

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 1998-99. Mr Graham Maguire retired from the Board and was replaced by the Hon. Chris Miles. Ms Janine Murphy succeeded Mr Richard Murray as the Executive Member. As at 30 June 1999 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.

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 and Sedgwick (Holdings) Pty 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, Syscorp Pty Limited and the Multiple Sclerosis Society of New South Wales.

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

Ms Janine Murphy the *ex officio* Executive Member of the Board has been with the Commonwealth Treasury since 1976 and has diverse experience across Treasury's various divisions, with a focus mainly on microeconomic reform, in particular the deregulation of the financial system, and taxation policy.

Retirement of Mr Graham Maguire

Mr Graham Maguire was appointed to the Board in August 1993. 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. The Board and the

Government have extended their appreciation to Mr Maguire for his valued contribution to the operations of the FIRB.

Relationship of the Executive to the Board

Executive assistance to the Board is provided by the Foreign Investment Policy Division of Treasury. During 1998-99 the Executive was headed by Mr Murray until succeeded by Ms Murphy as General Manager of the Division. The Executive provides secretariat services for the Board, prepares draft and final reports on proposals and is usually the first point of contact for foreign investment applicants.

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

During 1998-99, a reorganisation of the Treasury management structure resulted in the Executive becoming a separate Division of Treasury. Previously, executive assistance to the Board was provided by the Foreign Investment Review Branch of Treasury's Investment and Debt Division.

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 were 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.

During 1998-99 the Board continued to consider issues and to provide advice to the Treasurer on matters relevant to the review of foreign investment policy. The outcome of the review was announced by the Treasurer on 3 September 1999. The Treasurer's press release is reproduced at Appendix E and the policy changes which took effect from 10 September 1999 are incorporated in the summary of policy at Appendix A.

Administration of Foreign Investment Policy

The number of cases received in 1998-99 was 5,091 (4,765 in 1997-98). Of these 4,754 (4,375) were decided. Additionally, the Executive handled over 40,000 incoming telephone calls, answered 667 letters and 13 electronic mail messages during the year with regard to specific potential proposals and the operation of foreign investment policy more generally. It is estimated telephone inquiries resulted in around 6,000 information guidelines and/or foreign investment forms being either faxed or mailed to inquirers.

Under the *Foreign Acquisitions and Takeovers Act 1975*, the statutory time limit for reaching a decision is 30 days, with up to a further ten days to notify the parties. There is scope for an interim order extending the period of examination for up to a further 90 days. In 1998-99 there were 58 (111) interim orders and 155 (92) 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 <http://www.treasury.gov.au/firb> on the internet.

Major proposals will often 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.

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 1998-99 was some \$97,000. Remuneration of Board members was around 90 per cent of total Board expenditure, the remainder was for local travel, car hire, legal advice, printing 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 \$2.2 million in 1998-99 compared with around \$2.3 million in 1997-98. 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.

At 30 June 1999, there were 27 staff members in the Foreign Investment Policy Division of Treasury. This compares with 21 officers at the end of June 1998. The higher number reflects the reorganisation of the Treasury (referred to above) resulting in the inclusion of five support staff not included in the previous year's figure for the Executive.

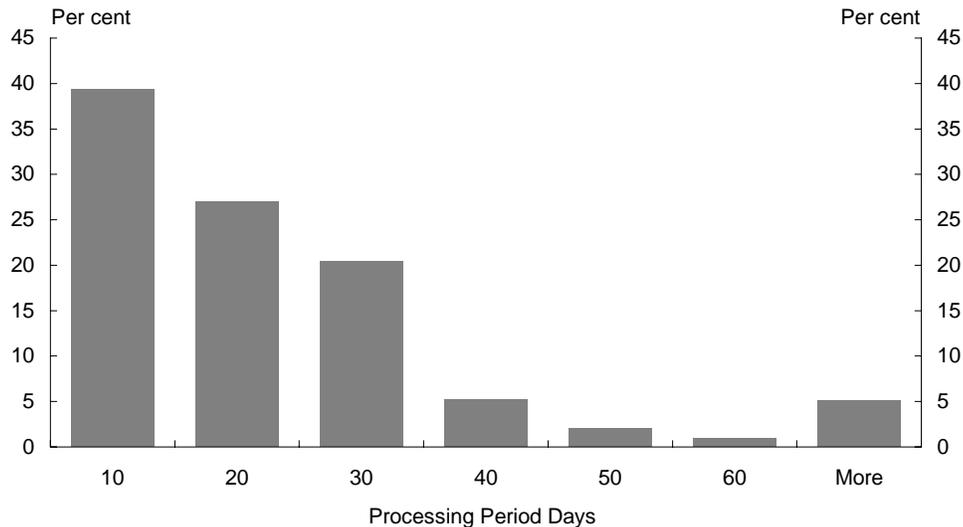
1998-99 Outcomes

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 1998-99, 40 per cent of applications (1,900) were decided within 10 days of receipt of a completed application (refer

