

# Seminar on foreign investment approval

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## Australia's Foreign Investment Approval Process

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# Australia's Foreign Investment Approval Process

by

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## Summary

- *Foreign investment in Australia is regulated by a combination of legislation and policy, which are generally permissive. However, rare adverse decisions are not readily reviewable.*
- *A case is considered in which an alleged breach of the foreign investment legislation was used to ground a successful complaint to the Takeovers Panel in a takeover dispute.*
- *Foreign investment, and therefore its regulation, is relevant to many acquisition and development projects in the energy and resources sectors. The most well-known refusal in recent years to a foreign merger proposal occurred in the energy sector.*
- *In 2008 the Australian Government issued guidelines relating to investment by foreign sovereign funds and state owned entities. These guidelines have been applied in relation to a number of applications from state owned entities from The People's Republic of China. The paper makes some observations about the guidelines and their application.*
- *Recent or proposed changes to the legislation will raise certain thresholds for requiring approval, and ensure that convertible note structures are caught by the legislation. No change has been made or is proposed in relation to acquisitions by sovereign entities or in relation to real estate acquisitions.*
- *The breadth of the legislation and policy, and the difficulty of legally challenging decisions under them, mean that Australia's foreign investment regime gives the Government considerable discretion in individual cases, albeit within a policy framework which is generally receptive to foreign investment.*

## Regulation of foreign investment in Australia

Foreign investment in Australia is regulated by the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**). The Treasurer has wide discretion under FATA to decline applications which he or she considers to be contrary to the national interest.

The foreign investment policy of the Commonwealth Government is also relevant. This policy is set out in guidelines issued by the Government (**Guidelines**) and Ministerial statements. Policy pronouncements have several functions:

- to describe the Government's approach to foreign investment, and the framework for its scrutiny of proposals under FATA;<sup>1</sup>
- to provide guidance and assistance to applicants under FATA, by describing the operation and requirements of FATA along with the framework for the scrutiny of proposals;<sup>2</sup> and
- to require applications to be made in circumstances where no application would be required under FATA.<sup>3</sup>

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<sup>1</sup> See e.g. *Australia's Foreign Investment Policy*, March 2009.

<sup>2</sup> See e.g. *How to Apply – Residential Real Estate*, June 2009.

<sup>3</sup> See e.g. *Principles Guiding Consideration of Foreign Government Related Investment in Australia*, released by the Treasurer on 17 February 2008.

## Foreign Investment Review Board

The FATA and Guidelines are administered by the Treasurer, who is advised by the Foreign Investment Review Board (**FIRB**). FIRB was established in April 1976 for the purpose of assisting and advising the government in the administration of foreign investment policy. Whilst it is the Treasurer who is ultimately responsible for policy and decisions in relation to foreign investment, FIRB is an important element of Australia's foreign investment approval regime.

FIRB is not established by FATA or other statute. FIRB's main functions are:

- to examine proposed investments in Australia, against the background of FATA and the Government's foreign investment policy, and to make recommendations to the Government on those proposals;
- to advise the Government on the operation of FATA and of foreign investment matters generally;
- to foster an awareness and understanding, both in Australia and abroad, of the Government's foreign investment policy; and
- to provide guidance, where necessary, to foreign investors and to monitor their compliance.<sup>4</sup>

FIRB provides an oversight role, however it is the Treasury's Foreign Investment and Trade Policy Division that undertakes the initial examination of foreign investment proposals and prepares recommendations to the Treasurer. The Treasurer has authorised senior Trade Policy Division staff to make decisions on foreign investment proposals that are consistent with the policy or do not involve issues of special sensitivity. Approximately 94 % of proposals are assessed by senior Trade Policy Division staff under this authorisation, most of which are within the real estate sector.<sup>5</sup>

### To whom does FATA apply?

The FATA applies to investments into Australia by *foreign persons* or their *associates*. Section 5 of FATA defines a *foreign person* to include:

- a natural person not ordinarily resident in Australia;
- a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a *controlling interest*; or
- 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*.

Section 9 of FATA provides that where a person (together with any *associates*) holds 15 % or more of the issued shares or voting power of a corporation or where two or more persons (together with any *associates*) hold 40 % or more of the issued shares or voting power of a corporation, they are taken to hold a *controlling interest* in the corporation unless the Treasurer is satisfied that they are not in a position to determine the policy of the corporation. The FATA provides no guidance on what is meant by being '*in a position to control the policy of the corporation*', or on what basis the Treasurer will make his or her determination. If the Treasurer fails to consider whether a shareholder is in a position to determine the policy of the corporation, his or her decision may be set aside.<sup>6</sup>

'Associate' is defined broadly under FATA and includes:

- a person's spouse and other relatives;
- any partner, employee or employer of the person;
- where the person is a corporation - any officer of the corporation;
- any corporation or trust estate in which the person holds a substantial interest; and

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<sup>4</sup> FIRB, *Annual Report 2007-08* (2009) 3.

