Australian Government

Foreign Investment Review Board

FOREIGN INVESTMENT REVIEW BOARD

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FIRB

Foreign Investment Review Board

Annual Report 2008-09

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Australian Government

Foreign Investment Review Board

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18 March 2010

The Hon Wayne Swan 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 Annual Report for the financial year 2008-09.

The Report outlines the activities of the Board, provides a summary of the year's foreign investment proposals, and comments on the levels of foreign investment in Australia and Australian investment abroad. The Report also provides an overview of the main provisions of the *Foreign Acquisitions and Takeovers Act 1975.*

On behalf of other members of the Board, I would like to take this opportunity to acknowledge the valuable contributions of retiring members Hon Chris Miles and Ms Lynn Wood to the deliberations of the Board and to its advice to the Treasurer since their respective appointments. I would particularly like to commend the long and dedicated contribution of Ms Wood over her 15 years of service to the Board.

Yours sincerely

M.J. Phillips AO
Chairman

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Acronyms and abbreviations

AAT	Administrative Appeals Tribunal
ABS	Australian Bureau of Statistics
AFP	Australian Federal Police
ANCP	Australian National Contact Point
APRA	Australian Prudential Regulation Authority
ATO	Australian Taxation Office
DFAT	Department of Foreign Affairs and Trade
DIAC	Department of Immigration and Citizenship
EU	European Union
FDI	foreign direct investment
FATA	*Foreign Acquisitions and Takeovers Act 1975*
FIMS	Foreign Investment Management System
FIRB (/the Board)	Foreign Investment Review Board
FOI	Freedom of Information
FOI Act	*Freedom of Information Act 1982*
FSSA	*Financial Sector (Shareholdings) Act 1998*
NGO	non-government organisation
Privacy Act	*Privacy Act 1988*
secretariat (/the Division)	the Treasury's Foreign Investment and Trade Policy Division
SWF	sovereign wealth fund
the policy	the Australian Government's foreign investment policy
Regulations	*Foreign Acquisitions and Takeovers Regulations 1989*
WTO	World Trade Organization

Glossary

Aggregate substantial interest in a corporation	Where two or more persons, together with any associate(s), are in a position to control not less than 40 per cent of the voting power, or hold interests in not less than 40 per cent of the issued shares, of a corporation (section 9 of the FATA).
Applications approved (/approvals)	Comprise all foreign investment proposals approved either with or without conditions.
Applications considered	Comprise all foreign investment proposals finalised (that is, approved, rejected, withdrawn or exempt).
Applications decided	Comprise all foreign investment proposals approved or rejected (that is, excluding proposals withdrawn or determined exempt).
Applications rejected	Comprise all foreign investment proposals that are either rejected under the policy or subject to a Final Order or a Divestiture Order under the FATA.
Australian rural land	Refers to land that is used wholly and exclusively for carrying on a primary production business.
Australian urban land	Refers to all other land in Australia that is not Australian rural land.
Australian urban land corporations and trust estates	A corporation (excluding holding companies) or trust estate where more than half of its assets are in the form of Australian urban land (section 13D of the FATA).
Corporate reorganisations	Corporate reorganisations encompass a wide range of transactions including corporate restructures and transfers of assets or shares within a corporate group.
Divestiture Order	An Order that requires an interest already acquired to be disposed of.
FIMS	The Foreign Investment Management System is the Division's electronic case management system.
Final Order	An Order that prohibits a proposed acquisition.

Glossary (continued)

Foreign Direct Investment / FDI	A direct investment has the objective of establishing a lasting interest in, and a strategic long-term relationship with, the target company. It may include a significant degree of influence by the investor in the management of the target company. It is international practice to define a direct investment as acquiring an interest of 10 per cent or more for statistical purposes. Interests below 10 per cent may also be direct investments if the investor can use those investments to influence or control the company.
Foreign Investment Review Board (FIRB or the Board)	A non-statutory body established in 1976 to advise the Treasurer on foreign investment policy and its administration.
Foreign person	(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 two 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 two 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. (Section 5 of the FATA)
Interim Order	An Order that extends the available statutory examination period and prohibits a proposed acquisition for up to 90 days.
Offshore takeover	Where an offshore company (/foreign person) that holds Australian assets or conducts a business in Australia is acquired by another foreign person, and the Australian assets or businesses of the target company are valued at less than 50 per cent of its global assets.
Off-the-plan	An acquisition of a dwelling under construction or completed that has not been lived in or previously sold.

Glossary (continued)

Portfolio investment	Passive or non-direct investment.
Proposed investment	Proposed investment associated with foreign investment proposals comprises the aggregate of acquisition costs and development expenditure in the case of existing businesses, and the aggregate of establishment costs and development expenditure in the case of new businesses.
Substantial interest in a corporation	Where a person, alone or together with any associate(s), is in a position to control not less than 15 per cent of the voting power, or holds interests in not less than 15 per cent of the issued shares, of a corporation (section 9 of the FATA).
Threshold	Monetary figure under either the policy or the FATA at which foreign persons are expected or required to notify an investment proposal to the Treasurer.

Main points

- In 2008-09, 5,352 proposals received foreign investment approval. This compared with 7,841 in 2007-08, representing a decrease of 32 per cent. The real estate sector recorded 4,827 approvals, representing a decline of 34 per cent on the 7,357 approvals in 2007-08. There was an overall increase in approvals in other sectors in 2008-09 compared with 2007-08, from 484 approvals to 525 approvals, representing an increase of 8 per cent.

- Approvals in 2008-09 involved proposed investment of $181.4 billion. This represented a 5 per cent decrease on the previous year's approvals of $191.9 billion. Approved investment in real estate was $23.4 billion in 2008-09 (compared with $45.5 billion in 2007-08), while approved investment in other sectors was $158 billion, compared with $146.4 billion in 2007-08, representing an increase of 8 per cent.

- The increase in foreign business approvals in 2008-09, in both number and value of proposed investment, stood in sharp contrast to the experience of the countries of the OECD area as a whole during the global financial crisis. According to OECD estimates, member countries' outflows of FDI fell by 19 per cent while inflows fell by 35 per cent in 2008.

- In 2008-09, three proposals were rejected, all related to real estate purchases, compared with 14 proposals rejected in 2007-08. There were three Interim Orders made (13 in 2007-08), extending the 30-day statutory decision-making period by up to 90 days.

- The mineral exploration and development sector was the largest destination by value, with approved investment in 2008-09 of $90.6 billion ($64.3 billion in 2007-08). The other major destinations were: services, with approved investment of $31.7 billion ($35.7 billion in 2007-08); real estate, with approved investment of $23.4 billion ($45.5 billion in 2007-08); and manufacturing, with approved investment of $19.1 billion ($31.3 billion in 2007-08).

- The United States of America was the largest source country for foreign investment in 2008-09, involving approved investment of $39.6 billion. China ($26.6 billion), Japan ($22.1 billion), the United Kingdom ($20.3 billion) and France ($7.5 billion) were the other major source countries of approved investment in 2008-09.

- The Hon Chris Miles' membership of the Board expired in June 2009. On 10 December 2009, the Treasurer announced the appointment of Mr Brian Wilson and Mr Hamish Douglass to the Board.

CHAPTER 1

Foreign Investment Review Board

Foreign Investment Review Board

The Foreign Investment Review Board (the Board or FIRB) is a non-statutory body established in 1976 to advise the Treasurer and the Government on foreign investment policy and administration. Its annual reports, which are not statutorily mandated, provide information on the operation of Australia's foreign investment review arrangements. This chapter covers the role of the FIRB and administration of these arrangements.

Functions of the Board

The Board's functions are advisory only. Responsibility for making decisions on foreign investment policy and proposals rests with the Treasurer. The Treasury's Foreign Investment and Trade Policy Division (the Division) provides secretariat services to the Board and is responsible for the day-to-day administration of the arrangements. The Division also provides advice to the Treasury ministers on foreign investment matters.

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

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

Information on the operation of the FATA is provided in Chapter 3.

Board membership

During 2008-09, the Board comprised three part-time Members and a full-time Executive Member.

Mr John Phillips AO was first appointed Chairman of the Board on 16 April 1997 and was reappointed for a further term of five years on 18 April 2007. He has extensive high-level experience in the public, finance and business sectors, including as Deputy Governor of the Reserve Bank of Australia. He has been director of a number of leading Australian companies and is the Chancellor of the University of Western Sydney.

Ms Lynn Wood has been a Board member since April 1995 and was reappointed on 3 April 2005 for a further term of five years. She has extensive experience as a director and is currently chairman of Noni B Ltd and a non-executive director of GPT Funds Management Limited and the Committee for Economic Development of Australia (CEDA). She is a Fellow of the Australian Institute of Company Directors and was awarded a Centenary Medal in 2003.

The Hon Chris Miles was appointed to the Board on 8 June 1999 and was reappointed for a further term of five years on 8 June 2004. His membership of the Board expired in June 2009. Between 1984 and 1998 Mr Miles was a member of the House of Representatives representing the seat of Braddon, Tasmania. From 1996 to 1998 he was Parliamentary Secretary (Cabinet) to the Prime Minister, with 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 Patrick Colmer became the General Manager of Treasury's Foreign Investment and Trade Division (the Division) and commenced as the Executive Member of the Board on 20 November 2006. Mr Colmer has an extensive background as a public policy adviser in a variety of government agencies. He was the General Manager of Treasury's Indirect Tax Division from 2002 to 2006 and was an Assistant Commissioner in the Australian Taxation Office from 1999 to 2002.

Mr Brian Wilson was appointed to the Board on 10 December 2009. In his 33-year career as an investment banker specialising in corporate financial advice he advised more than 40 of Australia's top 100 companies and numerous international groups. Mr Wilson retired in 2009 as a Managing Director of the global investment bank Lazard, after co-founding the firm in Australia in 2004 and was previously a Vice-Chairman of Citigroup Australia and its predecessor companies. He is currently Pro-Chancellor of University of Technology, Sydney, a non-executive director of Bell Financial Group and a member of the Australian Government Review of Australia's Superannuation System.

Mr Hamish Douglass was appointed to the Board on 10 December 2009. He has extensive experience in global foreign investment and in the origination and execution of corporate finance transactions and, in particular, public company mergers and acquisitions. He has had extensive experience in corporate finance transactions in the mining industry. He is the Chief Executive Officer of Magellan Financial Group, a specialist global fund management group which is listed on the ASX. He was previously Co-Head of Global Banking for Deutsche Bank AG in Australia and New Zealand and prior to that he was Head of Mergers and Acquisitions. He is a member of the Australian Government's Takeovers Panel and is a member of the Young Global Leaders, a forum of the World Economic Forum.

Relationship of the Division to the Board

As the Executive Member of the Board and the General Manager of the Division, Mr Colmer provides the link between the Board and the Treasury. As the secretariat to the Board, the Division is responsible for the initial examination of proposals received, and for preparing recommendations to the Treasury ministers or the Divisional officers the Treasurer has authorised to make decisions under the FATA and the policy. It also provides a contact point for foreign investors and their representatives/agents.

The Board provides advice on the application of the policy and the FATA across the range of proposals received by the Division and on foreign investment policy issues. It provides specific advice on the more significant applications received and also reviews the general handling of other applications. The Board performs this role with the benefit of weekly reports prepared by the Division on proposals received and through regular meetings and telephone discussions with the Executive Member. Formal Board meetings are generally held monthly, with telephone discussions taking place in the intervening weeks. The Board members draw on their considerable collective and individual professional and commercial experience in discharging their advisory role.

The Executive Member of the Board is also the Australian National Contact Point (the ANCP) for the *OECD Guidelines for Multinational Enterprises*. The ANCP is responsible for implementing the OECD Guidelines, handling inquiries, conducting formal reviews when the adherence of a multinational enterprise to the OECD Guidelines is questioned, facilitating discussions with interested stakeholders, and reporting on its activities to the OECD Investment Committee.

Administration of foreign investment policy

Information, advice and education

In keeping with the Board's role of fostering awareness and understanding of Australia's foreign investment review arrangements and the policy, the Division regularly engages with potential foreign investors, their representatives/agents and Australian businesses to provide information on the operation of the policy and the FATA and their application, including to specific proposals.

The Division also provides a telephone inquiry line, +61 2 6263 3795, an email address, firbenquiries@treasury.gov.au, and a website, www.firb.gov.au, for people seeking information or advice on the policy and the FATA.