Chart 1.1); 86 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 Division of the Treasury. Within the Division proposals are allocated to one of three specialist units depending on the industry sector involved or in the case of commercial and residential real estate allocation is generally on the basis of the geographic location of the assets being acquired (see page 73 for more details).

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 is usually considered 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.

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 1998-99 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/she 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.

The Government is also obligated to respect the privacy of personal information that is provided by applicants to the Foreign Investment Review Board in accordance with the requirements of the *Privacy Act 1988*. In

accordance with that Act, the Government advises that in situations where the applicant has breached, or is strongly suspected of having breached the *Foreign Acquisitions and Takeovers Act 1975* the Board may seek the assistance of other Government agencies in its efforts to ensure compliance. In seeking such assistance, the Board may pass relevant personal information to those government agencies. Most commonly these agencies will be the Department of Immigration and Multicultural Affairs, the Australian Taxation Office or the Australian Federal Police.

In the event that action is taken by third parties to obtain access to confidential information held by the Board, 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 1998-99, the Board's Executive directly dealt with three applications under the *Freedom of Information Act 1982* (FOI Act) and provided support to a Freedom of Information inquiry directed to the Department of Industry, Science and Resources. All applications sought information concerning foreign investment matters. Of the three applications specifically directed to the Board's Executive two were received during the course of 1998-99 while one was an application being processed as at 30 June 1998. Of these, two were still being processed as at 30 June 1999 while the remaining application was withdrawn.

There are 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.

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 1998-99, the Compliance Unit examined around 1,000 past proposals to ensure compliance with the conditions attached to foreign investment approval.

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

International Aspects

OECD Multilateral Agreement on Investment

Between 1995 and 1998 OECD members, including Australia, and several non-OECD participants met to negotiate a multilateral agreement on investment (MAI) with the aim of providing a transparent, effective and comprehensive framework for international investment.

In October 1998, the French Government withdrew from the MAI Negotiating Group. This led to the cessation of negotiations.

In announcing the end of the 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, 2 November 1998, available at <http://www.treasury.gov.au>).

On 21 December 1998 Treasury officials, including members of the Executive, were required to appear for a third time before the Joint Standing Committee on Treaties (JSCOT). JSCOT released its final report on the MAI in March 1999. The Government's response to that report was tabled on 1 December 1999.

Joint Prime Ministerial Task Force on Australia New Zealand Bilateral Economic Relations

In February 1999, the Prime Ministers of Australia and New Zealand established a Joint Prime Ministerial Task Force on Australia and New Zealand Bilateral Economic Relations.

Following the work of the Task Force, on 4 August 1999 the Prime Minister of Australia announced a number of changes to Australia's foreign investment regime aimed at facilitating investment between Australia and New Zealand. These changes took effect from 10 September 1999.

Australia's negotiating position for the Task Force drew upon ongoing work in relation to the review of foreign investment (see page 3). An officer of the Board's Executive was seconded to the Secretariat of the Task Force during March 1999.

Asia Pacific Economic Cooperation (APEC)

Australia has been a participant in enhancing the role of APEC, including in relation to foreign investment. APEC countries, including Australia, have lodged individual action plans that set out how each country is to achieve the goal of free and open investment. In its Individual Action Plans (IAP) from 1996 to 1998 Australia committed to other APEC countries that it would rationalise restrictions on foreign investment in real estate, and review the screening system in relation to foreign investment in 'non-sensitive' sectors.

Changes to foreign investment policy announced by the Prime Minister on 4 August 1999 and by the Treasurer on 3 September 1999 (see Appendix E) satisfy the Australian Government's IAP commitments.

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 1998-99, a treaty was signed with Lithuania. To date, Australia has also 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 actively negotiating further agreements with Egypt, Russia, Uruguay and the United Arab Emirates.

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