<sup>5</sup> FIRB, *Annual Report 2007-08* (2009) 6.

<sup>6</sup> *Canwest Global Communications Corporation v Treasurer (Cth)* (1997) 147 ALR 509.

- where the person is a corporation or trust estate — a person who holds a substantial interest in the corporation or trust estate.<sup>7</sup>

Significantly, associates of associates also fall within the definition. As a result, where A and B are associates and B and C are associates, A and C are deemed to be associates for the purposes of FATA.

FIRB's most recent available Annual Report suggests that a variety of factors may be relevant to the Treasurer's consideration of where ultimate control of a corporation lies. The Annual Report states that the extent to which each of these factors is relevant would depend on the particular circumstances of each case, and thus the determination of control is undertaken on a case-by-case basis. Relevant factors 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; 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.<sup>8</sup>

### Treasurer's powers

The FATA empowers the Treasurer to examine proposals for:

- the acquisition of shares,<sup>9</sup> assets<sup>10</sup> or urban land;<sup>11</sup>
- arrangements relating to the directorate of corporations;<sup>12</sup> and
- arrangements relating to the control of Australian businesses;<sup>13</sup>

which would result in control or acquisition by *foreign persons*.

If, upon examination, the Treasurer determines that a foreign investment proposal is contrary to the national interest, the Treasurer has wide powers to prohibit the proposal and may order the divestiture of an Australian company or the unwinding of foreign investment arrangements.

The Treasurer does not approve proposals. The Treasurer is empowered to prohibit proposals he or she decides would be contrary to the national interest. Alternatively, the Treasurer may raise no objections to a proposal, either without conditions or subject to conditions that the Treasurer considers necessary to ameliorate national interest concerns.

In practice, very few proposals are formally prohibited by the Treasurer. It is more common for an applicant to withdraw its proposal after receiving advice from Treasury that the proposal is likely to be considered contrary to the national interest or subject to conditions which are unacceptable to that party. There is no data publicly available as to the proportion of all withdrawals made after receiving such advice. Five hundred and twenty-one, out of a total of eight thousand, five hundred and forty eight, applications were withdrawn in 2007-08.<sup>14</sup> This compares with just a tenth of one percent being formally rejected.<sup>15</sup>

<sup>7</sup> *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 6.

<sup>8</sup> FIRB, *Annual Report 2007-08* (2009) 49.

<sup>9</sup> *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 18.

<sup>10</sup> *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 19.

<sup>11</sup> *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 21A.

<sup>12</sup> *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 20.

<sup>13</sup> *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 21.

<sup>14</sup> FIRB, *Annual Report 2007-08* (2009) 18.

<sup>15</sup> All rejections in 2007-08 related to the acquisition of real estate. FIRB does not provide statistics on the sector breakdown of applications withdrawn.

## Notification

It is compulsory for *foreign persons* to notify FIRB of certain types of investment proposals and substantial penalties apply for non-compliance. Investment proposals requiring notification include, for example:

- acquisitions by a foreign person or persons of a *controlling interest* in an Australian corporation that has gross assets exceeding \$100 million or where the proposal values the corporation at over \$100 million;<sup>16</sup>
- acquisitions by a foreign person or persons of a *controlling interest* in a foreign company with Australian subsidiaries or assets that are valued at \$200 million or more (the '*offshore takeovers*' threshold);<sup>17</sup>
- arrangements under which an Australian business valued at more than \$100 million or having gross assets exceeding \$100 million becomes controlled by foreign persons;<sup>18</sup>
- proposals to establish a new business involving a total investment of \$10 million or more;<sup>19</sup>
- direct investment by foreign governments and their agencies irrespective of the size of the proposal;<sup>20</sup> and
- acquisitions of interests in *Australian urban land*.<sup>21</sup>

On 4 August 2009 the Treasurer announced reforms of these thresholds to ensure that the Government does not become unnecessarily involved in uncontroversial business transactions.<sup>22</sup> As a result the Government will:

- institute a single threshold for private foreign investment in Australian businesses, whereby investments below \$219 million can proceed without review;
- index the new unified threshold on 1 January every year to keep pace with inflation and to prevent foreign investment review from becoming more restrictive over time; and
- abolish the existing requirement that private investors notify the Government when establishing a new business in Australia valued above \$10 million.

The Government estimates that around 20 % of current business applications will no longer be reviewed by FIRB as a result of the changes. Amending regulations to effect the changes are expected to be introduced into Parliament in September 2009.

Investors in the United States are already subject to special exemption thresholds as a result of the Australia-United States Free Trade Agreement which came into effect on 1 January 2005. The current thresholds, which are indexed annually, are \$110 million for investments in prescribed sensitive sectors<sup>23</sup> or by an entity controlled by the United States Government, or \$953 million in any other case.