Consideration timeframe

The FATA provides a 30-day statutory period for a decision to be made on proposals lodged under the FATA, with up to a further 10 days to advise the applicant parties of the decision. The statutory period commences upon receipt of a completed notice under section 25, section 26 or section 26A. The FATA also provides for the issue of an Interim Order, which extends the available examination period and prohibits the proposal for up to 90 days. Interim Orders are usually issued to allow the applicant additional time to provide adequate information for assessing the proposal. Proposals subject to the policy but not the FATA are decided (where possible) within the 30-day statutory deadline set by the FATA.

The Treasurer has provided an authorisation (effectively a delegation) to the Executive Member and other senior Division staff to make decisions on foreign investment proposals that are consistent with the policy or do not involve issues of special sensitivity. Around 93 per cent of proposals are decided under this authorisation. The Board maintains oversight of decisions made under this arrangement.

These arrangements, along with the use of notification forms for residential and non-residential real estate purchases, streamline the application and approval process. The forms, once completed, signed and submitted together with additional supporting information, facilitate a timely decision on applications.

Examination and approval process

Proposals are initially examined by the Division, in its role as Board secretariat, with the Board's direct and early involvement in significant applications. The Division also undertakes associated compliance work. Proposals are examined as to whether they conform with the requirements of the policy and the FATA, including the proponent's fulfilment of any conditions attached to past approvals. While the overwhelming majority of proposals proceed without objection, the Treasurer has powers under the FATA to prohibit proposals that are contrary to the national interest or to raise no objections to them subject to conditions that are considered necessary to ameliorate national interest concerns. Decisions are advised in writing to the applicants or their representatives/agents. Where the Treasurer makes a decision on a significant proposal, he may also issue a media release.

Consultation arrangements

In examining significant proposals, consultations are undertaken by the Board's secretariat with Australian, state and territory government departments and authorities with responsibilities relevant to the proposals. Advice and comments provided by such agencies are important in assessing the implications of proposals

and, in particular, in determining whether they raise any national interest issues. Such consultation is undertaken on a strictly confidential basis to protect the information provided by the applicants. The Board regards this liaison with key stakeholders as an integral part of the administration of the policy.

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

National interest

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

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

In preparing the Board's advice, consideration is also given to whether an investment is consistent with Australia's foreign investment policy (see the Board's website at www.firb.gov.au. This website also contains information on Australia's foreign investment screening arrangements and on national interest matters, especially relating to real estate and other sectors with specific requirements).

A proposal that does not meet the requirements set out in the policy would ordinarily be regarded as being contrary to the national interest. Additional guidance on aspects of the national interest includes, for example:

- existing government policy and legislation (for example, applying to telecommunications, broadcasting, the media, aviation, environmental regulation and competition policy);
- national security interests; or
- economic development.

The Australian Government's foreign investment policy document (see www.firb.gov.au) includes the principles announced by the Treasurer on 17 February 2008 to guide consideration of proposals involving direct investment by foreign government entities. Investment proposals involving foreign governments and their agencies are assessed on the same basis as private sector proposals with national interest implications determined on a case-by-case basis. The evaluation considers whether:

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

Handling of commercial-in-confidence and personal information

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

Moreover, the Government is required to respect the privacy and sensitivity of personal and commercial information that is provided by applicants to the Board, in accordance with the requirements of the relevant legislation, including the *Privacy Act 1988* (Privacy Act) and the *Freedom of Information Act 1982* (FOI Act). However, in accordance with the Privacy Act, to provide whole-of-government advice to the Treasurer on applications or where the applicant may have breached the FATA or the policy, other government agencies may be consulted and relevant information may be provided to those agencies. Those agencies include the Department of Immigration and Citizenship (DIAC) and the Australian Taxation Office (ATO).

In the event that third parties outside government seek access to confidential information, it would not be made available without the permission of the person(s) who provided it, except upon order by a court of a competent jurisdiction or, in some circumstances, through the operation of the FOI Act.

In 2008-09, the Division received one application under the FOI Act (two in 2007-08) seeking information concerning foreign investment matters. The FOI Act provides criteria to determine whether particular documents or parts of documents are available or exempt from release. These include, for example, that the document contains commercially sensitive information where its release would cause harm to its provider. In line with the provisions of the FOI Act, the Division may consult with the parties to a proposal about documents they provided which are the subject of an FOI request, to seek their views on their possible release to an FOI applicant.

2008-09 outcomes

Cost of the Board's operations

Total Board expenses in 2008-09 were $128,552 ($127,443 in 2007-08). Remuneration of Board members was around 91 per cent of total Board expenses, with the remainder expended on local travel, car hire and incidentals. Board members' fees are determined by the Remuneration Tribunal.

Total expenses of the Division for 2008-09 were $3.5 million ($3.3 million in 2007-08). These expenses mainly comprised employee salary (including superannuation and accruing leave entitlements) and administrative costs. Over the course of 2008-09, the Division employed an average of 28 staff, four fewer than the average number of staff employed in 2007-08.

Consideration of proposals and enquiries

In 2008-09, a total of 5,821 applications for foreign investment approval were considered, with 5,352 approved, three rejected, 341 withdrawn and 125 exempt as not subject to the policy or the FATA. Of the 5,355 applications decided in 2008-09 (that is, those approved or rejected but not those withdrawn or exempt), 4,968 were decided within the Division under the Treasurer's authorisation and 387 were decided by a Treasury minister.

Additionally, in 2008-09 the Division handled approximately 13,200 telephone enquiries and 4,548 items of correspondence[1] in relation to potential proposals, compliance with conditional approvals, the policy and the FATA.

In 2008-09, three Interim Orders and one Final Order were made and published in the Commonwealth of Australia *Gazette*.[2] No Divestiture Orders were made. Final Orders are issued where a proposal, assessed in terms of the policy, is considered to be contrary to the national interest. Divestiture Orders are issued where an acquisition has already occurred and is subsequently assessed, in terms of the policy, as being contrary to the national interest.

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

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

2 The FATA provides the Treasurer with the power to make orders prohibiting an acquisition (an Interim Order or a Final Order) or having the effect of requiring an interest to be disposed (a Divestiture Order). While the prohibition under a Final Order is not subject to any time limitations, an Interim Order prohibits the acquisition proceeding during the period from gazettal until the earlier of an additional 90 days, or until a decision has been made.

In 2008-09, 97 per cent of proposals were decided within 30 days, compared with 95 per cent of proposals in 2007-08. Proposals that took more than 30 days to decide were generally delayed by a lack of sufficient information from the parties or because the application involved significant complexity or sensitivity. If those cases were excluded, the average time taken for processing applications in 2008-09 was 27 days. Of the real estate cases decided in 2008-09 (which represent the majority of proposals received), 90 per cent were finalised within two weeks, compared with 73 per cent in 2007-08. This increase in finalisation rate partly reflected the streamlined application process announced by the Assistant Treasurer on 18 December 2008 and fully implemented by March 2009.

Changes to foreign investment policy — residential real estate

On 18 December 2008, the Assistant Treasurer released details of administrative changes to the Government's foreign investment screening arrangements for acquisitions of residential real estate by foreign persons. The changes were made to streamline the notification arrangements. The changes were implemented progressively — those that only required changes to the policy came into effect immediately, while those requiring changes to the Regulations came into effect after the necessary amendments were made on 31 March 2009. There were no changes to the FATA.

Prior to this announcement, foreign investment screening arrangements for residential real estate had not been updated since 1989 and thus no longer gave appropriate effect to the intent of the Government's foreign investment policy. The changes were designed to streamline and update foreign investment screening for residential real estate acquisitions, enhancing flexibility in the market and reducing compliance costs for temporary residents and the construction industry. The changes are now fully implemented. The Government will monitor the changes. Further information relating to these changes can be found on the FIRB website at www.firb.gov.au.

Monitoring and compliance activity

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

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

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

In examining proposals, the applicant's compliance with any conditions relating to past proposals is taken into account. Instances of lack of compliance with conditions may result in future proposals being rejected. It is general policy to report potential breaches of the FATA to DIAC, the ATO, the AFP and other government agencies as appropriate.

In order to ensure compliance with foreign investment policy, the Division systematically monitors whether foreign persons are complying with the conditions of their approvals. This involves cooperation with relevant members of the business community, local government authorities, the legal profession, and on occasion, the general public.

In addition, compliance activities focus on:

- settling outstanding compliance matters;
- investigating, separately, instances of possible specific non-compliance as well as possible systemic non-compliance; and
- improving awareness of the policy in the local government arena and within appropriate Australian, state and territory government agencies.

The Division's compliance and monitoring procedures and documentation processes are subject to ongoing review.

CHAPTER 2
Foreign Investment Proposals

Foreign investment proposals

This chapter provides an overview of, and statistical information on, applications considered in 2008-09.

Features of the FIRB statistics

While this chapter provides a useful source of data on foreign direct investment in Australia, the Board urges particular caution in the use of these statistics, including when making comparisons with earlier years as policy, data capture and reporting methodologies change over time. There are also substantial differences between the FIRB statistics and actual investment flows. The latter developments are more reliably captured by Australian Bureau of Statistics (ABS) data, which seeks to reflect more comprehensively investment transactions between residents of Australia and non-residents.

The statistics contained in this chapter do not measure total foreign investment made in any year, nor do they measure changes in net foreign ownership levels in Australia. Rather, they provide information on proposed investments that fall within the scope of the *Foreign Acquisitions and Takeovers Act 1975* (the FATA) and the Government's foreign investment policy (the policy). The monetary value attributed to an approved proposal is the amount advised by the applicants. It represents an estimate of the expected investment in that year and subsequent years that would result if the proposal is in fact implemented. The statistics therefore provide partial coverage of all foreign investments made and may include some transactions that do not actually proceed. Several points should be noted:

- The data does not cover foreign investments below the various monetary and percentage thresholds that apply under the FATA and the policy. Nor does the data cover follow-on investments to expand the capital stock of existing foreign-owned businesses (both in existing areas and into related areas). See the FIRB website, www.firb.gov.au, for the current thresholds.

- The figures are based on the assumption that investment funds will be sourced from overseas. The extent to which approved investment proposals will actually be funded externally and therefore result in foreign capital inflows depends not only upon whether they are implemented, but also upon the proportion that is financed from foreign sources. Some (and in some cases all) of the proposed funds to be invested may be contributed by Australians, for example, where they are in partnership with foreign interests or where the investment is financed from existing Australian operations.

- The source of funds identified in the Board's statistics does not necessarily imply the country of control. For example, if a company has a single substantial

shareholder, the country of that shareholder is recorded, or if a company's shares are widely held, the country of domicile/incorporation is recorded.

- The data does not necessarily reflect a change in foreign ownership as, in some cases, both the target and the purchaser are defined as a foreign person under the FATA.

- Acquisitions of diversified company groups are classified into a single industry sector according to the major activity of the group, for example, in a diversified mining company with interests in various minerals. Acquisitions of real estate to be used for purposes incidental to the main business activity of the purchaser are classified according to that activity.[1]

The Board's statistics are also not a reliable indicator of foreign investment inflows because:

- they include proposals that are approved in a given year but which are not actually implemented, or could be implemented in a later year, or over a number of years;

- they include approvals for multiple potential acquirers of the same target company or asset;

- they are inherently irregular and can be skewed due to very large investment proposals;

- major liberalisations of the policy that have occurred since the mid-1980s have acted to reduce the number of proposals and thus limit comparability over time, such as:

  – the increase in the general asset threshold in 1999 from $5 million to $50 million, and again in December 2006 from $50 million to $100 million;

  – the increase in the offshore takeovers threshold in December 2006 from the general asset threshold (then at $50 million) to $200 million;

  – the introduction of thresholds for the calendar year 2005 of $800 million and $50 million (indexed annually) for United States investors from 1 January 2005; and

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1 Data has been compiled by reference to the *Australian and New Zealand Standard Industrial Classification* (ANZSIC 1993), except: newspaper printing and publishing are allocated to the services industry sector (ANZSIC 1993 classifies these under manufacturing); and tourism is recorded as a separate industry sector rather than being included with the other service industries.

