

Foreign Investment Review Board

Functions of the Board

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

The main functions of the Board are:

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

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

Membership

There were two changes to the composition of the Board during 1997-98. Mr Ken Stone, AO retired from the Board with effect from 31 March 1998. Further, Mr Richard Murray succeeded Mr Tony Hinton as the Executive Member on 1 May 1998. As at 30 June 1998 the Board comprised three part-time members and a full time Executive Member.

Mr John Phillips, AM was appointed Chairman of the Board on 16 April 1997 for a term of five years. He has extensive high level experience in the public, finance and business sectors including the position of Deputy Governor of the Reserve Bank of Australia. His present responsibilities include Chairman, the Australian Gas Light Company, Chairman, IBJ Australia Bank Limited, and Deputy Chairman, Woolworths Limited.

Mr Graham Maguire was appointed to the Board in August 1993 for a term of five years. He was a Senator for South Australia in the Commonwealth Parliament between 1983 and 1993. During his term of office, he served as Chairman of the Senate Standing Committee on Foreign Affairs, Defence and Trade and was a member of the Joint Committee on Public Accounts. He is a Director of Airservices Australia and AVSUPER Pty Ltd and an Australia-India Council Board Member.

Ms Lynn Wood was appointed to the Board in April 1995 for a term of five years. Ms Wood has considerable business experience in financial services, including having been a Director of Schroders Australia Ltd. She has also served as a Director of the Investment Funds Association of Australia and as a Member of the Economic Development Council of New South Wales. Ms Wood is currently a Director of the New South Wales Lotteries Corporation and Sedgwick (Holdings) Pty Ltd.

Mr Richard Murray was the *ex officio* Executive Member of the Board at the close of 1997-98. He has been with Treasury since 1970 and has diverse experience across Treasury's various divisions. He was the Minister (Economic) in the Australian High Commission, London for the period August 1993 to January 1997.

Retirement of Mr Ken Stone, AO

Mr Ken Stone, AO was appointed to the Board in May 1984 and was Acting Chairman from October 1992 until April 1997. He was formerly the Secretary of the Victorian Trades Hall Council, Junior Vice-President of the Australian Council of Trade Unions and National Director of the Australian Trade Union Training Authority. The Board and the Government have extended their appreciation to Mr Stone for his dedicated service.

Relationship of the Executive to the Board

Executive assistance to the Board was provided by the Foreign Investment Review Branch of Treasury's Investment and Debt Division. During 1997-98 the Executive was headed by Mr Hinton, First Assistant Secretary of the International and Debt Division, until succeeded in that position by Mr Murray. The head of the Foreign Investment Review Branch to 2 February 1998 was Mr Peter Tormey until succeeded by Ms Janine Murphy. The Executive provides secretariat services for the Board, writes draft and final reports on proposals and is usually the first point of contact for foreign investment applicants.

In addition to its function as a secretariat for the Board, the Executive also advises the Government on general foreign investment policy matters, including Australia's participation in multilateral and bilateral international agreements on investment.

Review of Foreign Investment Policy

The Treasurer announced on 28 June 1996 a comprehensive schedule of legislative reviews to commence over the next four years, including a review of foreign investment policy.

The reviews are proposed to test consistency with the requirements of the national competition policy and examine costs imposed upon business. The review of foreign investment policy falls into the latter category.

In the context of the review the Government has made it clear that the general preclusion of foreign interests buying developed residential real estate will

Chapter 1

continue and any approval for foreign interests to acquire vacant land for development will be on the condition that continuous development commences within 12 months of approval.

During 1997–98 the Board continued to consider issues and to provide advice to the Treasurer on matters relevant to the review of foreign investment policy.

Administration of Foreign Investment Policy

The number of cases received in 1997-98 was 4,765 (4,544 in 1996-97). Of these 4,375 (4,201) were decided. Additionally, the Executive handled over 40,000 incoming telephone calls during the year with regard to specific potential proposals and the operation of foreign investment policy more generally.