Parties proposing to enter into notifiable transactions must either seek prior foreign investment approval or ensure that any acquisition agreement is conditional on such approval.<sup>24</sup> Entering into an agreement that is not conditional may result in prosecution and an order for divestment. Failure to comply with the compulsory notification provisions of FATA is an offence.

Notwithstanding that notification may not be compulsory in respect of a particular proposal, a party may elect to notify the Treasurer due to the risk that a transaction which is not compulsorily notifiable but which results in control by *foreign persons* may subsequently be unwound if considered contrary to the national interest.

<sup>16</sup> *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 26.

<sup>17</sup> *Australia's Foreign Investment Policy*, March 2009, paragraph 9.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> *Principles Guiding Consideration of Foreign Government Related Investment in Australia*, released by the Treasurer on 17 February 2008.

<sup>21</sup> *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 26A.

<sup>22</sup> *Reforming Australia's Foreign Investment Framework*, released by the Treasurer on 4 August 2009.

<sup>23</sup> Including, relevantly, the extraction of (or the holding of rights to extract) uranium or plutonium.

<sup>24</sup> The acquisition provisions of the agreement should not become binding until the condition has been satisfied: see e.g. *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 26(3)(b).

On 20 August 2009 the *Foreign Acquisitions and Takeovers Amendment Bill 2009* was introduced into Parliament. This bill seeks to broaden the operation of FATA to require compulsory notification of foreign investment proposals where there is a possibility that the type of arrangement being used will deliver influence or control over an Australian company, whether now or at some time in the future. This approach differs from the current regime whereby only foreign investment proposals actually having such an effect (as opposed to potentially) are notifiable.

These amendments were foreshadowed in February 2009<sup>25</sup>, in response to the growing use of more complex investment structures, in particular instruments such as convertible notes. Such structures demonstrated that ownership and control events could potentially arise in a variety of ways which were not envisaged when FATA was originally drafted. The objective of the amendments is to ensure that the Treasurer's powers apply equally to all foreign investments, irrespective of the way they are structured.<sup>26</sup>

## National Interest

'National interest' is not defined in FATA. The FATA confers upon the Treasurer the power to decide what constitutes the national interest in relation to each particular proposal, and:

*"The Government determines what is 'contrary to the national interest' by having regard to the widely held community concerns of Australians."*<sup>27</sup>

The process by which the Government divines widely held community concerns is not described. It seems that the Government has considerable discretion in determining the 'national interest'.

A proposal that does not meet the requirements set out in policy may be regarded as being contrary to the national interest. In preparing its advice to the Treasurer, FIRB also takes into account:

- existing whole-of-government policy and law — reflecting the view that existing policy and law define important aspects of the national interest;
- national security interests; and
- economic development.<sup>28</sup>

A high profile example of the Treasurer's assessment of the national interest was the Treasurer's decision to prohibit Shell Australia Investment Limited's (**Shell**) acquisition of a substantial shareholding in Woodside Petroleum Limited (**Woodside**); which would have resulted in a change of control of Woodside. The Treasurer at the time, Mr Costello, noted that Woodside was a joint venturer with Shell in the North West Shelf (**NWS**) project, of which Woodside was the operator. Mr Costello prohibited the proposal on the basis that it was in the national interest for:

*'... the project be developed to its full capacity and that Australia's export sales from the NWS are maximised... [and] for the operator of th[e] project to develop the resource to its maximum and for sales from the NWS to be promoted in preference to competing sales from projects in other parts of the world.'*<sup>29</sup>

The Courts have been asked to review the Treasurer's decision on national interest grounds under FATA on only a few occasions.<sup>30</sup> On each occasion the Court accepted that it had jurisdiction to review the decision of the Treasurer, but expressed an unwillingness to interfere with the Treasurer's wide discretion. In *Canwest*, Hill J noted that:

<sup>25</sup> It is notable that the amendments were announced on the same day as the ill-fated strategic partnership between Rio Tinto and Chinalco.

<sup>26</sup> *Amendments to Foreign Acquisitions and Takeovers Act*, released by the Treasurer on 12 February 2009.

<sup>27</sup> *Australia's Foreign Investment Policy*, March 2009, paragraph 5.

<sup>28</sup> FIRB, *Annual Report 2007-08* (2009) 7.

<sup>29</sup> The Hon. Peter Costello MP, 'Foreign Investment Proposal - Shell Australia Investments Limited's Acquisition Of Woodside Petroleum Limited' (Statement, 23 April 2001).

<sup>30</sup> *Leisure & Entertainment Pty Ltd v Willis* (1996) 64 FCR 205, *Canwest Global Communications Corporation v Treasurer (Cth)* (1997) 147 ALR 509; *Wight v Pearce* [2007] FCA 26.