  - the introduction of changes in 2009 to the screening arrangements for residential real estate whereby persons who are temporary residents are not required to seek FIRB approval for certain residential real estate acquisitions (see the FIRB website www.firb.gov.au for more information);

- changes to other government policies and legislation may have an effect on proposed foreign investment, such as:

  - the removal of foreign ownership restrictions in the media sector in April 2007; and

  - changes in immigration policies that control the number of temporary resident visa holders which largely determines the level of foreign investment in developed residential real estate;

- the implementation of a new case management system (known as FIMS) in December 2005 significantly improved data collection accuracy. FIMS allows a more detailed analysis of proposed foreign investment, as reflected in improvements to the statistics presented from the 2005-06 Annual Report onwards. While the data in that report and subsequent reports is consequently more accurate, caution is necessary in making inter-year comparisons involving data from earlier years;

- reporting procedures for proposals involving financing arrangements were amended in 2005-06. Although they continue to be included in the statistics (in the number of approvals), the proposed acquisition cost and development expenditure are not recorded in FIMS for proposals such as lending arrangements where there is not expected to be an equity investment flow into Australia.[2] This has affected the value attributed to proposed investment in the finance and insurance industry; and

- prior to 2005-06, proposals involving share acquisitions were recorded as conditionally approved on the basis that the proposed acquisition was to proceed within 12 months. In FIMS, such proposals are no longer recorded as conditionally approved.[3]

- Changes to the real estate screening arrangements introduced in 2008-09 have affected the proportion of approvals that are subject to conditions (58 per cent of total approvals in 2008-09 compared with 79 per cent under the previous system in 2007-08). However, the value of proposed investment reported as being associated

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2 This is similar to the existing practice for corporate reorganisations.

3 Applicants are required to re-apply if the transaction has not taken place and they wish to proceed after the 12 month period has passed.

with the conditional approval category has significantly increased due to the very large investment amounts involved with such proposals.

The term 'proposed investment' is used widely throughout this report. Proposed investment is the aggregation of the following estimates:

- acquisition costs (including shares, real estate or other assets);
- development costs following the acquisition; and
- costs of both establishment and development in the case of new businesses.

Applications considered

This section analyses all investment proposals that were finalised (approved, rejected, withdrawn or exempt) during 2008-09, irrespective of the date they were submitted.[4] Corporate reorganisations are included here (75 in 2008-09), whereas they are excluded from the analysis of approved investment provided later in this chapter.[5]

The number of applications considered during 2008-09 was 5,821, which is 32 per cent lower than the 8,548 in 2007-08. Table 2.1 provides a breakdown of the number of applications considered over the last six years, according to the outcome of proposals.

Of the 5,352 applications **approved** in 2008-09 (32 per cent lower than the 7,841 approvals in 2007-08), 3,086 were approved subject to conditions and 2,266 without conditions being imposed. All but five of the conditional approvals were in the real estate sector. Real estate conditions ordinarily imposed at that time include those relating to the period during which development must commence (increased from 12 months to 24 months from December 2008), requiring temporary residents to reside in and then sell established dwellings when they cease to reside in them, and reporting requirements.

A total of three proposals were **rejected** in 2008-09 (14 in 2007-08), representing less than 0.1 per cent of all proposals considered. All of these rejected proposals were related to real estate acquisitions.

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4 Since proposals determined exempt were not included prior to 2005-06, the figures shown for prior years have been amended from those previously published to include these proposals.

5 The proposed acquisition costs and development expenditure are not recorded for corporate reorganisations.

In 2008-09, 341 proposals were **withdrawn** by the applicants, representing a 35 per cent decrease on the 521 withdrawals in 2007-08 and representing about the average level over recent years of around 6 per cent of the total applications received. In 2008-09, 86 per cent of withdrawals involved real estate proposals. Many of these withdrawals resulted from applicants submitting several concurrent or a series of applications (often for properties that were to be auctioned and for which they intended to bid), and once one property had been purchased, subsequently withdrawing the remaining applications. In other cases, proposals were withdrawn because the investment was deferred or the applicant decided not to proceed for commercial reasons.

Foreign investors are encouraged to discuss all types of proposals with the Board's secretariat to ensure they are consistent with the policy. Where it is important to maintain commercial confidentiality, applicants may decide to withdraw and later resubmit complex proposals that require more than the standard 30-day examination period set by the FATA in preference to the issuing of an Interim Order, because such Orders are published in the Commonwealth of Australia *Gazette* and therefore reveal publicly the existence of the proposals.

During 2008-09, 125 proposals were determined to be **exempt** compared with 172 in 2007-08. Some applications received were determined to be outside the scope of the policy or the scope of the FATA, because they were exempted by the *Foreign Acquisitions and Takeovers Regulations 1989*. The existence of these particular applications reflects in part the requirement under the policy that foreign investors submit proposals if they have any doubt as to whether the proposals are notifiable.

Table 2.1: Applications considered: 2003-04 to 2008-09 (number of proposals)

Outcome	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09
	No.	No.	No.	No.	No.	No.
Approved unconditionally	995	1,127	1,386	1,520	1,656	2,266
Approved with conditions	3,452	3,233	3,800	4,637	6,185	3,086
Total approved	**4,447**	**4,360**	**5,186**	**6,157**	**7,841**	**5,352**
Rejected	64	55	37	39	14	3
Total decided	**4,511**	**4,415**	**5,223**	**6,196**	**7,855**	**5,355**
Withdrawn	319	287	373	629	521	341
Exempt	206	182	185	200	172	125
Total considered	**5,036**	**4,884**	**5,781**	**7,025**	**8,548**	**5,821**

Note: Figures include corporate reorganisations (75 in 2008-09).

Applications decided

This section analyses all proposals that were approved (either with or without conditions), or rejected during 2008-09, irrespective of the date they were submitted. Corporate reorganisations are included.

The number of applications decided during 2008-09 was 5,355 which was 32 per cent fewer than in 2007-08, and which reversed the increasing trend in applications decided in recent years (see Table 2.1). The value of decided applications was $181.4 billion in 2008-09, or 6 per cent lower than in 2007-08. Table 2.2 provides a breakdown of proposed investment according to the outcome of decided applications for the corresponding period provided in Table 2.1.

Table 2.2: Applications decided: 2003-04 to 2008-09 (proposed investment)

Outcome	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09
	$b	$b	$b	$b	$b	$b
Approved unconditionally	58.9	60.4	72.5	140.3	162.6	135.9
Approved with conditions	40.1	59.1	13.3	16.1	29.3	45.5
Total approved	**99.0**	**119.5**	**85.8**	**156.4**	**191.9**	**181.4**
Rejected	0.1	0.0	0.0	0.0	0.2	0.0
Total decided	**99.1**	**119.5**	**85.8**	**156.4**	**192.0**	**181.4**

Note: Totals may not add due to rounding.
'0.0' indicates a figure of less than $50 million.
Including corporate reorganisations (75 in 2008-09).

Charts 2.1 and 2.2 display the figures from Tables 2.1 and 2.2 to show the difference between applications decided within the real estate and non-real estate sectors[6] (other sectors) by number of proposals and value of proposed investment.

Chart 2.1 shows that, by number, most of the applications decided were within the real estate sector. Chart 2.2 shows that, by value, most of the proposed investment occurred in non-real estate sectors.

Charts 2.1 shows the decrease in the number of applications decided in the real estate sector in 2008-09. Chart 2.2 shows that the estimated proposed investment in the real estate sector declined in 2008-09 but the estimated proposed investment in the non-real estate sectors continued to increase. As noted previously, the decline in real estate cases in 2008-09 largely reflected changes to the screening arrangements for residential real estate announced on 18 December 2008. Further discussion of developments in the real estate sector is provided on pages 28-36.

6 Analysis of approvals by industry sector is provided on pages 24-36.

Chart 2.1: Applications decided 2003-04 to 2008-09 — number of proposals

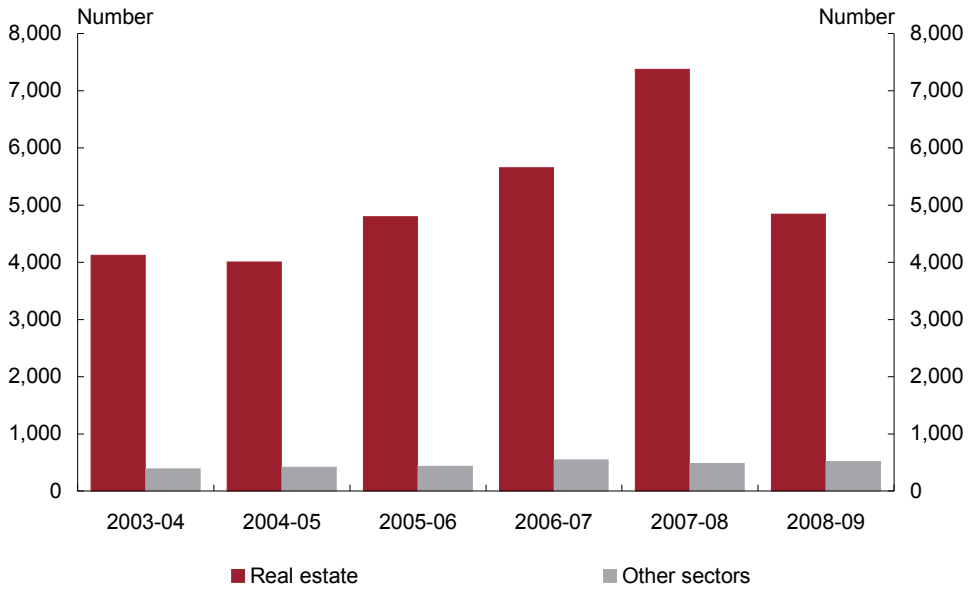
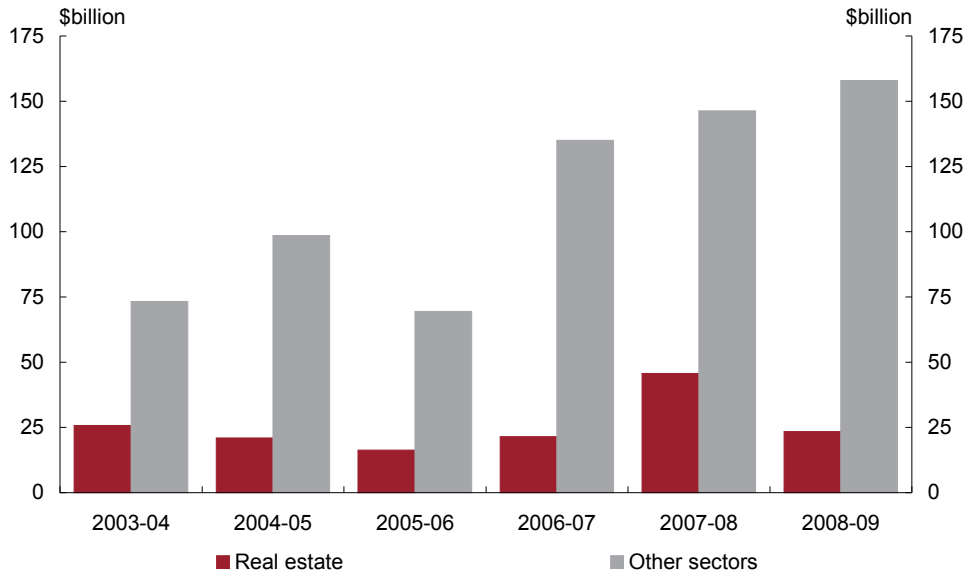


Chart 2.2: Applications decided 2003-04 to 2008-09 — proposed investment



Approvals by value

This section analyses applications approved during 2008-09 (excluding corporate reorganisations). Table 2.3 displays approvals by the value of proposed investment for 2005-06 to 2008-09. There was a decrease in 2008-09, compared with 2007-08, across all categories except those proposals where the value exceeded $5 billion. Overall, there were 32 per cent fewer approvals with a 5 per cent decrease in proposed investment compared with 2007-08.

Table 2.3: Total approvals by value and number 2005-06 to 2008-09

Value of proposal	2005-06		2006-07		2007-08		2008-09	
	No.	$b	No.	$b	No.	$b	No.	$b
< $1 million	3,955	1.8	4,598	2.24	5,906	2.99	3,925	1.94
≥ $1 million & < $50 million	892	7.4	1,142	8.6	1,463	10.8	1,000	9.0
≥ $50 million & < $100 million	105	7.3	108	7.5	123	8.9	116	8.1
≥ $100 million & < $500 million	112	25.5	158	32.2	195	41.8	172	36.2
≥ $500 million & < $1 billion	23	16.4	43	28.4	53	36.7	36	25.0
≥ $1 billion & < $2 billion	11	15.2	11	16.3	20	25.3	15	20.6
≥ $2 billion & < $5 billion	2	6.2	4	12.2	10	30.2	7	19.5
≥$5 billion	1	5.8	5	49.0	5	35.2	5	60.9
Total	**5,101**	**85.8**	**6,069**	**156.4**	**7,775**	**191.9**	**5,277**	**181.4**

Note: Totals may not add due to rounding.
Excludes corporate reorganisations (75 in 2008-09).

