted by the Governments of the OECD Member countries in 1976. They were adopted with the aim of avoiding or minimising the imposition of conflicting requirements on multinational enterprises by governments. In view of this objective, the OECD Council has adopted a procedural decision seeking to promote co-operation among Member countries.*

#### General considerations

1. In contemplating new legislation, action under existing legislation or other

exercise of jurisdiction which may conflict with the legal requirements or established policies of another Member country and lead to conflicting requirements being imposed on multinational enterprises, the Member countries concerned should:

- (a) Have regard to relevant principles of international law;
- (b) Endeavour to avoid or minimise such conflicts and the problems to which they give rise by following an approach of moderation and restraint, respecting and accommodating the interests of other Member countries \*;
- (c) Take fully into account the sovereignty and legitimate economic, law enforcement and other interests of other Member countries;
- (d) Bear in mind the importance of permitting the observance of contractual obligations and the possible adverse impact of measures having a retroactive effect.

2. Member countries should endeavour to promote co-operation as an alternative to unilateral action to avoid or minimise conflicting requirements and problems arising therefrom. Member countries should on request consult one another and endeavour to arrive at mutually acceptable solutions to such problems.

#### Practical approaches

3. Member countries recognised that in the majority of circumstances, effective co-operation may best be pursued on a bilateral basis. On the other hand, there may be cases where the multilateral approach could be more effective.

4. Member countries should therefore be prepared to:

- (a) Develop mutually beneficial, practical and appropriately safeguarded bilateral arrangements, formal or informal, for notification to and consultation with other Member countries;
- (b) Give prompt and sympathetic consideration to requests for notification and bilateral consultation on an ad hoc basis made by any Member country which considers that its interests may be affected by a measure of the type referred to under paragraph 1 above, taken by another Member country with which it does not have such bilateral arrangements;
- (c) Inform the other concerned Member countries as soon as practicable of new legislation or regulations proposed by their Governments for adoption which have significant potential for conflict with the legal requirements or established policies of other Member countries and for giving rise to conflicting requirements being imposed on multinational enterprises;
- (d) Give prompt and sympathetic consideration to requests by other Member countries for consultation in the Committee on International Investment and Multinational Enterprises or through other mutually acceptable arrangements. Such consultations would be facilitated by notification at the earliest stage practicable;
- (e) Give prompt and full consideration to proposals which may be by other

Member countries in any such consultations that would lessen or eliminate conflicts.

These procedures do not apply to those aspects of restrictive business practices or other matters, which are the subject of existing OECD arrangements.



# Appendix H

Contact Details





## Foreign investment proposals

### Applications

Applications for foreign investment approval should be addressed to:

The Executive Member  
Foreign Investment Review Board  
c/- The Treasury  
CANBERRA ACT 2600

*Executive Member* — Mr Chris Legg  
Tel: (02) 6263 3777

### General enquiries

General Enquiries: (02) 6263 3795  
Overseas: +61 (2) 6263 3795  
Fax: (02) 6263 2940  
Internet: <[www.firb.gov.au](http://www.firb.gov.au)>  
E-mail Address: <[firb@treasury.gov.au](mailto:firb@treasury.gov.au)>

### Special enquiries

International & Compliance Unit is responsible for international & compliance issues.

Mr Roy Nixon  
Manager

Tel: (02) 6263 3764

Primary Industries and Secondary Industries Unit is responsible for Mining, Agriculture, Manufacturing & Resource Processing and real estate acquisitions in NSW, ACT, WA & SA.

Ms Jo Laduzko  
Manager

Tel: (02) 6263 3864

Tertiary Industries Unit is responsible for Finance and Insurance, Tourism & Media, Other Services and real estate acquisitions in Qld, Vic, Tas & NT.

Mr Grahame Crough  
Manager

Tel: (02) 6263 3834

## **Australian National Contact Point for the OECD Guidelines for Multinational Enterprises**

### **Suggestions, comments, questions and complaints**

Suggestions, comments, questions and complaints in relation to the OECD Guidelines for Multinational Enterprises should be addressed to:

#### **The Executive Member**

Foreign Investment Review Board  
c/- The Treasury  
CANBERRA ACT 2600

*Executive Member* — Mr Chris Legg

Tel: (02) 6263 3777

Fax: (02) 6263 2940

E-mail address: <ANCP@treasury.gov.au>

Internet: <www.ausncp.gov.au>

### **Singapore Help Desk**

This service is for Singaporean investors and their agents only.