*'A court would be loathe to interfere with a discretion vested in the Treasurer on a matter such as national interest... Parliament has entrusted decisions on matters of national interest to the Treasurer, not to the courts. But that is not to say that the court lacks jurisdiction altogether... But the area in which judicial challenge can succeed is clearly circumscribed by the breadth of the consideration of national interest entrusted to the Treasurer.'*<sup>31</sup>

## Making an application

Notification of a foreign investment proposal must be made in accordance with the forms prescribed in the *Foreign Acquisitions and Takeovers (Notices) Regulations 1975*.

Upon receipt of a valid notice by the Treasurer, a 30-day statutory examination period commences. If the Treasurer does not take action within this period, the power to prohibit the proposal or to impose conditions expires.<sup>32</sup> A further period of 10 days is available to publish any order in the Commonwealth of Australia Gazette and to notify the parties.<sup>33</sup>

The 30-day examination period may be extended by up to a further 90 days by the issue of an interim order.<sup>34</sup> Such interim orders are also published in the Commonwealth of Australia Gazette. Some parties elect to withdraw their application prior to the issue of an interim order and resubmit, to preserve the confidentiality of their proposal.

Although bound by the above gazettal requirements for orders under FATA, the Government recognises that many foreign investment proposals are confidential in nature and it seeks to ensure that appropriate security is given to information provided by applicants. Government policy is to deny third parties access to such confidential information without the permission of the applicant, subject to the operation of applicable legislation or upon the order of a court.<sup>35</sup>

## Decision of Treasurer subject to challenge

The Federal Parliament has extensive authority over foreign investment in Australia, derived through the combined effect of a number of constitutional heads of power including trade and commerce, aliens, foreign corporations and external affairs: sections 51(i), (xix), (xx) and (xxix) of the *Constitution of the Commonwealth* respectively.

In the case of *Wight v Pearce*,<sup>36</sup> a Swiss citizen not ordinarily resident in Australia sought to challenge an order that she divest her interest in a property in South Australia on the grounds that section 21A (relating to acquisitions of interests in urban land) was constitutionally invalid. Besanko J held that section 21A, as extended by section 4(6)(a), was a valid law with respect to external affairs and aliens pursuant to the *Constitution of the Commonwealth*.

Although the Treasurer's decision under FATA is administrative in nature, it is not reviewable under the *Administrative Decisions (Judicial Review) Act 1977 (Cth)*<sup>37</sup> nor can it be the subject of an appeal under the *Administrative Appeals Tribunal Act 1975 (Cth)*.<sup>38</sup>

However, there remains limited scope for review of decisions on common law grounds primarily where the Treasurer:

- did not fulfil a condition precedent to making the order;
- took into account a matter that was clearly not relevant to the national interest; or
- made a decision that no reasonable person could have made.

<sup>31</sup> *Canwest Global Communications Corporation v Treasurer (Cth)* (1997) 147 ALR 509 at 525.

<sup>32</sup> *Foreign Acquisitions and Takeovers Act 1975 (Cth)* s 25(2).

<sup>33</sup> *Ibid.*

<sup>34</sup> *Foreign Acquisitions and Takeovers Act 1975 (Cth)* s 25(3).

<sup>35</sup> FIRB, *Annual Report 2007-08* (2009) 84.

<sup>36</sup> (2007) 157 FCR 408.

<sup>37</sup> *Administrative Decisions (Judicial Review) Act 1977 (Cth)* s 3 and Schedule 1, paragraph (h).

<sup>38</sup> The FATA does not specifically provide that a decision under the FATA is subject to review by the Administrative Appeals Tribunal as required by section 25(4) of the *Administrative Appeals Tribunal Act 1975 (Cth)*.

In the case of *Canwest Global Communications Corporation v Treasurer (Cth)*,<sup>39</sup> shareholders of a corporation successfully challenged divestiture orders made by the Treasurer under FATA. Hill J determined that the Treasurer's decision should be set aside as the Treasurer had erred in law by:

- failing to consider the appropriate test of foreign control under section 18(4)(a)(ii) of FATA; and
- failing to satisfy himself that the shareholder's substantial interest placed them in a position to '*determine the policy*' of the corporation pursuant to section 9(2) of FATA.

As noted above, Courts have generally expressed an unwillingness to interfere with the Treasurer's wide discretion in relation to the national interest. In the absence of bath faith, it is unlikely that a court would limit the considerations to which the Treasurer may properly have regard in determining whether a particular transaction is contrary to the national interest.<sup>40</sup>

### **Alleged breach of FATA grounded application to Takeovers Panel**

In the recent decision of *Re Midwest Corporation Limited 02*,<sup>41</sup> the Takeovers Panel made a declaration of unacceptable circumstances on the basis of a failure to comply with the compulsory notification provisions of FATA as a result of an *associate* relationship.

In early 2008, Midwest Corporation Limited (**Midwest**) was the subject of both an unsolicited off-market takeover bid by Sinosteel Corporation (a Chinese state owned entity), through its subsidiary Sinosteel Ocean Capital Pty Limited (**Sinosteel**), and a proposed scheme of arrangement with Murchison Metals Ltd (**Murchison**).