Under the *Foreign Acquisitions and Takeovers Act 1975* statutory time limit for reaching a decision is 30 days, with up to a further ten days to notify the parties. There is scope for an interim order extending the period of examination for up to a further 90 days. In 1997-98 there were 111 (85) interim orders and 92 (110) final orders issued. Interim orders are usually sought where the applicant has failed to provide adequate information to assess the proposal against the national interest test within the 30 day statutory deadline. Final orders are issued where a proposal is inconsistent with Australia's foreign investment policy and not in the national interest, including where the applicant has failed to comply with conditions applying to a previously approved proposal.

In keeping with the Board's responsibility to foster an awareness and understanding of the Government's policy and to provide guidance to investors, the Board's Executive is readily available to meet with both potential foreign investors and Australian businesses to explain foreign investment policy and its application to particular proposals. The Board and the Executive are ready to comment on proposals in draft form.

The Executive welcomes direct contact from the general public seeking advice on foreign investment policy questions. Alternatively, information can be obtained from the Treasury website at <http://www.treasury.gov.au>. This

website is kept up to date and contains forms to be used when lodging an application.

Major proposals usually will be in the public domain and the Board welcomes submissions on them from third parties. Consideration of such submissions is an important part of the Board's examination process and its making of recommendations to the Treasurer or Assistant Treasurer.

In 1997-98 the Board produced a Service Charter (**Appendix E**), which is available as a brochure.

From time to time developments in market practices raise special issues for the administration of foreign investment policy. One current issue is the increasing use of option arrangements in the acquisition by foreign parties of interests in companies and real estate.

It has been the practice under foreign investment policy for a one year period to be available, from the date of approval, for completion of an approved acquisition. This approach has been justified on several grounds as it:

- ❖ limits potential difficulties should there be a change in foreign investment policy;
- ❖ reduces the likelihood that the nature of the proposal could change (eg proponent changing its activities, size, or ownership) without the possibility of re-assessment;
- ❖ places a limit on the time within which a foreign party is able to speculate on asset values (including urban land); and
- ❖ it is identical to the time within which development must occur on vacant land and thereby prevents foreigners from using options to circumvent the development condition.

However, there are some occasions where the normal working of the one year condition may be varied. An example is where the use of an option agreement is fundamental to the success of the proposal and is otherwise clearly not contrary to the national interest. In these situations an option agreement with more than one year to the exercise date may be approved, either outright or subject to certain conditions. Foreign investment policy guidelines have been amended to clarify this situation (see **Appendix A**).

Cost of the Board's Operations

Consistent with the proper discharge of its functions, the Board is concerned to ensure that its operating costs are minimised. Government expenditure on the Board in 1997-98 was some \$111,000, slightly higher than the revised previous year expenditure of \$103,000. Around 80 per cent of this expenditure was for remuneration of Board members; the remainder was for local travel, car hire, printing expenses and incidentals. Board members' fees are determined by the Remuneration Tribunal. Under the Remuneration Tribunal Act 1973, the Tribunal is required to make reports or determinations in respect of the remuneration and allowances of officers at intervals of not more than one year.

Government expenditure on the Executive was around \$2.3 million in 1997-98 compared with around \$1.7 million in 1996-97. This expenditure was mainly for salaries, including on-costs such as superannuation, with other expenses being incurred for travelling, printing and advertising. The total cost of foreign investment screening would also include a minor part of the expenditure of other Government authorities and agencies, at both the Commonwealth and State levels, that are consulted on proposals.

Reasons for the increase in Government expenditure on the Executive were that the cost of legal expenses and advertising services increased dramatically and a greater amount of short term overseas and domestic travel resulted from commitments associated with consultation on, and participation in, the now discontinued negotiations for developing a Multilateral Agreement on Investment.