All correspondence should be sent to:

Singapore Help Desk  
Foreign Investment Review Board  
C/o Department of the Treasury  
CANBERRA ACT 2600  
AUSTRALIA

Telephone Inquiries +61 2 6263 3755 Fax +61 2 6263 2940

Email for foreign investment inquiries: <Singaporehelpdesk@treasury.gov.au>

Website <<http://www.firb.gov.au/singaporehelpdesk.asp>>

# Foreign Investment Review Board Annual Report 2002-03

## Corrigendum

- **On page 7 of the report:**

“The types of proposals that are decided under delegation include acquisitions of urban land valued below \$50 million (\$100 million for commercial real estate and ‘off the plan’ proposals), acquisitions of existing businesses or the establishment of new businesses valued at less than **\$10 million**, and offshore takeovers where the Australian assets represent less than 50 per cent of the total assets of the business being acquired.”

Was replaced with:

“The types of proposals that are decided under delegation include acquisitions of urban land valued below \$50 million (\$100 million for commercial real estate and ‘off the plan’ proposals), acquisitions of existing businesses or the establishment of new businesses valued at less than **\$100 million**, and offshore takeovers where the Australian assets represent less than 50 per cent of the total assets of the business being acquired.”

- **On page 30 of the report:**

“Table 2.9: Total proposed investment associated with approved proposals, by country of investors and industry sector 2002-03 (**\$billion**).”

Was replaced with:

“Table 2.9: Total proposed investment associated with approved proposals, by country of investors and industry sector 2002-03 (**\$million**).”

- **On page 49 of the report:**

“Australia — Thailand Closer Economic Relations (Free Trade)”.

Was replaced with:

“Australia — Thailand Closer Economic Relations (Free Trade Agreement)”.

- **On page 49 of the report:**

“The completion of this Agreement also demonstrates Australia’s close economic integration within the East Asian region and is expected to strengthen the linkages between Australia and the ASEAN Free Trade Area (AFTA).”

Was replaced with:

“The completion of this Agreement also demonstrates Australia’s close economic integration within the **South** East Asian region and is expected to strengthen the linkages between Australia and the ASEAN Free Trade Area (AFTA).”

- **On page 53 of the report:**

“Inflows are expected to be USD\$490.6 billion in 2002 compared with USD\$1,272.6 billion in 2000. FDI outflows were \$1,276.5 in 2000 while they are expected to be only \$606.4 billion in 2002.”

Was replaced with:

“Inflows are expected to be USD\$490.6 billion in 2002 compared with USD\$1,272.6 billion in 2000. FDI outflows were **USD \$1,276.5 billion** in 2000 while they are expected to be only **USD \$606.4 billion** in 2002.”

- **On page 53 of the report:**

“As at 30 June 2001, among OECD countries, Australia had the **eleventh** largest stock of inward and outward FDI with USD\$105.5 billion (4 per cent increase from 1997), and USD\$91.4 billion (27 per cent increase from 1997) respectively.”

Was replaced with:

“As at 30 June 2001, among OECD countries, Australia had the **twelfth** largest stock of inward and outward FDI with USD\$105.5 billion (4 per cent increase from 1997), and USD\$91.4 billion (27 per cent increase from 1997) respectively.”

- **On page 55 of the report:**

In Table 4.2 the figure:

**329,382.5** – against Netherlands direct outward investment position in 2001.

Was replaced with:

**329.4** – against Netherlands direct outward investment position in 2001.

- **On page 56 of the report:**

“The stock of Australian direct investment in the US at 30 June 2002 was \$74 billion, some \$16 billion **less** than the stock of US direct investment in Australia on the same date”

Was replaced with:

“The stock of Australian direct investment in the US at 30 June 2002 was \$74 billion, some \$16 billion **greater** than the stock of US direct investment in Australia on the same date”

- **On page 59 of the report, notes to Chart 4.2:**

“(d) The net foreign investment figure has been derived from determining the difference between foreign investment in Australia and Australian investment abroad.”

Was replaced with:

“(a) The net foreign investment figure has been derived from determining the difference between foreign investment in Australia and Australian investment abroad.”

- **On page 59 of the report:**

“**Table 4.2** provides a breakdown of the flow of foreign investment over the past five years measured by ABS statistics.”

Was replaced with:

“**Table 4.3** provides a breakdown of the flow of foreign investment over the past five years measured by ABS statistics.”

- **On page 59 of the report:**

“Flows of total investment abroad increased by **38 per cent** over the five year period, from **\$19.1 billion** to \$26.4 billion at 30 June 2003. Flows of total investment in to Australia increased by approximately **32 per cent**, from **\$49.3 billion** to \$65.2 billion.”

Was replaced with:

“Flows of total investment abroad increased by **34 per cent** over the five year period, from **\$19.7 billion** to \$26.4 billion at 30 June 2003. Flows of total investment in to Australia increased by approximately **39 per cent**, from **\$46.9 billion** to \$65.2 billion.”

- **On page 60 of the report:**

In Chart 4.3:

x-axis values: 36312, 36678, 37043, 37408, 37773.

Were replaced with:

x-axis values: Jun-99, Jun-00, Jun-01, Jun-02, Jun-03.