Immediately prior to the announcement of the Murchison scheme, Murchison announced that it had increased its shareholding in Midwest to just under 10 %. In the days following, entities associated with US hedge fund Harbinger Capital Partners (**Harbinger entities**) also acquired a substantial interest in Midwest, ultimately acquiring 9.29 %. The Harbinger entities were also the largest shareholder of Murchison, with a relevant interest of 19.98 %.

As the Harbinger entities held more than 15 % of Murchison they were deemed to be an '*associate*' of Murchison for FATA purposes<sup>42</sup>. As a result the Harbinger entities' interest in Midwest was aggregated with Murchison's 10 %. The Harbinger entities were therefore required, under the compulsory notification provisions, to notify the Treasurer of the 4.29 % of Midwest shares they purchased in excess of the 15 % controlling interest threshold under FATA.

Sinosteel applied to the Panel, seeking a declaration of unacceptable circumstances on the basis, *inter alia*, that the Harbinger entities' acquisition of the 4.29 % of Midwest shares without having first obtained advice that the Treasurer did not object was in contravention of FATA.

Whilst the Panel noted that it was not seeking to become the enforcer of FATA, it regarded compliance with legislation other than the *Corporations Act 2001* (Cth) as relevant to its consideration of whether or not unacceptable circumstances existed. The Panel determined that it had jurisdiction to deal with the alleged breach of FATA as the circumstances related to a substantial shareholding and the control, or potential control, of a target entity.

The Panel determined that the acquisition of Midwest shares by the Harbinger entities in excess of the prescribed limit was unacceptable having regard to the purposes of Chapter 6 of the *Corporations Act 2001* (Cth). The Panel concluded that the Harbinger entities' acquisition of the excess Midwest shares had the following effects:

- it was a factor in maintaining the Midwest share price above Sinosteel's offer price;
- it influenced the view that market participants would be likely to take regarding the relative merits of the Sinosteel bid and the proposed Murchison merger; and

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<sup>39</sup> (1997) 147 ALR 509.

<sup>40</sup> Lawbook Co. *Foreign Investment in Australia*, (at 6554) [6.370].

<sup>41</sup> [2008] ATP 15.

<sup>42</sup> *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 6.

- it materially affected Sinosteel's ability to compulsorily acquire Midwest, by allowing the Harbinger entities to acquire very close to a blocking stake in Midwest when they would not otherwise have been able to do so.

The Panel was satisfied that the acquisition by the Harbinger entities of the excess Midwest shares had an effect, or was likely to have an effect, on the control or potential control of Midwest or on the proposed acquisition by Sinosteel of a substantial interest in Midwest.

The Panel ordered that the Harbinger entities dispose of the 4.29 % of Midwest shares if approval under FATA was not obtained. The Panel did not order immediate divestment, as it considered that such an order would unfairly prejudice the Harbinger entities if they were to ultimately obtain clearance. It was subsequently announced that the Treasurer did not propose to take any action under FATA in relation to the acquisition of the Midwest shares.

The Panel also made orders prohibiting the Harbinger entities from exercising voting rights in respect of the 4.29 % of Midwest shares whilst Sinosteel's bid remained open (including any period of extension). The Panel concluded that this voting restriction would remove any competitive advantage that Murchison and the Harbinger entities had obtained in the competition for control of Midwest.

### Liberalisation of foreign investment in the resources and energy sectors

The FIRB Annual Report states that proposed investment in the mineral exploration and development sector increased by 99 %, from \$32.3 billion in 2006-07 to \$64.3 billion in 2007-08.<sup>43</sup>

A total of 173 proposals were approved (compared with 141 in 2006-07), comprising five to establish new businesses and 168 to acquire an interest in an existing business. There were 83 proposals involving total investment of \$100 million or more, including 12 for \$1 billion or more. These 12 proposals involved a combined proposed investment in excess of \$34 billion. Proposals in the oil and gas industry accounted for 7 % of total approved investment in this sector.