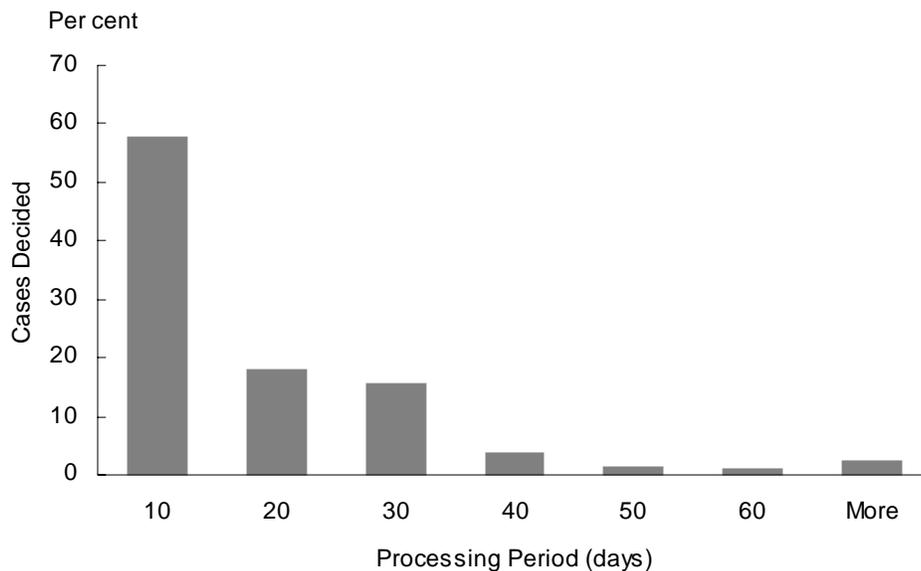
At 30 June 1998, there were 21 officers in the Foreign Investment Review Branch of Treasury. This compares with 18 officers at the end of June 1997.

1997-98 Outcomes

Minimising the impact on commercial decision making processes and ensuring proper consideration of cases against policy requirements continue to be important objectives of the administration of foreign investment policy. The Board continues to ensure that proposals are dealt with quickly and efficiently and every effort is made to avoid unnecessary interference in business decision making.

The information requirements for processing proposals have been designed to keep to a minimum the time taken (and hence the cost involved) in obtaining foreign investment approval. In 1997-98, 76 per cent of applications (3322) were decided within 20 days of receipt of a completed application (refer **Chart 1.1**); 91 per cent of cases were decided within 30 days. Factors which resulted in cases taking more than 30 days to process include delays in applicants providing necessary information and in demonstrating compliance with previous approvals, environmental considerations and the complexity or sensitivity of the case.

Chart 1.1: Processing Time for Cases Decided



Processing of Proposals

After proposals have been submitted to the Board or its Executive, the initial work is handled within the Foreign Investment Policy area of the Commonwealth Treasury. Within the Foreign Investment Policy area proposals will be allocated to one of three specialist units depending on the industry sector involved (broadly classified between primary, secondary and tertiary sectors) or in the case of commercial and residential real estate generally on the basis of the geographic location of the assets being acquired (see page 66 for more details).

Chapter 1

The Board considers reports prepared by the Executive on major proposals on a weekly basis. Formal meetings are held approximately every four weeks, with a telephone discussion between the Executive Member and the other Board members in each of the intervening weeks. Following examination of a report, the Board's views and recommendations are submitted by the Executive Member to the Treasurer or Assistant Treasurer. The Board's views need not be unanimous. For the more significant cases, the Executive Member usually meets with the Treasurer and the Executive also discusses cases with the Assistant Treasurer. Should a proposal raise important considerations and/or impinge on other ministerial responsibilities, the Treasurer may consult his colleagues or seek Cabinet's view.