Charts 2.3 and 2.4 depict total approvals by value and number using the data provided in Table 2.3. The decrease in the number of approvals involving proposed investment of less than $1 million can be seen in Chart 2.3, correlating with the decrease in real estate proposals shown in Chart 2.1.

Chart 2.3: Total approvals by value 2005-06 to 2008-09 — number of proposals

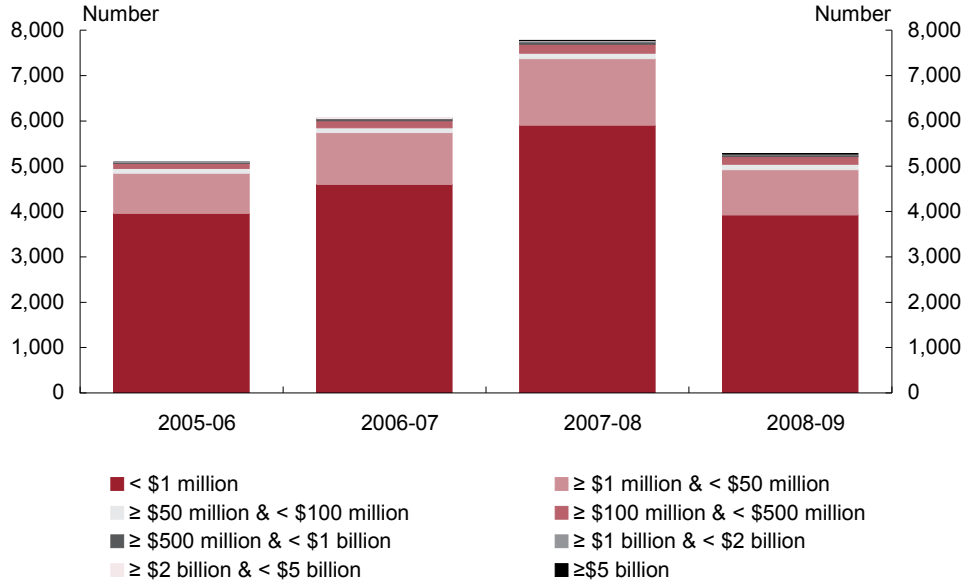
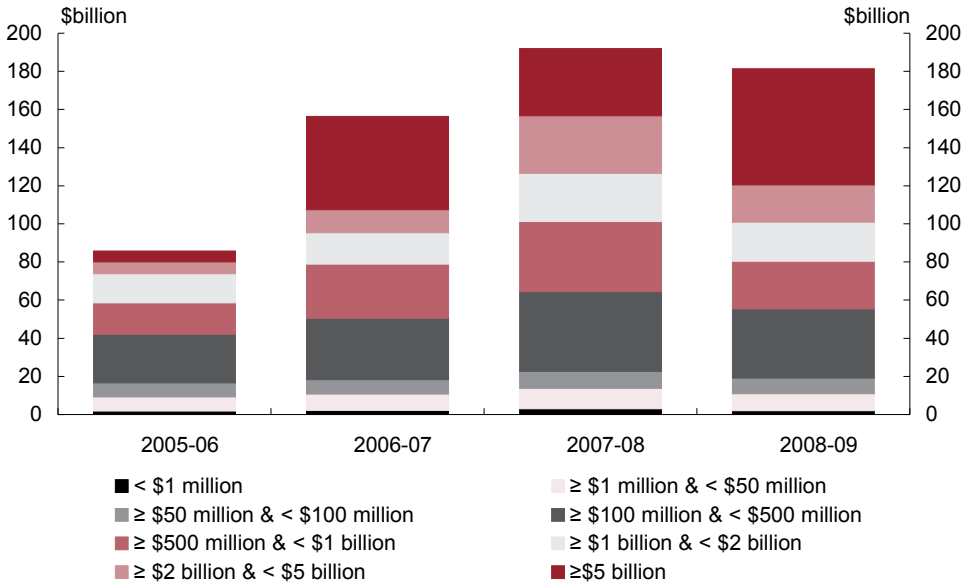


Chart 2.4: Total approvals by value 2005-06 to 2008-09 — proposed investment



Approvals by sector

Table 2.4 lists applications approved in 2008-09 by industry sector. Chart 2.5 depicts the sectoral distribution of approved proposed investment in 2008-09. Corporate reorganisations are excluded. Most of the proposed investment is attributable to acquisition cost. The skewing of the foreign investment data towards acquisition costs reflects the fact that the FATA applies to acquisitions of interests in, and not to the expansion of, existing businesses. The real estate sector's development figures predominantly reflect the estimated expenditure on construction on vacant land. Bearing in mind the limitations of the Board's data, the figures show that, during 2008-09:

- mineral exploration and development was the largest industry sector by value of approvals, with approvals totalling $90.6 billion ($64.3 billion in 2007-08); and
- other significant sectors by value of proposed investment were: services with $31.7 billion ($35.7 billion in 2007-08), real estate with $23.4 billion ($45.5 billion in 2007-08), and manufacturing with $19.1 billion ($31.3 billion in 2007-08).

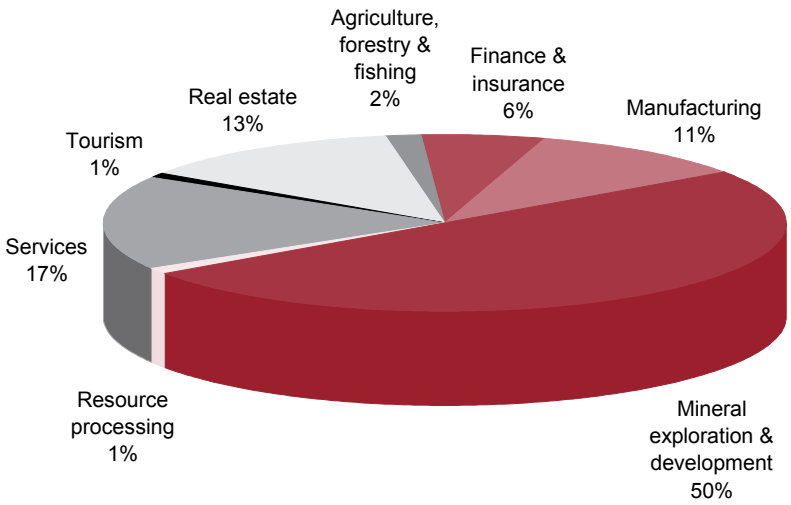
Table 2.4: Total approvals by industry sector in 2008-09

Industry	Number of approvals	Acquisition cost $b	Development expenditure $b	Proposed investment $b
Agriculture, forestry & fishing	12	2.78	-	2.78
Finance & insurance	60	10.87	0.01	10.88
Manufacturing	52	18.16	0.95	19.11
Mineral exploration & development	164	69.47	21.15	90.62
Resource processing	10	1.80	-	1.80
Services	132	31.32	0.35	31.67
Tourism	19	0.89	0.17	1.06
Real estate(a)	4,827	19.09	4.33	23.42
Total	**5,277**	**154.38**	**26.97**	**181.35**

(a) Proposed investment in the real estate sector includes off-the-plan approvals provided to real estate developers and approvals for annual programs. Further details are provided in section on real estate on page 31.

Note: Totals may not add due to rounding.
'-' indicates a figure of zero.
Excludes corporate reorganisations (75 in 2008-09).

Chart 2.5: Total approvals by value by industry sector in 2008-09 — proposed investment



Note: Totals may not add due to rounding.

Agriculture, forestry and fishing

Proposed investment in the agriculture, forestry and fishing sector increased in 2008-09. Twelve proposals were approved with a total value of $2.8 billion, compared with 11 approvals in 2007-08 with a total value of $2.5 billion. Of these approvals, seven involved total investment in excess of $100 million, including one involving estimated investment in excess of $1.6 billion.

Finance and insurance

During 2008-09, 60 proposals were approved in the finance and insurance sector with proposed investment of $10.9 billion, compared with 39 proposals and $9.2 billion in 2007-08. There were 23 proposals approved which involved investment of $100 million or more (13 in 2007-08), with two involving proposed investment of $1 billion or more, accounting for $2.1 billion (19 per cent) of the overall total. The increases in the number and value of proposals in the finance and insurance sector can be partly attributed to the global financial crisis where banks and insurance companies globally sought to recapitalise. This recapitalisation typically involved the provision of financial, including equity, support to financial institutions by foreign governments or their related entities.

As discussed on page 17, the proposed acquisition costs and development expenditure (and therefore the total investment value) are not recorded in the FIRB data base (FIMS) for proposals such as financing arrangements where there is not expected to be an investment flow into Australia.

Manufacturing

The manufacturing sector saw a slight increase in the number of proposals approved and a decrease in proposed investment in 2008-09. There were 52 proposals (8 per cent more than the 48 proposals in 2007-08) and proposed investment of $19.1 billion (39 per cent less than the $31.3 billion in 2007-08). Twenty proposals involved total investment of $100 million or more in 2008-09. Five proposals involved total investment of $1 billion or more, compared with four proposals in 2007-08.

Table 2.5: Manufacturing sector approvals in 2008-09

Industry	Number of approvals	Acquisition cost $b	Development expenditure $b	Proposed investment $b
Chemical, petroleum & coal products	4	5.41	-	5.41
Electricity & gas	20	6.35	0.48	6.82
Food, beverages & tobacco	5	3.52	-	3.52
Machinery & equipment	6	0.95	-	0.95
Metal Products	4	0.20	-	0.20
Non-metallic mineral products	2	0.76	-	0.76
Other(a)	11	0.97	0.48	1.45
Total	**52**	**18.16**	**0.95**	**19.11**

(a) Comprises: miscellaneous manufacturing; water, sewerage and drainage; paper and paper products; and textiles.

Note: Totals may not add due to rounding.
'-' indicates a figure of zero.

Mineral exploration and development

Proposed investment in the mineral exploration and development sector increased by 41 per cent, from $64.3 billion in 2007-08 to $90.6 billion in 2008-09, making it the largest industry sector by value of approvals. A total of 164 proposals was approved (compared with 173 in 2007-08), comprising eight to establish new businesses and 156 to acquire an interest in existing businesses. There were 60 proposals involving total investment of $100 million or more, including 15 for $1 billion or more (compared with 12 for $1 billion or more in 2007-08). These 15 proposals accounted for a combined proposed investment in excess of $72.6 billion (80 per cent of the proposed investment in this sector).

Table 2.6: Mineral exploration and development sector approvals: 2007-08 to 2008-09

Industry	Acquisitions				New businesses			
	2007-08		2008-09		2007-08		2008-09	
	No.	$b	No.	$b	No.	$b	No.	$b
Metallic minerals								
- Bauxite	3	12.38	4	0.60	-	-	-	-
- Copper-gold	24	11.26	24	8.03	-	-	1	0.02
- Iron ore	24	8.88	30	27.19	1	0.02	-	-
- Nickel	10	3.05	8	0.35	-	-	1	0.05
- Uranium	7	1.25	15	1.68	1	0.01	-	-
- Zinc-lead-silver	5	5.54	5	0.19	-	-	-	-
- Other	12	3.41	11	0.13	1	0.06	1	0.25
Coal	37	10.36	31	14.99	2	1.11	2	0.71
Oil & gas	31	4.52	20	15.95	-	-	3	19.13
Other(a)	15	2.45	8	1.31	-	-	-	-
Total	**168**	**63.09**	**156**	**70.42**	**5**	**1.19**	**8**	**20.15**

(a) Comprises: services to mining and exploration; and non-metallic minerals.
Note: Totals may not add due to rounding.
'-' indicates a figure of zero.

Resource processing

There was an increase in proposed foreign investment in the resource processing sector, with 10 approvals in 2008-09, compared to three in 2007-08. Total proposed investment was $1.8 billion ($0.2 billion in 2007-08).

Services

Proposed investment in the services sector decreased by 11 per cent, from $35.7 billion in 2007-08 to $31.7 billion in 2008-09. However, the number of proposals increased from 109 in 2007-08 to 132 in 2008-09. There were 60 proposals involving proposed investment of $100 million or more, including three of $1 billion or more.