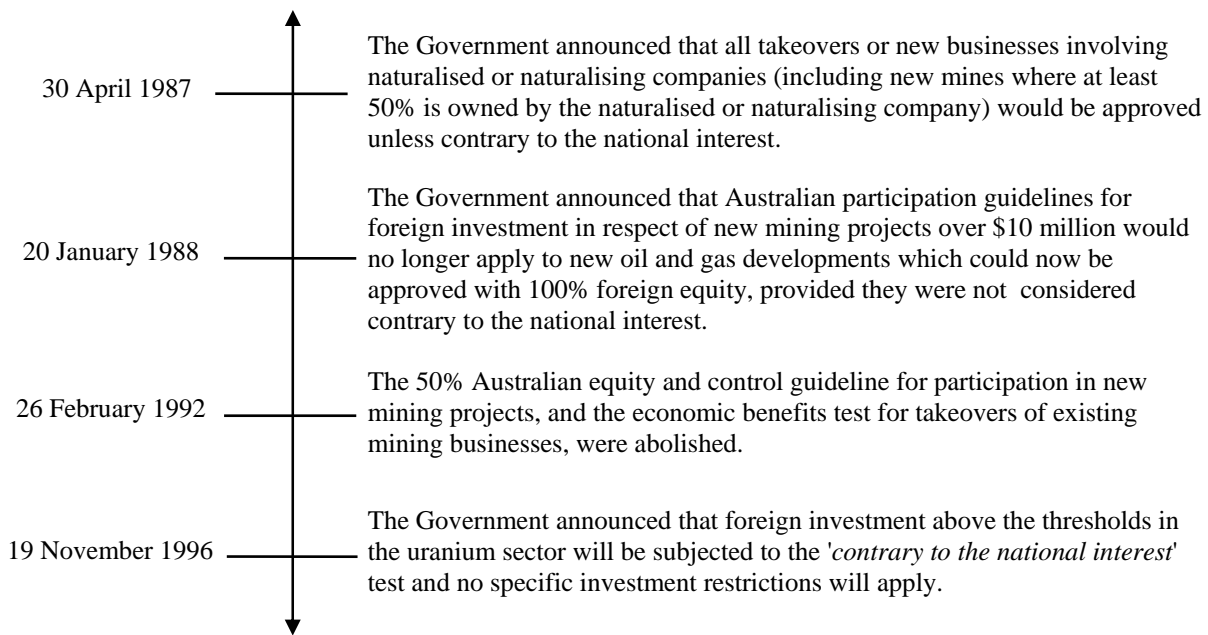
#### Mineral exploration and development sector approvals 2006-07 to 2007-08<sup>44</sup>

Industry code	Acquisitions				New businesses			
	2006-07		2007-08		2006-07		2007-08	
	No.	\$b	No.	\$b	No.	\$b	No.	\$b
Metallic minerals								
- Bauxite	-	-	3	12.38	-	-	-	-
- Copper/Gold	37	2.84	24	11.26	-	-	-	-
- Iron ore	13	1.17	24	8.88	-	-	1	0.02
- Nickel	5	5.27	10	3.05	-	-	-	-
- Uranium	12	1.75	7	1.25	-	-	1	0.01
- Zinc	2	0.17	5	5.54	-	-	-	-
- Other	9	0.83	12	3.41	1	0.38	1	0.06
Coal	30	4.19	37	10.36	5	1.48	2	1.11
Oil & Gas	13	2.24	31	4.52	2	11	-	-
Other	11	0.95	15	2.45	1	0.01	-	-
<b>Total</b>	<b>132</b>	<b>19.41</b>	<b>168</b>	<b>63.09</b>	<b>9</b>	<b>12.87</b>	<b>5</b>	<b>1.19</b>

The Australian Government has steadily liberalised its policy towards foreign investment in the mining and energy sectors. The following timeline shows the major developments:

<sup>43</sup> FIRB, *Annual Report 2007-08* (2009) 29.

<sup>44</sup> FIRB, *Annual Report 2007-08* (2009) Table 2.6.



## Acquisition of mineral right/mining tenement

The Guidelines note that the acquisition of a mineral right, mining lease, mining tenement or production licence may require foreign investment approval as such proposals can involve the acquisition of land.<sup>45</sup>

Section 21A of FATA empowers the Treasurer to examine proposals by foreign persons to acquire interests in Australian urban land and prohibit such proposals if considered contrary to the national interest. In addition, section 26A provides that a foreign person must notify the Treasurer prior to entering into an agreement by virtue of which he or she acquires an interest in Australian urban land.

The definition of *Australian urban land* is broader than the phrase suggests and covers any land situated in Australia that is not used wholly and exclusively for carrying on a business of primary production (being the cultivation of land, the raising of animals or poultry and fishing or forestry operations).

Section 12A of FATA defines *interest in Australian urban land* which includes, relevantly:

- a legal or equitable interest in Australian urban land, other than an interest under a lease or licence;
- an interest as lessee or licensee in a lease or licence giving rights to occupy Australian urban land where the term of the lease or licence (including any extension) is reasonably likely, at the time the interest is acquired, to exceed 5 years; and
- an interest in an arrangement involving the sharing of profits or income from the use of, or dealings in, Australian urban land.

Consequently, depending on the nature of the interest, a mineral right, mining lease, mining tenement or production licence may constitute Australian urban land, and its acquisition may require notification to the Treasurer and may be prohibited if considered contrary to the national interest.