The nature of a report and the level to which it is submitted for decision are normally determined by the features of the foreign investment proposal. In the case of significant proposals (because of their size, complexity or the policy issues raised), a full report to the Board is usually made for its consideration at a formal Board meeting prior to seeking the decision of the Treasurer or Assistant Treasurer. Where time constraints make a formal meeting impracticable the Board's involvement will be by telephone or other form of electronic communication.

There are also arrangements under which authority, for approval of certain types of proposals that do not involve issues of significance, is delegated to senior staff of the Executive.

Conclusions are reached only after examination of the proposal as submitted and necessary consultations to determine whether it conforms to the general and particular requirements of foreign investment policy including the proponent's fulfillment of conditions attached to past approvals. Proposals are blocked using foreign investment powers only in circumstances involving major national interest concerns. Reasons for rejecting substantial commercial proposals are published in press releases of the Treasurer (see **Appendix C**).

Consultation Arrangements

In the examination of large or otherwise significant proposals, State and Commonwealth Government departments and authorities with responsibilities relevant to the proposed activity of the foreign investor may be consulted. Consultation is undertaken on a strictly confidential basis to protect the information provided by the investor.

The Board acknowledges the assistance received during 1997-98 from the relevant Commonwealth and State departments and authorities whose advice and comments are important in assessing the implications of proposals. The Board regards its liaison with key stakeholders as an integral part of the administration of Australia's foreign investment policy.

An example of the consultation process relates to the Environment Impact Assessment process. The Board supports the workings of the *Environment Protection (Impact of Proposals) Act 1974*. It does this by recommending to the Treasurer or Assistant Treasurer (the action Minister) that projects, subject to foreign investment approval with significant environment aspects, be designated. Where the action Minister agrees with the Board he will 'designate' the proponent (the person or body responsible for the proposal).

Designation allows the proposal to be referred to the Minister for the Environment who will make an environment assessment of the project. Within 28 days of receiving written comments relating to a Public Environment Report and 42 days from receipt of the final Environmental Impact Statement, the Minister for the Environment will provide recommendations to the action Minister. The action Minister, after taking into account such recommendations will make a final decision on the project. The Minister for the Environment does not have veto power over this decision.

Many proposals also require assessment under State/Territory environment legislation. To avoid duplication, arrangements are made with the States and Territories to facilitate joint or cooperative assessments of proposals. These arrangements are in accordance with the Environment Impact Assessment principles agreed under the *Intergovernmental Agreement on the Environment* and the *ANZECC Basis for a National Agreement on Environment Impact Assessment*.

Handling of Commercial-in-Confidence Information

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

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

In 1997-98, the Board's Executive processed 11 applications received under the *Freedom of Information Act 1982* (FOI Act) for access to documents concerning foreign investment matters. There are, of course, provisions in the FOI Act authorising denial of access to commercially confidential documents. This has relevance to documents provided to the Board (or prepared by the Board or Executive) in examination of proposals. It is the practice of the Executive to consult with the parties to a proposal about the documents that are the subject of a FOI request to establish whether the parties are prepared to have the documents released to an applicant or whether there are justifiable grounds to withhold documents.

As a result of these procedures three applicants in 1997-98 were granted a full release of documents and partial release was approved in respect of four requests. Of the remaining requests one was still being processed at 30 June 1998 (although some requested information had been released), one was withdrawn, and access to documents was denied for two applications. Denied access in one instance was because the documents could not be found to exist and in the other because it would have resulted in an unreasonable diversion of resources.

Monitoring and Compliance Activity

The *Foreign Acquisitions and Takeovers Act 1975* (the Act) contains wide-ranging powers under which the Treasurer may take legal action to protect and enforce the intent of the Government's foreign investment policy (see **Appendix A**). The powers include the ability to:

- ❖ unwind (by requiring the parties to sell shares, assets or property) transactions that have gone ahead, without prior foreign investment approval having been obtained, where that purchase is inconsistent with policy;
- ❖ prosecute persons and companies who fail to obtain prior approval;
- ❖ prosecute persons and companies who fail to comply with an order to sell shares, assets or property; and
- ❖ prosecute persons and companies who fail to comply with conditions attached to any approval given under the foreign investment legislation.