Table 2.7: Services (excluding Tourism) sector approvals in 2008-09

Industry	Number of approvals	Acquisition cost	Development expenditure	Proposed investment
		$b	$b	$b
Construction	14	1.40	0.28	1.67
Communications	25	9.45	-	9.45
Health	11	1.47	-	1.47
Other community services	4	0.96	-	0.96
Property & business services	20	2.67	-	2.67
Trade				
- Retail	4	0.19	-	0.19
- Wholesale	5	0.25	-	0.25
Transport				
- Air	19	4.79	0.04	4.83
- Rail	7	0.25	0.04	0.29
- Road	15	9.29	-	9.29
- Services to transport	2	0.24	-	0.24
Defence	2	0.26	-	0.26
Other(a)	4	0.10	-	0.10
Total	**132**	**31.32**	**0.35**	**31.67**

(a) Comprises: education, museum and library services; storage; entertainment and recreational services; and personal services.
Note: Totals may not add due to rounding.
'-' indicates a figure of zero

Tourism

Total proposed foreign investment in the tourism sector declined by 67 per cent in 2008-09, to $1.06 billion, from $3.2 billion in 2007-08, which was a peak in proposed investment in recent years (see Table 2.8 below). Five proposals involved proposed investment of $100 million or more (three in 2007-08).

Table 2.8: Proposed foreign investment in the tourism sector 2004-05 to 2008-09

Outcome		2004-05	2005-06	2006-07	2007-08	2008-09
Number of approvals		54	57	68	38	19
Proposed investment	$b	0.72	2.80	1.50	3.20	1.06

Real estate

Changes to foreign investment policy — residential real estate

The changes to the administration of residential real estate screening implemented throughout 2009 mean that data in this report for this category cannot be compared to data for previous years. As the changes were implemented throughout the year, 2008-

09 data will not provide a baseline for future years. The 2009-10 data will be the new baseline.

The relevant changes from a data perspective are:

- From 1 April 2009, temporary residents are exempted from notification of proposed acquisitions of established residential real estate for their own residence, new residential real estate and vacant residential land. In previous years, temporary residents accounted for around two-thirds of real estate applications.

- The pre-approval arrangements for off-the-plan sales have been discontinued and purchasers must now notify individually.

Further information relating to these changes can be found on the FIRB website at www.firb.gov.au.

Proposals in real estate in 2008-09

The total number of approvals in the real estate sector decreased significantly from 7,357 in 2007-08 to 4,827 in 2008-09, or by 34 per cent. The bulk of this reduction in proposals occurred in the last quarter of 2008-09 (April to June 2009) when the new screening arrangements for residential real estate became fully operational.

Total proposed investment in real estate decreased from $45.5 billion in 2007-08 to $23.4 billion in 2008-09.

Most of the decrease was in commercial property acquisitions which decreased from $25.1 billion in 2007-08 to $8.5 billion in 2008-09. The number of commercial real estate approvals also decreased from 183 to 113 in 2008-09. (These reductions are not related to the changes announced in December 2008). However, the 2007-08 year was marked by a significant increase in commercial real estate proposals and the 2008-09 figures are consistent with the long term trend.

The value of acquisitions of commercial real estate included $5.2 billion for existing property (a decrease of $8.6 billion from 2007-08) and $1.7 billion for vacant land (a decrease of $5.0 billion from 2007-08). The former included several large acquisitions of beneficial interests in managed investment funds with real estate property as assets. There was a $3 billion decrease in the value of approvals for annual program acquisitions from $4.6 billion in 2007-08 to $1.6 billion in 2008-09.

Residential approvals decreased from $20.4 billion in 2007-08 to $14.9 billion in 2008-09, largely as a result of the administrative changes. Of the decrease in residential real estate proposals, $1.2 billion was for existing dwellings which decreased from $3.0 billion in 2007-08 to $1.8 billion in 2008-09. There was a decrease in value of $1.2 billion for vacant land and $4.1 billion was for newly constructed dwellings.

Residential real estate

Developed

During 2008-09, 2,457 proposals were approved for the acquisition of **developed residential** real estate, a 39 per cent reduction from the 4,028 that were approved in 2007-08. This category consists primarily of temporary residents in Australia acquiring an established dwelling as their principal place of residence.[7] Proposed investment approved totalled $2.5 billion, a decrease of 27 per cent on the $3.4 billion in 2007-08. Existing residential property approvals account for 73 per cent of the total value, with $1.8 billion, the remainder, $0.7 billion being approvals for acquisitions under an 'annual program' arrangement.

Table 2.9: Investment in residential real estate by type of expenditure and number of proposals approved in 2008-09

	Number of approvals	Acquisition cost $b	Development expenditure $b	Proposed investment $b
Residential				
Developed				
- existing residential property	2,450	1.81	-	1.81
- annual programs	7	0.68	-	0.68
Sub-total 'Developed'	*2,457*	*2.49*	-	*2.49*
For development				
- vacant land	988	0.94	1.77	2.72
- new dwellings(a)				
- individual purchases	954	0.60	-	0.60
- developer 'off-the-plan'	235	5.48	-	5.48
Sub-total 'new dwellings'	*1,189*	*6.08*	-	*6.08*
- redevelopment	73	0.37	0.69	1.06
- annual programs	8	2.20	0.38	2.58
Sub-total 'For development'	*2,258*	*9.60*	*2.83*	*12.43*
Total residential	**4,715**	**12.09**	**2.83**	**14.92**

(a) The 'new dwellings' category was previously referred to as 'off-the-plan'.
Note: Totals may not add due to rounding.
'-' indicates a figure of zero.

For development

In 2008-09, 2,258 proposals were approved for acquisitions of **residential real estate for development** (including eligible redevelopment), which represented a 28 per cent

7 Includes a small number of approvals relating to foreign companies acquiring existing residential property for company employees to reside in.

decrease on the 3,143 approvals in 2007-08.[8] Proposed investment decreased by 27 per cent to $12.4 billion ($17.0 billion in 2007-08).

The *vacant land* categories consist primarily of individual blocks of land purchased for single dwelling construction. It also includes broadacre land for residential subdivision and multiple-dwelling residential developments (such as townhouses and units). In 2008-09, 988 vacant land proposals were approved (a 41 per cent decrease on the 1,667 proposals in 2007-08), with proposed investment of $2.7 billion ($3.9 billion in 2007-08).

The *new dwellings* and *off-the-plan* category consists of applications by individuals to acquire newly constructed dwellings directly from developers and applications by developers to sell up to 50 per cent of new residences to foreign interests. If a developer is given approval, individuals need not apply for approval. Under the new screening arrangements there are no restrictions on the number of off-the-plan dwellings in a new development which may be sold to foreign persons, provided that the developer markets the dwellings locally as well as overseas (that is, the dwellings cannot be marketed exclusively overseas).

In 2008-09, 954 new dwelling proposals from individuals were approved, involving acquisition costs of $600 million (compared with 1,043 proposals and $662 million in 2007-08). There were 235 advance off-the-plan approvals to developers covering sales in new multi-unit residential developments (compared with 324 in 2007-08). This corresponded to a reduction in approval value of 42 per cent, down from $9.5 billion in 2007-08 to $5.5 billion in 2008-09.

Developed property for *redevelopment* involves the acquisition of existing property for the purpose of demolition and construction of new residential dwellings. The number of redevelopment proposals declined by 29 per cent with 73 approvals in 2008-09 (compared with 103 in 2007-08). The proposed investment associated with these approvals was $1.1 billion in 2008-09 ($1.6 billion in 2007-08).

Comparative data 2007-08 and 2008-09

The changes to residential real estate came into effect on 1 April 2009. Table 2.10 compares the number of investment proposals approved, and proposed investment, in residential real estate in the period 1 July 2007 to 31 March 2008 and in the period 1 July 2008 to 31 March 2009, when the same reporting requirements for residential real estate applied. Both the number of approvals and proposed value of investments were lower in the latter period. This may reflect the impact of the global financial crisis.

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8 The acquisitions of house and land packages, where construction has not commenced, are treated as vacant land for development rather than falling within the off-the-plan category.

Table 2.10: Comparison of investment in residential real estate by expenditure and number of proposals approved in the period 1 July 2007 to 31 March 2008 and 1 July 2008 to 31 March 2009

	1 July 2007 - 31 March 2008		1 July 2008 - 31 March 2009	
	Number of Approvals	Proposed Investment $b	Number of Approvals	Proposed Investment $b
Residential				
Existing residential real estate	*3,021*	*2.56*	*2,424*	*2.46*
For development				
- vacant land	1,250	2.96	784	2.40
- new dwellings(a)				
Sub-total new dwellings	*1,025*	*7.62*	*923*	*5.74*
- redevelopment	78	1.21	53	1.06
- annual programs	5	1.01	6	2.17
Sub-total 'For development'	*2,358*	*12.80*	*1,766*	*11.37*
Total residential	**5,379**	**15.36**	**4,190**	**13.83**

(a) The 'new dwellings' category was previously referred to as 'off-the-plan'.
Note: Totals may not add due to rounding.

Table 2.11 shows the number of real estate approvals in the last quarter of 2008-09 (April to June 2009) when the new screening arrangements became fully operational.

Table 2.11: Investment in residential real estate by type of expenditure and number of proposals approved in the period 1 April to 30 June 2009

	Number of approvals	Acquisition cost $b	Development expenditure $b	Proposed investment $b
Residential				
Developed				
- existing residential property	33	0.03	-	0.03
- annual programs	-	-	-	-
Sub-total 'Developed'	*33*	*0.03*	-	*0.03*
For development				
- vacant land	204	0.19	0.13	0.32
- new dwellings(a)				
- individual purchases	262	0.17	-	0.17
- developer 'off-the-plan'	4	0.18	-	0.18
Sub-total 'new dwellings'	*266*	*0.34*	-	*0.34*
- redevelopment	20	0.03	0.02	0.05
- annual programs	2	0.41	-	0.41
Sub-total 'For development'	*492*	*0.97*	*0.14*	*1.11*
Total residential	**525**	**1.00**	**0.14**	**1.14**

(a) The 'new dwellings' category was previously referred to as 'off-the-plan'.
Note: Totals may not add due to rounding.
'-' indicates a figure of zero.

Commercial real estate

Developed

In 2008-09, there were 71 approvals to purchase **developed commercial** real estate (for example, shopping centres, office buildings and warehouses), a 21 per cent reduction from the 90 approvals in 2007-08. The associated proposed investment was $5.8 billion, about one third of the $16.5 billion proposed investment in 2007-08. Of this, 27 per cent was attributed to the acquisition of beneficial interests in managed investment funds holding land assets that exceeded 50 per cent of its total assets, rather than direct acquisitions of legal title to the land. This data reports only part of the total foreign investment that would have occurred in commercial real estate as some acquisitions, including of non-vacant, non-heritage listed commercial property valued below $50 million are exempt.

For development

During 2008-09, there were 42 approvals to purchase **commercial land for development**, compared with 93 approvals in 2007-08. These approvals involved proposed investment of $2.8 billion, including $1.5 billion in development expenditure. This represented a substantial reduction on the $8.6 billion total proposed investment reported for 2007-08. However, it should be noted that 2007-08 was at a peak in recent

years for investment in this type of real estate. The proposed investment in 2008-09 was more in line with the longer term trend in proposed investment in this sector.

There were no rejections of proposed acquisitions of developed commercial property or commercial real estate for development by foreign persons in 2008-09 (none in 2007-08).

Annual programs

The '**annual program**' arrangements allow foreign persons to apply for an annual approval for real estate acquisitions up to a specified global monetary limit. Such an approval relieves them of the requirement to seek separate approvals for individual real estate acquisitions within the approved value and the approval year. Approvals are subject to the condition that applicants subsequently report on the actual acquisitions completed and any associated development.

In 2008-09, a total of 19 annual programs were approved with proposed investment of $4.9 billion, compared with 31 annual programs and proposed investment of $6.4 billion in 2007-08. The reduction of $1.5 billion on the 2007-08 proposed investment was accountable by: a decrease of $2.1 billion for developed commercial property, a decrease of $0.8 million for commercial land for development and an increase in the value of annual programs in the residential sector of $1.5 billion (reflecting an increase of $0.2 million for developed real estate and $1.2 billion for real estate for development).