Section 12A(7) offers an exception to the above as it provides that a reference in FATA to the acquisition of an interest in Australian urban land does not include a reference to the acquisition of an interest in Australian urban land from the Commonwealth, a State or a Territory. Therefore, where a mineral right, mining lease, mining tenement or production licence is granted to a foreign person by the Commonwealth or a State or a Territory government, this will not constitute an acquisition of Australian urban land and will not require notification.

<sup>45</sup> *Australia's Foreign Investment Policy*, March 2009, paragraph 42.

## Foreign government related investment guidelines

In a speech to the Australia-China Business Council in 2008, Treasurer Wayne Swan revealed that in the nine months following the 2007 Federal Election, the value of applications for proposed investment from mainland China had reached almost \$30 billion. This amount was three times the value for approved proposals in fiscal years 2005-06 and 2006-07 combined. Given the role of the state in Chinese business, these applications invariably emanated from Chinese government owned or supported enterprises.

China is now Australia's largest trading partner, with over 15 % of two way trade with Australia.<sup>46</sup> However, China has less than 1 % of the total foreign direct investment in Australia.<sup>47</sup> As Australia's largest customer, it is perhaps unsurprising that China is now seeking a more prominent role in the development of Australia's resources.

In response to this surge in foreign investment by Chinese government enterprises, on 17 February 2008 the Treasurer released a set of principles the Government will consider in determining whether investments by foreign governments and their agencies are consistent with Australia's national interest.<sup>48</sup> When releasing the guidelines the Treasurer stated that investors with links to foreign governments may not operate solely in accordance with normal commercial considerations and have the potential to pursue broader political or strategic objectives that could be contrary to Australia's national interest.

Whilst such proposals will be determined on a case by case basis and take into account the usual considerations for private sector proposals, these proposals will also be evaluated having regard 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.

The Treasurer stated in his July 2008 speech that foreign government investment guidelines were released with the aim of maintaining a market based system in which companies are responsive to shareholders and in which investment and sales decisions are driven by market forces rather than external strategic or political considerations. Mr Swan also expressed the Government's predisposition to more carefully consider proposals by consumers to control existing producing firms:

*'We usually welcome and encourage some participation by the buyer, because that offers the buyer some security of supply and the seller some stability in the market. But we need to ensure that investment is consistent with Australia's aim of ensuring that decisions continue to be driven by commercial considerations and that Australia remains a reliable supplier in the future to all current and potential trading partners... [I]t follows that as the proposed participation by a consumer of the resource increases to the point of control over pricing and production, and especially where the resource in question is already developed and forms a major part of the total resource, or where the market disciplines applying to public companies are absent, I will look more carefully at whether the proposal is in Australia's national interest.'*<sup>49</sup>

<sup>46</sup> ABS, '5368.0 International Trade in Goods and Services' (June 2009).

<sup>47</sup> ABS, '5352.0 International Investment Position, Australia: Supplementary Statistics' (2008).

<sup>48</sup> *Release of a set of principles to enhance the transparency of Australia's foreign investment screening regime*, released by the Treasurer on 17 February 2008.

<sup>49</sup> The Hon. Wayne Swan MP, 'Australia, China and This Asian Century' (Speech delivered at the Australia-China Business Council, Melbourne, 4 July 2008).

Mr Swan denied that the Government had changed its policy to a more restrictive stance or slowed down the processing of Chinese applications, however he acknowledged that some Chinese proposals had required more time than the general 30 day time limit. Mr Swan noted that in such cases, for commercial reasons, most applicants preferred to withdraw and resubmit, rather than having their bid become known publicly through the gazettal of a formal interim order.

An early application of the new foreign government related investment guidelines came in the context of Sinosteel's successful application to acquire up to 49.9 % of Murchison. In addition to its takeover of Midwest (discussed above), Sinosteel applied to FIRB in relation to a proposal to acquire up to 100 % of Murchison, an iron ore company with tenements adjacent to Midwest's.

On 16 June 2008, an interim order was issued prohibiting the proposed acquisition for 90 days to allow time to consider the proposal. It seems that Sinosteel was told that an application for approval to buy 100% of Murchison Metals would be unsuccessful, but an application for a non-controlling interest would be viewed more favourably. On 21 September 2008, the Treasurer approved Sinosteel's application to acquire up to 49.9 % of Murchison.

In a press release the Treasurer said that '*...a shareholding of up to 49.9 % in Murchison will maintain diversity of ownership within the Mid-West region. The Government considers the development of such potentially significant new resource areas should occur through arrangements that are open to multiple investors.*'<sup>50</sup>

The decision suggests that, in sensitive areas, a minority ownership position is likely to be more acceptable than full ownership or a controlling position.

On 22 June 2009, the Senate Standing Committee on Economics questioned the General Manager of FIRB, Patrick Colmer, in the course of its inquiry into foreign investment by state-owned entities.<sup>51</sup> Mr Colmer told the Committee that FIRB had overall observed a fair degree of overt commercial behaviour on the part of Chinese entities. In particular, FIRB had seen Chinese companies having a strong commercial orientation and trying to understand western business processes.

