

## CHAPTER 8

# FOREIGN INVESTMENT ADMINISTRATION IN AUSTRALIA

8.1 The terms of reference for the committee include an examination of the guidelines of the Foreign Investment Review Board (FIRB). The committee's task is to examine the operations and procedures of FIRB and to determine whether that body satisfactorily administers Australia's foreign investment policies. This chapter examines the structures and procedures of FIRB.

8.2 It could be argued that, where it sees fit, government promotes FIRB as the formal administrator of its foreign investment policies. Though policy and administration are often intertwined in a bureaucracy (and that is especially so in respect of FIRB and foreign investment policy), the division of administration from policy is important in demonstrating that FIRB is an administrative structure chosen by government to advise it on the implementation of its policy. FIRB should be seen as more akin to a regulator implementing established policy, than a 'think tank' created to decide on policy options for problem sectors of the economy.

### **FIRB's functions are advisory**

8.3 FIRB's functions are:

- to examine proposals by foreign interests for investment in Australia and to make recommendations to the government on those proposals;
- to advise the government on foreign investment matters generally;
- to foster an awareness and understanding of the government's policy in the community at large and in the business sector, both in Australia and abroad; and

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- to provide guidance, where necessary, to foreign investors so that their proposals may be in conformity with policy.<sup>1</sup>

8.4 The Treasury and its staff emphasised the advisory function of FIRB which they contended established the master/servant relationship between the Treasurer and FIRB:

The Board has no authority to take decisions either to approve or reject foreign investment applications.<sup>2</sup>

8.5 In evidence, Mr Hinton emphasised this point:

... FIRB is an advisory body. It provides advice to the government on the consistency of individual foreign investment applications with government policy. The board has no authority to take decisions either to approve or to reject foreign investment applications. It is for the Treasurer, or the Assistant Treasurer, and the government to make decisions on cases and policy.<sup>3</sup>

and again:

... FIRB is an advisory body only and does not make decisions on any foreign investment proposal, either for approval or rejection. It is for the Treasurer, Assistant Treasurer or cabinet - the government - to make decisions on proposals. At the end of the day it is not for any official or advisory body to make a decision about what is contrary to the national interest. It is open to the board - in fact it is incumbent upon it - to give advice to the Treasurer, Assistant-Treasurer and the government on the sorts of issues that are flagged by a particular proposal. It is the government's policy to assess it against the view, 'Is it contrary to the national interest?'. At the end of the day it is the Treasurer, the Assistant-Treasurer or the government who makes that fundamental decision as to whether or not it should be allowed to proceed under foreign investment

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<sup>1</sup> Department of the Treasury, *Foreign Investment Review Board Report*, AGPS, Canberra, 1992-93, p 1

<sup>2</sup> Treasury Submission, p 8 and supplementary submission of 20 April 1994. FIRB officers have the delegation to approve applications in certain sectors provided these applications comply with existing Government policy.

<sup>3</sup> Evidence p 7

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policy. That is a very important part of foreign investment policy administration.<sup>4</sup>

8.6 The previous Treasurer, John Dawkins, emphasised FIRB's advisory role:

So FIRB is not some mysterious body; it is merely a process by which the Treasurer, instead of being advised by, say, officials in the department, is advised by a [non-] statutory board about the particular application in respect of either the provisions of the Act or the provisions of the government's policy as announced.<sup>5</sup>

8.7 A former Treasurer, John Kerin, said of FIRB:

They put the situation before me. That is the advice; the Treasurer does not have to take the advice of FIRB; the Treasurer does not have to give reasons for taking decisions.<sup>6</sup>

8.8 The committee accepts that the executive government should have, and has, responsibility for initiation and administration of policies relating to foreign investment, and that FIRB is an advisory body created to facilitate that process. However, the committee does not accept any implication that FIRB is in practice only an advisory body with limited impact on foreign investment policy.

8.9 FIRB assists the Treasurer to consider foreign investment applications that deal with both new and existing foreign investment policies. FIRB is involved in multi-million dollar recommendations that have the potential to, and have actually, changed the corporate landscape of Australia. The print media decisions alone saw the transfer of a totally owned Australian enterprise with a price tag of \$1.5 billion to the control of foreign nationals. Few advisory bodies preside over systems that affect so dramatically the Australian economy.

8.10 FIRB is referred to as a 'Board'; it has prominent Australians as its members and it reports annually to Parliament. If the government was of a

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<sup>4</sup> Evidence of Mr Tony Hinton, p 36

<sup>5</sup> Evidence p 495

<sup>6</sup> Evidence p 460

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mind to reduce FIRB's standing, it could have employed one or more FIRB members as private consultants and abolished the board. Instead, FIRB has been given a prominence and standing that has created a community perception that FIRB is both authoritative and an authority on foreign investment matters.

### **FIRB as a non-statutory body**

8.11 FIRB is a non-statutory body (NSB). This means FIRB is not constituted under an Act or regulation. No reference to FIRB is found in the FATA or any broadcasting legislation. No reference to FIRB is found in any regulations associated with media-related legislation. FIRB was created following the then Treasurer's announcements in 1976, though 'the possibility of embodying policy in a comprehensive way in legislation' was identified as an important role for FIRB.<sup>7</sup> Similarly, establishing FIRB as a NSB was seen as an expedient though not long term option:

Initially we will establish the Board by administrative action. It is proposed that it be given a statutory basis as soon as possible.<sup>8</sup>

8.12 FIRB operates on the same basis as other non-statutory bodies that report to their portfolio minister. FIRB sits at the same hierarchical level as all other less well known non-statutory bodies. Examples of bodies with the same non-statutory status include the Advisory Committee on Commemorative Reunions, the Agreement on Standards, Accreditation and Quality Monitoring Committee and the Innovative Agricultural Marketing Program Executive Committee.<sup>9</sup>

8.13 The informality of a non-statutory FIRB, however, is seen by its present members as a boon:

**Chairman:** ... Are there any rules of procedure for the operation of the meetings of FIRB? Is there a constitution or any other governing document?