During 2008-09, seven annual program approvals involved acquisitions of developed residential real estate with proposed investment of $0.7 billion (13 approvals to the value of $0.4 billion in 2007-08). Such approvals generally involve foreign mining companies acquiring housing for employees in rural areas. Eight approvals were made for the purchase of vacant residential real estate for development (six in 2007-08) involving proposed total investment of $2.6 billion, representing a doubling of the $1.3 billion in 2007-08.

The development expenditure associated with annual programs in the 'for development' categories did not always reflect the policy requirement applying during 2008-09 that at least 50 per cent of the acquisition cost is spent on development. This is because a number of approvals were for acquisitions of property which were not intended for development for various reasons, such as the land was to be acquired for use as:

- a 'buffer zone', for example, surrounding an existing mine or quarry; or
- a tree plantation, including as part of a 'carbon sinks' program.

As with advance off-the-plan approvals for developers, the Board's figures for annual program approval values overstate the likely extent of actual foreign purchases. The

value of investment reported against annual program approvals represents the maximum amount the foreign person may acquire under the program.

Table 2.12: Investment in commercial real estate by type of expenditure and number of proposals approved in 2008-09

	Number of approvals	Acquisition cost	Development expenditure	Proposed investment
		$b	$b	$b
Developed				
- existing commercial property	70	5.15	0.00	5.15
- annual programs	1	0.60	-	0.60
Sub-total 'Developed'	71	5.75	-	5.75
For development				
- vacant commercial property	39	0.24	1.50	1.73
- annual programs	3	1.02	-	1.02
Sub-total 'For development'	42	1.25	1.50	2.75
Total commercial	113	7.00	1.50	8.50

Real estate by location of investment

Table 2.13 provides details of proposed investment in the real estate sector, according to the state and territory location of the investment. During 2008-09, Queensland was the main location of proposed real estate investment with 24 per cent of the total amount approved (compared with 18 per cent in 2007-08), followed by New South Wales and Victoria which accounted for approximately 17 per cent and 15 per cent respectively (compared with 16 per cent and 21 per cent in 2007-08).

Table 2.13: State distribution of proposed investment in real estate in 2008-09

Location	Number of approvals	Residential		Commercial		Total
		Developed	For development	Developed	For development	
		$b	$b	$b	$b	$b
Various(a)	40	0.69	2.67	3.36	1.06	7.78
QLD	1,093	0.35	4.19	0.21	0.77	5.51
NSW	956	0.50	1.71	1.01	0.70	3.92
VIC	1,562	0.52	2.55	0.47	0.09	3.63
WA	672	0.27	1.08	0.29	0.03	1.66
SA	403	0.14	0.18	0.05	0.11	0.47
ACT	45	0.01	0.02	0.32	0.01	0.36
NT	20	0.01	0.02	0.04	-	0.06
TAS	36	0.01	0.02	-	-	0.03
Total	**4,827**	**2.49**	**12.43**	**5.75**	**2.75**	**23.42**

(a) Comprises approved proposals where the investment is to be undertaken in more than one State or Territory.

Note: Totals may not add due to rounding.
'-' indicates a figure of zero to less than $5 million.

Approvals by country of investor

Proposed investment in 2008-09 by selected country, disaggregated by sector, is shown in Table 2.14. The US was again the largest source of proposed foreign investment in Australia. The other major sources of foreign investment were China, Japan, the United Kingdom (UK), France and Switzerland.

Approved investment from the US fell by 20 per cent from $49.5 billion in 2007-08 to $39.6 billion in 2008-09. Proposed investment was primarily in the mineral exploration and development and services sectors, accounting for 91 per cent of total US investment. The US was the leading nationality for foreign investment in the services sector, accounting for 51 per cent of investment in that sector.

China was Australia's second largest investor in 2008-09 with $26.6 billion. Investment in the mineral exploration and development sector accounted for $26.3 billion, representing 99 per cent of all Chinese investment in Australia. This was dominated by one proposed investment of $19.8 billion, representing 74 per cent of the total Chinese investment.

Japan was the third largest investor in 2008-09 with total proposed investment of $22.1 billion. Japan's principal sector for investment was the mineral exploration and development sector, accounting for $17.3 billion and representing 78 per cent of that country's proposed investment.

The UK recorded the fourth largest amount of proposed investment in 2008-09, with $20.3 billion. Of this proposed investment, $7.3 billion or 36 per cent was in the mineral exploration and development sector. The UK was the leading source of foreign investment in the finance and insurance sector, with proposed investment accounting for 40 per cent of total proposed investment from all sources in this sector and 21 per cent of the UK's total proposed investment. During 2008-09 a number of foreign governments provided substantial financial support to various banks within their jurisdictions to ensure there was not a collapse of global financial markets.

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Table 2.14: Approvals by country of investor in 2008-09 — industry sector

Country(a)	Number of approvals(f)	Agriculture forestry & fishing $m	Finance & insurance $m	Manufacturing $m	Mineral exploration & development $m	Commercial real estate $m	Resource processing $m	Services $m	Tourism $m	Total $m
US	95	100	1,675	1,884	19,798	*	0	16,094	28	39,579
China(b)	57	-	43	82	26,254	*	162	54	5	26,599
Japan	46	238	541	3,311	17,329	*	353	336	-	22,108
UK	72	402	4,336	4,966	7,336	*	141	2,878	226	20,285
France	30	-	839	1,030	4,702	*	-	907	-	7,478
Switzerland	27	1	117	4,242	425	*	990	603	4	6,382
Canada	15	1,600	-	-	106	*	-	4,185	-	5,891
Germany	49	-	244	1,913	153	*	-	2,968	-	5,278
India	7	-	-	281	3,828	*	-	82	-	4,191
Malaysia	21	-	-	-	2,757	*	-	142	-	2,899
Netherlands	17	315	548	-	1,043	*	-	277	-	2,183
NZ	17	-	-	130	1,314	*	-	521	70	2,035
Singapore	25	-	1,154	182	108	*	-	414	176	2,034
Brazil	2	-	-	-	2,000	*	-	-	-	2,000
Hong Kong	10	-	-	38	1,225	*	-	500	-	1,763
Other EU	17	-	258	756	40	*	155	378	120	1,707
Thailand	9	-	-	-	1,115	*	-	-	155	1,270
Other(c)	16	-	48	176	104	*	-	-	204	533
South Africa	12	-	-	400	-	*	-	26	-	426
Sth Korea	14	-	-	-	350	*	-	-	-	350
United Arab Emirates	6	127	10	-	-	*	-	151	-	288
Other ASEAN	3	-	-	-	122	*	-	-	70	192
Not allocated(d)	1	-	-	-	-	8,500	-	-	-	8,500
Sub-total	*568*	*2,783*	*9,814*	*19,390*	*90,110*	*8,500*	*1,801*	*30,518*	*1,058*	*163,973*
Australia(e)	36	-	1,068	-	512	*	-	1,155	-	2,736
Total	**604**	**2,783**	**10,882**	**19,390**	**90,622**	**8,500**	**1,801**	**31,673**	**1,058**	**166,709**

Note: Totals may not add due to rounding.
'-' indicates a figure of zero, '*' indicates that the column total has not been broken down into individual countries.
See Notes on page 38.

Notes applying to Table 2.14

(a) Includes overseas territories.

(b) China excludes Special Administrative Regions and Taiwan.

(c) Other comprises all other countries excluding Australia.

(d) The investment identified as unallocated includes investments in commercial real estate by property trusts which have a range of foreign investors including pension funds, superannuation funds, and equity funds.

(e) Comprises proposals where the investment is from more than one country, such as in joint venture arrangements.

(f) These figures indicate the total number of proposals in which investors from the particular country have an interest. Those involving investment originating from more than one country count as one proposal for each of the countries concerned.

CHAPTER 3

Overview of the *Foreign Acquisitions and Takeovers Act 1975*

Overview of the *Foreign Acquisitions and Takeovers Act 1975*

Introduction

This chapter provides an overview of the main provisions of the *Foreign Acquisitions and Takeovers Act 1975* (the FATA) as at March 2010. The FATA and the *Foreign Acquisitions and Takeovers Regulations 1989* (the Regulations) provide legislative support for the Government's foreign investment policy. A copy of the FATA, the Regulations and a summary of the policy are available on the FIRB website at www.firb.gov.au.

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

- acquire, or to increase, a substantial shareholding[1] in, or acquire a controlling interest in the assets of, a prescribed Australian corporation valued above the relevant thresholds;[2] or

- acquire an interest in Australian urban land.[3]

The FATA does not provide the Treasurer with a power to 'approve' investment proposals. Rather, it empowers the Treasurer to prohibit a proposal that he decides would be contrary to the national interest (sections 18, 19, 20, 21 and 21A), or to raise no objections subject to conditions considered necessary to remove national interest concerns (section 25). It also permits the Treasurer to make orders for foreign persons to divest shares, assets or interests in urban land where the acquisition is decided to be contrary to the national interest.

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1 A substantial interest is defined by the FATA as where a person, alone or together with any associate(s), is in a position to control not less than 15 per cent of the voting power, or holds interests in not less than 15 per cent of the issued shares, of a corporation.

An aggregate substantial interest is where two or more persons together with any associate(s), are in a position to control not less than 40 per cent of the voting power, or hold interests in not less than 40 per cent of the issued shares, of a corporation.

2 The thresholds were increased in late 2009 following a review of all thresholds. US investors are subject to different thresholds. The thresholds are indexed annually.

3 Australian urban land is defined as any land within Australia on which a primary production business is not being conducted. Consequently, this definition encompasses all land in Australia that is not being used for primary production, regardless of whether it is in an urban area.

The national interest, and hence what might be contrary to it, is not defined in the FATA. The FATA confers upon the Treasurer the power to decide in each case whether a particular proposal would be contrary to the national interest. The Government's foreign investment policy statements set out guidelines on national interest matters in relation to real estate and other industry sectors regarded as sensitive. Ordinarily a proposal that does not meet the requirements set out in the policy would be regarded as being, prima facie, contrary to the national interest and hence subject to rejection.

The FATA also requires the prior notification of certain proposals, namely where a foreign person proposes to acquire a substantial shareholding in a prescribed Australian corporation (section 26) or certain interests in Australian urban land (section 26A).

Notification

Section 26 makes it compulsory for a foreign person to notify the Treasurer of a proposal to acquire or increase a substantial shareholding in a prescribed Australian corporation where the total assets exceed, or the transaction values it above, the thresholds set under the Regulations.

Section 26A makes it compulsory for a foreign person to notify the Treasurer of a proposal to acquire or increase an interest in Australian urban land, unless the acquisition is exempt under the Regulations.

Substantial penalties apply for non-compliance with the notification provisions of sections 26 and 26A. On conviction, a natural person may be subject to a fine not exceeding 500 penalty units (currently $110 per unit) or imprisonment for a period not exceeding two years, or both. A corporation may be subject to a fine not exceeding 500 penalty units.

Section 25 applies where the Treasurer has received a notice from a person, including those notices that are required under sections 26 and 26A. It also provides an avenue for the notification of proposals falling within the scope of the FATA or the policy, but which are not subject to compulsory notification under the FATA. These include offshore acquisition of interests, acquisitions of business assets, acquisitions of shares in prescribed Australian corporations that are less than a substantial shareholding, and investments by a sovereign government or a government-related entity.

Formal notification of a proposal under sections 25, 26 or 26A must be made in accordance with the forms prescribed in the *Foreign Acquisitions and Takeovers (Notices) Regulations 1975* (forms available at www.firb.gov.au). Receipt of a valid notice activates the commencement of the 30-day statutory examination period. If the Treasurer does not take action (under sections 18, 19, 20, 21A, 22 or 25) within this period, the power to prohibit the proposal or to impose conditions expires. A further period of 10 days is available to publish any order in the Commonwealth of Australia *Gazette* and to notify the parties. The 30-day examination period may be extended by

up to a further 90 days by the issue of an Interim Order (section 22 and subsection 25(3)) which prohibits the proposal for that period.

The Treasurer's powers

The powers available to the Treasurer under the FATA in relation to foreign investment proposals are primarily contained in sections 18, 19, 20, 21, 21A and 25.

Section 18 deals with proposals involving the acquisition of shares in prescribed corporations which carry on an Australian business (unless the transaction values it, or its total assets are, below the thresholds). Where an acquisition would result in a foreign person acquiring a controlling interest, and the Treasurer concludes that this would be contrary to the national interest, it may be prohibited by the issue of an order (known as a Final Order). The Treasurer's powers under the section apply irrespective of whether the controlling interest is being acquired by a foreign person, or by an additional or different, foreign person(s).