When asked to explain FIRB's national interest test, Mr Colmer said:

- FIRB starts off by saying that foreign investment is good for Australia;
- the most common cause of rejection (which is itself very rare) is criminality on the part of the proposed investor; and
- the six principles in the foreign government investment guidelines were the best guide to the national interest test.

Mr Colmer noted that only the first of the six criteria of the foreign government investment guidelines is uniquely relevant to state-owned enterprises, and the other five are considerations FIRB takes into account on any proposal. Mr Colmer stressed that investment proposals are examined on a case-by-case basis, however he stated that FIRB's preference is for small stakes in large Australian resource producers and partnership or joint venture type arrangements of up to fifty % in smaller companies.

Mr Colmer said one of FIRB's major concerns is information that sheds light on how a potential investor could be expected to operate in Australia. In particular, FIRB would look very closely at any evidence that the investor had acted outside of the law in another country. He noted that of the 16 cases that had been rejected since 1990, the predominate reason for rejection was various forms of criminality on the part of the proposed investor.

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<sup>50</sup> The Hon. Wayne Swan MP, 'Foreign Investment Approval: Sinosteel's Interests In Murchison Metals Ltd' (Press Release, 21 September 2008).

<sup>51</sup> The transcripts of the Senate Committee's public hearings, including Mr Colmer's comments, are available at: [http://www.aph.gov.au/Senate/committee/economics\\_ctte/firb\\_09/hearings/index.htm](http://www.aph.gov.au/Senate/committee/economics_ctte/firb_09/hearings/index.htm)

## Reform proposals

Throughout FIRB's history there have been calls to reform its role in Australia's foreign investment review process. In 1994 a Senate Select Committee inquiry into certain aspects of foreign ownership decisions in relation to the print media recommended that an independent statutory authority, to be known as the Federal Investment Commission (FIC), be established to replace FIRB.<sup>52</sup> Whilst many of its reform proposals were not acted upon, the inquiry also recommended that:

- the FIC be empowered to make binding decisions in respect of certain categories of applications by applying tests established under FATA, whilst the Treasurer continue to make decisions, on the FIC's recommendation, in relation to key industry sectors;<sup>53</sup>
- FATA should contain the criteria to be used to determine applications by foreign investors,<sup>54</sup> or at the very least the FIC should publish its views on the matters relating to the national interest; and
- decisions of the FIC be subject to the processes of administrative law review.<sup>55</sup>

Similar reform proposals have received recent attention from some commentators<sup>56</sup> in light of the surge in foreign investment by Chinese government enterprises and the arrest of four employees of Rio Tinto Ltd on allegations of illegally obtaining commercial secrets and bribery. These commentators suggest that such events demonstrate the need to depoliticise Australia's foreign investment review process. Frith argues that "[t]he majority of foreign investment applications do not have national interest implications and would be better handled by an independent statutory body, with clear and straightforward criteria for decisions, rather than the present opaque regime."

As referred to above, the Senate Committee on Economics is currently inquiring into foreign investment in Australia by state-owned entities and is due to report in mid-September 2009. It will be interesting to see the Committee's findings and the extent to which the Government is prepared to embrace its recommendations. However, it may be inferred from the limited scope of amendments announced in relation to the notification thresholds and those contained in the recent *Foreign Acquisitions and Takeovers Amendment Bill 2009* that the Government does not have any present intentions to further reform the current regime.

## Conclusion

The breadth of the Treasurer's discretion under FATA and policy, and the limited circumstances in which judicial review is available, mean that the application of Australia's foreign investment policy can create uncertainty for prospective foreign investors.

In a world where there is competition for foreign investment, this uncertainty may result in Australia losing foreign investment that it would otherwise receive.

Finally, the successful use of an alleged breach of FATA in the *Re Midwest Corporation Limited 02 Takeover Panel* proceedings will probably encourage the more aggressive exploration of FATA issues in future takeover bids, many of which are subject to FATA conditions precedent.

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<sup>52</sup> *Percentage players : the 1991 and 1993 Fairfax ownership decisions*, Report of the Senate Select Committee of Certain Aspects of Foreign Ownership Decisions in Relation to the Print Media, June 1994, recommendation 10.8.

<sup>53</sup> *Ibid*, recommendation 10.10.

<sup>54</sup> *Ibid*, recommendation 10.4.

<sup>55</sup> *Ibid*, recommendation 10.13.

<sup>56</sup> Bryan Frith, *Keep politics out of FIRB decisions*, *The Australian*, 17 July 2009; Bryan Frith, *National interest judgements must be independent*, *The Australian*, 29 July 2009; Stephen Kirchner, *Capital Xenophobia II: Foreign Direct Investment in Australia, Sovereign Wealth Funds, and the Rise of State Capitalism*, The Centre for Independent Studies Policy Monograph 88, 2008.