There are also general powers that make it an offence to provide false or misleading information, or to enter into any schemes for the purpose of avoiding the provisions of the Act.

Monitoring of compliance with foreign investment policy continues to be a significant activity, particularly in respect of the real estate sector. Close attention is given to proposals designed to avoid the application of policy, and/or the fulfillment of conditions attached to approval.

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 not being approved.

During 1997-98, compliance activities of the Executive were improved by the appointment of an additional full-time compliance officer. Further information on real estate compliance is contained in Chapter 2.

International Aspects

OECD Multilateral Agreement on Investment

During 1997-98, Australia participated in the OECD negotiations (subsequently discontinued) for a Multilateral Agreement on Investment (MAI). OECD Ministers at their Ministerial Council Meeting in April 1998, re-affirmed their continuing support for an MAI, with the aim of reaching a successful and timely conclusion of an MAI and seeking broad participation in it. However, Ministers decided on a 6 month period of assessment and further consultation between the negotiating parties and with interested parts of their societies.

During the pause in the OECD negotiations, members of the Foreign Investment Review Branch intensified their consultations, including with State and Territory Governments, Business Groups, Union Groups and other non-governmental organisations. Members of the Executive prepared Treasury's Submission to the Parliamentary Joint Standing Committee on Treaties that was tasked with inquiring into the MAI and on 11 March 1998 and 6 May 1998 they appeared before the Committee.

In October 1998, the French Government withdrew from the negotiating group. This led to the cessation of negotiations. The Assistant Treasurer noted that the Australian Government had indicated for some time that it had a number of serious concerns with the draft text of the proposed treaty as it stood. He also reiterated the Government's commitment not to sign any treaty unless it is demonstrably in the national interest (see Assistant Treasurer Press Release No 42 of 2 November 1998, available from the Treasury website <http://www.treasury.gov.au>).

Asia Pacific Economic Cooperation (APEC)

Australia has been a participant in enhancing the role of APEC, including in relation to foreign investment. APEC Ministers have endorsed a set of non-binding investment principles. The APEC Economic Leaders Declaration of Common Resolve released in Bogor, Indonesia on 15 November 1994, announced an agreement to adopt the long term goal of free and open trade and investment in the Asia Pacific region. Under the agreement, industrialised economies are to achieve the goal of free and open trade and investment no later than 2010, and the developing economies no later than

2020. The details of the implementation of the agreement to free and open investment in the Asia Pacific region will be developed in the period ahead. APEC countries, including Australia, have lodged individual action plans (IAPs) that set out how each country is to achieve the goal of free and open investment. The review of Australia's foreign investment policy (see page 3) has been included as part of Australia's IAP.

Bilateral Investment Promotion and Protection Agreements (IPPAs)

Australia's bilateral IPPAs with other countries promote the flow of capital for economic activity and development. The IPPAs provide 'most favoured nation' commitments in regard to treatment of foreign investment, give undertakings about expropriation/nationalisation, including the nature of compensation for such acts, and establish mechanisms for resolving disputes over investment matters. A model IPPA text has been established, and was updated in early 1998, to provide the basis on which these agreements can be negotiated.

Australia has entered into IPPAs with a number of countries. In 1997-98, treaties were signed with Pakistan and the Ukraine. To date, Australia has signed IPPAs with Argentina, Chile, the Czech Republic, Hong Kong, Hungary, Indonesia, Laos, Pakistan, Papua New Guinea, the People's Republic of China, Peru, the Philippines, Poland, Romania, Ukraine and Vietnam. Australia is currently negotiating further agreements with Egypt, India, Lebanon, Lithuania and Russia.

By promoting confidence in the regulatory environment relating to foreign investment, IPPAs have the potential to enhance investment flows between Australia and other countries.