Sections 19, 20 and 21 confer upon the Treasurer powers similar to section 18 but in respect of other types of acquisitions and arrangements. Section 19 deals with acquisitions of business assets, section 20 with arrangements relating to the corporation's governance and operation such as board representation or alterations to constituent documents such as the articles of association, and section 21 with the leasing or hiring of assets, management agreements or profit sharing arrangements.

Section 21A deals with proposals to acquire interests in Australian urban land. It empowers the Treasurer to examine proposed acquisitions of interests in Australian urban land and make an order prohibiting those that he considers would be contrary to the national interest.

The FATA applies to acquisitions, or proposed acquisitions, of interests in 'Australian urban land' (see section 12A). Consequently, section 21A applies not only to direct purchases of Australian urban land, but also to interests in such land, for example mortgage, or certain leasehold interests. It also applies to the purchase of shares in companies and units in trusts (Australian urban land corporations and trust estates), where more than half of its assets are in the form of Australian urban land, and participation in profit sharing agreements in relation to land.

The Treasurer's powers in section 21A to take action against acquisitions of interests in Australian urban land are not limited to acquisitions of what the Treasurer considers to be a controlling interest as is the case in sections 18 to 21. Failure to notify an acquisition of an interest in Australian urban land is an offence under section 26A of the FATA, unless exempt under the Regulations.

Sections 18, 19, 20, 21 and 21A give the Treasurer the power to order the divestment or unwinding of an investment where the acquisition is subsequently found to have been contrary to the national interest.

Section 25 allows conditions to be applied which are considered necessary to remove national interest concerns that would otherwise arise. This power is available where the Treasurer can make an order under sections 18, 19, 20, 21 and 21A.

Foreign-to-foreign transactions

Transactions involving acquisitions by foreign persons of Australian businesses or assets that are already foreign-owned or controlled (referred to as 'foreign-to-foreign' transactions), are subject to the FATA. Such transactions are of two broad types: indirect acquisitions where a foreign company acquires another, or part of it, and in so doing also acquires an interest in its Australian business or assets (referred to as an 'offshore acquisition'); and direct acquisitions by a foreign person of an already foreign owned or controlled Australian business or assets.

For the FATA to apply to a foreign-to-foreign transaction, the Australian business or assets of the target company must be valued above the applicable thresholds set under the Regulations. These transactions are assessed against the policy applicable to the relevant sector of the economy. Such proposals normally do not raise issues that might make the transaction contrary to the national interest.

Prior approval for contractual arrangements

The FATA makes it an offence to acquire, or increase, a substantial shareholding or certain interests in Australian urban land without providing prior notification to the Treasurer (sections 26 and 26A). Consequently, parties proposing to enter into such transactions should ensure that the relevant agreements are conditional on foreign investment approval, or alternatively ensure they seek prior approval. This applies to situations where the acquirer intends to make an offer, tender or bid for shares or real estate. Entering an agreement that is not conditional may result in the acquisition of an interest that is in breach of the notification provisions of the FATA and also may expose the acquirer to possible prosecution and divestment action.

Foreign control

Under the FATA, a substantial interest in an Australian corporation is deemed to be a controlling interest unless the Treasurer is satisfied that the acquirer is not in a position to determine the policy of the corporation (see section 9). A variety of factors and considerations other than simply a person's share ownership may be relevant to the Treasurer's consideration of where ultimate control of a corporation lies. These factors are also relevant to sections 19, 20 and 21 which relate to control of business assets and arrangements relating to the directorate and governance of corporations. These factors and considerations include:

- voting rights attached to the various shareholdings and the rights of shareholders, including in relation to representation on the Board or controlling body;

- the distribution and composition of share holdings;

- that all rights over future shares and potential voting power are treated as having been exercised at the time the agreement is entered into, such as the issuing of convertible notes; and

- arrangements or agreements between shareholders and a corporation or controlling body that would enable a shareholder to exercise a measure of control, including through the provision of finance, technology, materials, markets and marketing or management expertise.

The extent to which each of these or other factors is relevant would depend on the particular circumstances of each case. The determination of control is undertaken on a case-by-case basis as contemplated by the relevant provisions of the FATA.

Enforcement provisions

If the Treasurer raises no objections to a proposal subject to conditions and the parties do not comply with the conditions, they may commit an offence under subsection 25(1C) of the FATA. Failure to comply with an order made by the Treasurer constitutes an offence under section 30. The FATA empowers the Treasurer to make orders to prohibit schemes entered into for the purpose of avoiding its provisions (section 38A). In addition, the provision of false or misleading information can constitute an offence under the *Crimes Act 1914* and Chapter 7 of the *Criminal Code Act 1995*.

Other aspects of foreign investment policy

Foreign portfolio shareholdings

As indicated above, under the FATA, a substantial interest in a corporation is deemed to be a controlling interest unless the Treasurer is satisfied to the contrary having regard to the circumstances.

An interest less than a substantial shareholding could be regarded as being a controlling shareholding under foreign investment policy. This is because it may still permit control of, or allow the holder to exert material influence over, the company. This is considered on a case-by-case basis. The considerations would include:

- A person with less than a substantial interest is able to exert a measure of control through representation on the board of the company and/or is able to influence its policy or operations through other means, for example, the provision of technology, finance or marketing links. Such shareholdings may be taken into account in calculating the level of foreign ownership of the company. Other arrangements affecting control of the company may also come within the scope of the FATA.

- Foreign shareholdings (including portfolio shareholdings) that aggregate to 40 per cent or more in a company or venture, which the FATA defines to be a controlling interest unless the Treasurer is satisfied to the contrary.

- Where more than half the assets of a company or trust are in the form of Australian urban land (that is, it is an Australian urban land corporation or trust estate), any proposed acquisition by foreign persons is subject to the FATA.

Foreign government investment in Australia

Special considerations can arise in respect of proposals by foreign governments or their agencies to invest in Australia. Where such investments are not subject to the FATA, the parties are still required under the policy to notify and seek approval of direct investments, irrespective of the size of the proposed investment.

These proposals are considered on a case-by-case basis, having regard to the principles announced by the Treasurer on 18 February 2008 as to whether:

- an investor's operations are independent from the relevant foreign government;

- an investor is subject to and adheres to the law and observes common standards of business behaviour;

- an investment may hinder competition or lead to undue concentration or control in the industry or sectors concerned;

- an investment may impact on Australian Government revenue or other policies;

- an investment may impact on Australia's national security; and

- an investment may impact on the operations and directions of an Australian business, as well as its contribution to the Australian economy and broader community.

Amendments to the *Foreign Acquisitions and Takeovers Act 1975*

The *Foreign Acquisitions and Takeovers Act 1975* (as amended) received Royal Assent on 12 February 2010. It improves the integrity of Australia's foreign investment screening regime by ensuring that the Treasurer has the capacity to examine substantial investment proposals that could potentially raise national interest concerns.

The use of innovative and increasingly complex financing arrangements has been a growing feature of investment activity over recent years. While these types of investment arrangements may have a solid commercial basis, they can have the effect of delivering influence or control over Australian companies through a variety of ways that were not envisaged when the *Foreign Acquisitions and Takeovers Act 1975* (the Act) was being drafted.

The Amendment clarifies the operation of the Act by explicitly requiring foreign investors to notify the Treasurer where there is a possibility that the type of arrangement being used will deliver influence or control over an Australian company, either currently or at some time in the future. The Amendment clarifies the definition of substantial interest by expanding the definition of voting power so that it covers the number of votes that could be cast if it is assumed that a future right is exercised, and by clarifying the section of the Act dealing with interests in shares.

The *Foreign Acquisitions and Takeovers Regulations 1989* (the Regulations) were amended to coincide with the Amendments to the Act. The Regulations ensure that Australian companies are not inadvertently treated as foreign companies under the Act by virtue of the expanded definition of substantial interest.

The changes to the Act and the Regulations apply retrospectively from 12 February 2009. This is the date that the Treasurer announced the amendments. The Act provides transitional arrangements to ensure that foreign investors are not adversely impacted by the amendments.

Taxation

Consistent with the Government's general welcoming view on foreign investment, Australia's tax laws are designed to ensure they do not provide an unjustifiable disincentive to investing in Australia. The Government requires that commercial investments by foreign governments or government-related agencies be structured in a manner that enables all normal taxes and charges to be levied, and avoids questions of sovereign immunity arising. However, this approach is necessarily balanced by tax measures to prevent cross-border tax avoidance and evasion and to ensure that financing arrangements associated with foreign investment reflect normal commercial practice.

Further information regarding the application of Australia's tax laws is available on the Australian Taxation Office website, which can be accessed at www.ato.gov.au.

CHAPTER 4

Australia's international investment position

Australia's international investment position

Introduction

One of the Government's principal policy objectives is to generate and capture benefits for the Australian community through international trade and investment liberalisation. This is pursued through a multifaceted policy involving complementary multilateral, regional and bilateral engagement.

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

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

Over the past two decades, growth in worldwide flows of foreign direct investment (FDI) has been particularly strong. This growth in FDI largely reflects the worldwide relaxation of trade and investment controls, together with advancements in information technologies, communications and transport, and the emergence of global production chains. The global financial crisis has impacted adversely on global capital flows. According to OECD estimates, member countries' outflows of FDI fell by 19 per cent while inflows fell by 35 per cent in 2008. These OECD estimates show that FDI inflows into Australia rose by 7 per cent while outflows from Australia rose by 113 per cent in 2008.

Australia has traditionally relied on inward FDI to meet the shortfall between domestic saving and the level of domestic investment. Foreign investment supplements local savings, thereby supporting higher rates of economic growth and employment levels which in turn improves the wellbeing of the Australian people. Inward FDI also continues to play a significant role in making Australian industry internationally competitive, and thereby contributing to export growth, facilitating access to new technologies, financing new and often risky innovations, and providing opportunities for global integration and networking.

Outward FDI enables Australian firms to expand their business beyond the potential constraints imposed by the limited size of the domestic market. By extending their market presence and access to resources, expertise and technology in other markets, Australian firms are able to become more efficient and competitive in global markets. Outward FDI also has a multiplier effect through stimulating the demand for goods and services provided by component and other input suppliers.

Australia's international investment position

This section summarises trends in foreign investment in Australia and Australian investment abroad using Australian Bureau of Statistics (ABS) data.[1] 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 position is compiled in accordance with the relevant international statistical standards promulgated by the OECD and the International Monetary Fund. This data is a measure of the actual cross-border transactions and the level of foreign investment held at a particular time. By contrast, FIRB statistics relate to proposals submitted for approval, regardless of the source of finance or whether proposals were actually implemented. These differences are explained in Chapter 2.

Foreign investment levels[2]

According to ABS statistics,[3] the stock of foreign investment in Australia at the end of December 2009 was $1,927.7 billion. This represents an increase of $124.6 billion over the level at the end of December 2008.

At the same time, the stock of Australian investment abroad was $1,159.1 billion. This represents an increase of $69.8 billion over the stock at the end of December 2008.

Foreign direct investment levels by country

Chart 4.1 depicts recent trends in FDI levels between Australia and its five most important FDI partners: the US, the United Kingdom (UK), Japan, New Zealand and the European Union (EU) (other than the UK). The latest ABS data on foreign direct investment levels by country is for 2008.

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1 As ABS data is subject to periodic revision, data included in the current report may differ from that published for the same period in previous reports.

2 Prior to 2005-06, foreign investment levels were reported on a calendar year basis.

3 Source: ABS cat. no. 5302.0 Balance of Payments and International Investment Position, Australia, December Quarter 2009.

The US is Australia's single largest source of inward FDI and the most important destination for Australian FDI abroad. Almost a quarter of all FDI in Australia comes from the US and approximately 43 per cent of all Australian direct investment abroad flows to the US.

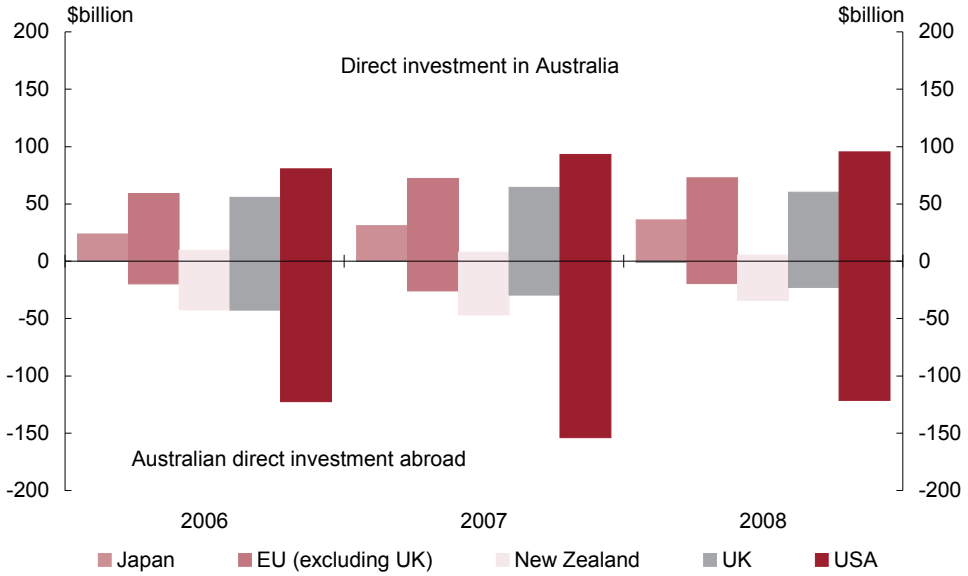
The UK has traditionally been Australia's other major source of FDI. At the end of 2008, $60 billion, or approximately 15 per cent, of the level of FDI in Australia originated from the UK. The level of Australian direct investment in the UK was $23 billion at the end of 2008.

The level of Japanese FDI in Australia at the end of 2008 was $36 billion. However, Australian FDI in Japan remains at a very low level.

The level of Australian direct investment in New Zealand at the end of 2008 was $34 billion. New Zealand direct investment in Australia was $5 billion at the end of 2008.

The level of EU (excluding the UK) direct investment in the Australian economy grew to $73 billion by the end of 2008. Australian direct investment in the EU (excluding the UK) was $20 billion at the end of 2008.

Chart 4.1: Level of foreign direct investment by country



Source: ABS cat. no. 5352.0 International Investment Position, Australia: Supplementary Country Statistics 2009.

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 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 flows and stocks 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 cross-border investment in equity and debt securities other than direct investment. Financial derivatives are linked to a specific financial instrument or indicator, or to a particular commodity. 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 Australian Treasury for use in financing payment imbalances or intervention in foreign exchange markets.

Table 4.1 provides a breakdown of the flow of foreign investment over the past five years measured by ABS statistics. In 2008-09, the inflow of foreign investment into Australia was $101.7 billion. The outflow of Australian investment abroad was $62.8 billion.

Table 4.1: Foreign investment flows 2004-05 to 2008-09

	2004-05(a)	2005-06	2006-07	2007-08	2008-09
	$b	$b	$b	$b	$b
Australian investment abroad(b)					
Direct investment					
Equity and reinvested earnings	49.9	-27.4	-19.6	-21.0	-21.5
Other capital	-1.9	-2.3	-14.8	-6.4	-10.9
Portfolio investment					
Equity	-14.3	-26.5	-38.5	-40.7	4.8
Debt	-16.4	-33.5	-39.0	-24.1	-0.1
Derivatives	23.5	13.0	14.4	-4.1	28.7
Other investment(c)	-2.6	-18.2	-20.9	-31.3	-51.9
Reserve assets	-8.1	-5.6	-20.1	44.3	-11.9
Total Australian investment abroad	*30.1*	*-100.5*	*-138.5*	*-83.3*	*-62.8*
Foreign investment in Australia(b)					
Direct investment					
Equity and reinvested earnings	-6.1	16.8	24.4	35.6	41.3
Other capital	11.9	7.3	21.6	20.7	6.2
Portfolio investment					
Equity	-37.5	18.4	32.2	3.1	44.8
Debt	69.8	106.6	110.0	58.7	6.9
Derivatives	21.9	16.5	11.3	-3.6	-35.3
Other investment(c)	12.2	22.7	21.7	41.7	37.8
Total foreign investment in Australia	*72.2*	*188.3*	*221.2*	*156.2*	*101.7*
Net foreign investment	**102.3**	**87.8**	**82.7**	**72.9**	**38.9**

(a) The figures for 2004-05 were significantly affected by one particular transaction whereby a major corporate reorganisation was recorded both as a transaction reducing Australian investment abroad and also reducing direct investment in Australia. The net effect of this transaction was zero.

(b) 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.

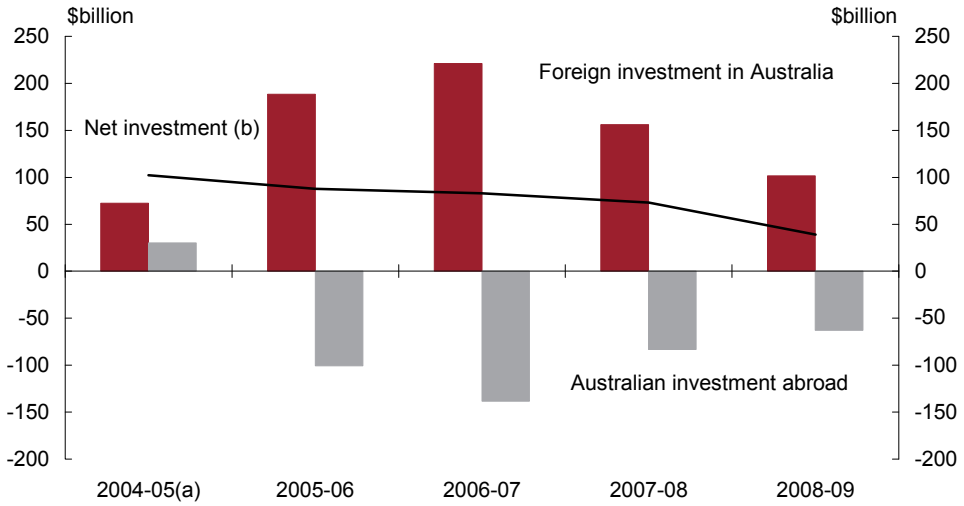
(c) Other investment includes all other investment.

Note: Figures may not add due to rounding.

Source: ABS cat. no. 5302.0 Balance of Payments and International Investment Position, Australia, September Quarter 2009, Table 75, Financial Account — Financial Year.

Chart 4.2 summarises major trends in foreign investment flows using the data in Table 4.1. It indicates that Australia remains a net importer of capital.

Chart 4.2: Foreign investment flows 2004-05 to 2008-09



(a) The figures for 2004-05 were significantly affected by one particular transaction whereby a major corporate reorganisation was recorded both as a transaction reducing Australian investment abroad and also reducing direct investment in Australia. The net effect of this transaction was zero.

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

Source: ABS cat. no. 5302.0 Balance of Payments and International Investment Position, Australia, September Quarter 2009, Table 75, Financial Account — Financial Year.

Appendix A

Media releases and policy statements

Media releases and policy statements

1. Speech by the Treasurer, the Hon Wayne Swan MP — The Global Foundation, Brisbane — 10 December 2009.

2. Speech by the Treasurer, the Hon Wayne Swan MP — Foreign Investment and the Long Road to Recovery — Thomson Reuters Newsmaker Series, Sydney — 4 August 2009.

3. Speech by the Treasurer, the Hon Wayne Swan MP — Australia, China and This Asian Century, Speech to the Australia-China Business Council, Melbourne — 4 July 2008.

4. Statement by the Assistant Treasurer, Senator the Hon Nick Sherry - Foreign Investment Proposal – Yanzhou Coal Mining Company Limited acquisition of Felix Resources Limited – 23 October 2009

5. Statement by the Treasurer, the Hon Wayne Swan MP — Foreign Investment Proposal — James Hardie Industries N.V. Corporate Restructure — 18 September 2009.

6. Statement by the Treasurer, the Hon Wayne Swan MP — Reforming Australia's Foreign Investment Framework — 4 August 2009.

7. Statement by the Treasurer, the Hon Wayne Swan MP — Foreign Investment Proposal — Anshan Iron and Steel Group Corporation (Ansteel) to acquire an additional shareholding in Gindalbie Metals Ltd — 8 May 2009.

8. Statement by the Treasurer, the Hon Wayne Swan MP — Foreign Investment Proposal — China Minmetals Non-ferrous Metals Co Ltd to acquire certain mining assets of OZ Minerals Ltd, but not including the Prominent Hill mine — 23 April 2009.

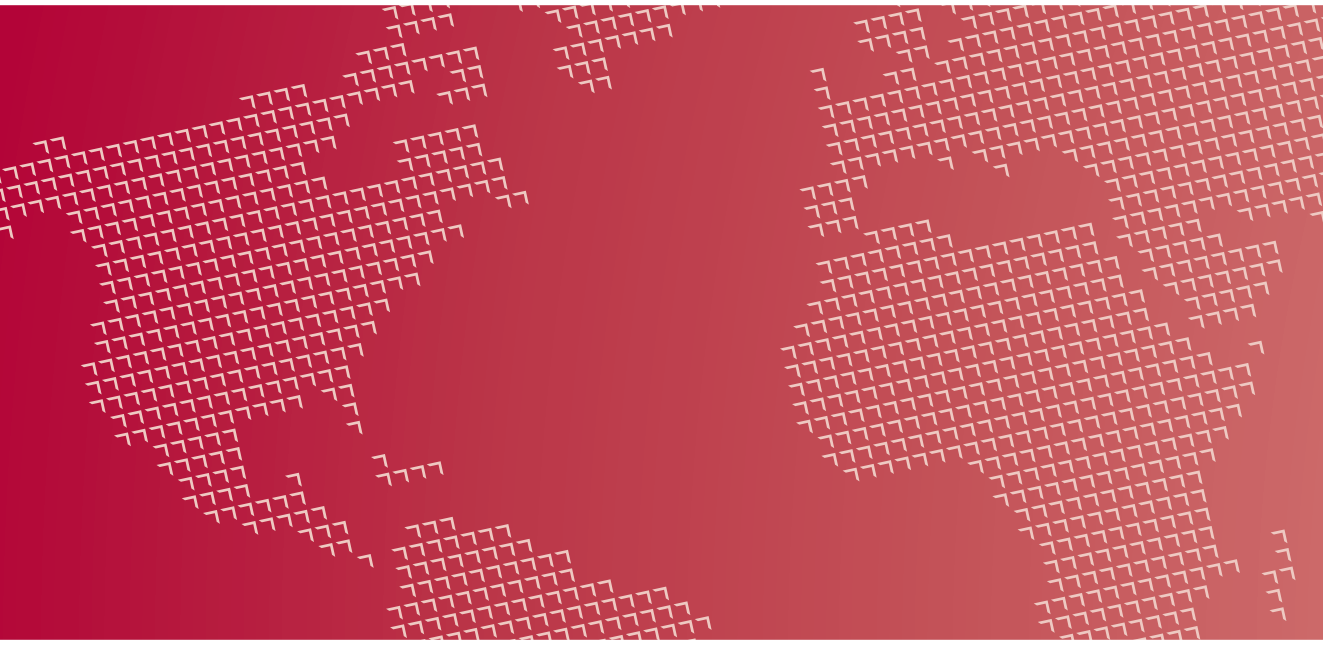
9. Statement by the Treasurer, the Hon Wayne Swan MP — Foreign Investment Proposal — Hunan Valin Iron and Steel Group for up to a 17.55 per cent shareholding in Fortescue Metals Group — 31 March 2009.

10. Statement by the Treasurer, the Hon Wayne Swan MP — Foreign Investment Proposal — China Minmetals Non-Ferrous Metals Co Ltd for 100 per cent of Oz Minerals Ltd — 27 March 2009.

11. Statement by the Treasurer, the Hon Wayne Swan MP — Amendments to Foreign Acquisitions and Takeovers Act — 12 February 2009.

12. Statement by the Treasurer, the Hon Wayne Swan MP — Foreign Investment Proposal — Sinosteel Corporation to acquire up to 49.9 per cent of Murchison Metals Ltd — 21 September 2008.

13. Statement by the Treasurer, the Hon Wayne Swan MP — Foreign Investment Proposal — Aluminium Corporation of China Limited (Chinalco) to acquire up to 14.99 per cent of the shares in Rio Tinto Plc, the London Stock Exchange listed arm of Rio Tinto Group — 24 August 2008.



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