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<sup>7</sup> *FIRB Report 1977*, p 32

<sup>8</sup> *FIRB Report 1977*, p 31

<sup>9</sup> Senate Standing Committee on Finance and Public Administration, *List of Commonwealth Bodies*, Commonwealth of Australia, June 1993, p xii

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**Mr Hinton:** The FIRB is a non-statutory advisory body and, therefore, does not operate under legislative guidelines, structures or strictures. The more informal nature of that body means that the operational processes for meetings of the FIRB depend significantly on the wishes of the chairman or acting chairman. Experience over the years has been that effective exchange of views and discussion of the issues at hand is facilitated more by an open, free-flowing discussion than a formalised board meeting. Being a small group it does not need very strict control over the operation of meetings.

**Chairman:** I take it from that that there are no written rules of procedure or constitutions.<sup>10</sup>

### **The FIRB and the Foreign Investment Branch of Treasury**

8.14 FIRB has existed since 1976 and has developed a unique relationship with Treasurers. Since that time, membership of FIRB has remained remarkably stable. The late Sir Bede Callaghan, CBE, was Chairman of the Board from 1976 until 30 September 1992. Messrs Ken Stone and Des Halsted were first appointed in 1984 and continue to serve today. Mr George Pooley was the executive member for many years until replaced in 1992 by Mr Tony Hinton, also a career Treasury officer. Mr Graham Maguire, a former ALP Senator, was appointed in 1993 (and has not been involved in this inquiry). Mr Stone has been acting Chair since the resignation of the late Sir Bede Callaghan.

8.15 FIRB is the advisory body consisting of four members but the actual day-to-day administration associated with foreign investment applications is undertaken by 18 permanent public servants within the FIRB branch of the Treasury. In his evidence before the Senate Standing Committee on Environment, Recreation and the Arts, Mr Pooley, the then Executive Member and head of that part of the Treasury, explained the working relationship as:

What we [the public servants employed in the Division] really do, I think is to prepare a draft minute to the Treasurer which we send to the [other members of the] Board and, to the extent that the Board wants to change it, then it changes it. That minute goes to the Treasurer. It is just sent to the Treasurer by us along with all other minutes that are going to him, but

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<sup>10</sup> Evidence p 15

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it is on separate paper, headed 'Foreign Investment Review Board', and it contains all the views of everybody, including the views of the FIRB.<sup>11</sup>

8.16 In other words, the Treasury prepares a report after its own contact with the applicant and interested parties. The report is shown to FIRB which looks at the recommendation, reads the report and decides whether it wants to change the recommendation or to go along with the one that is made.<sup>12</sup>

8.17 Over time, the staff within Treasury servicing FIRB have developed substantial expertise and have been granted considerable authority to administer the foreign investment regime. Treasury staff, for example, are used by applicants to sound out potential applications, to give advice on matters likely or unlikely to obtain approval. They also exercise the Treasurer's delegation to approve applications in some fields which comply with existing policy. FIRB and the Treasury staff assisting FIRB have separate and distinct roles that complement each other. The Treasury staff cannot be dismissed as a mere secretariat to FIRB itself. Rather it could be argued that Treasury staff are public servants employed to administer existing government foreign policy and facilitate the development of new or revised policy, where necessary, using FIRB as a mechanism to those ends.

### **Past FIRB experience in assessing newspaper applications**

8.18 The first FIRB examination of the newspaper sector was of the proposal by News Limited to takeover the Herald and Weekly Times group in 1987. The Treasury submission records the government decision 'not to raise any objections to the News Limited's proposal after having considered carefully all the issues, having taken into account the views of state governments and the various representations received.'<sup>13</sup>

8.19 It would be accurate to say that commentators and sections of the community were greatly concerned about this outcome. When the John

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<sup>11</sup> Senate Standing Committee on Environment, Recreation and the Arts, Senate Printing Unit, Canberra, September 1992, *The Australian Environment and Tourism Report*, para 10.5

<sup>12</sup> Evidence to the Senate Standing Committee on Environment, Recreation and the Arts, op cit, p 168

<sup>13</sup> Submission No 16, p 7

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Fairfax group went into receivership in 1990, many people believed this event offered an opportunity to revisit the issue of foreign investment levels in the print media. Instead, newspaper policy has been revised to reflect the outcomes of the applications by various foreign interests for shares in that newspaper group. That is, policy has been developed in a reactive manner. From a position of absolute restriction in the early 1980s, the policy flirted with total liberalisation in the late 1980s before moving to the compromise positions of foreign shareholdings of 20 percent in 1991 and 30 percent in 1993.

### **Change in the culture of FIRB over time**

8.20 Anyone examining FIRB publications over time may be forgiven for concluding that the foreign investment regime has remained static since 1975. With the exception of different colours for each annual report and edition of the *Australia's Foreign Investment Policy*, the reports use the same language year in and year out. This was drawn to the attention of FIRB:

Senator Kernot: I was very interested to notice that the three paragraphs on consultation arrangements in your annual reports have been the same for about five years<sup>14</sup>

8.21 The use of other almost standard passages gives an impression of continuity of policy. Indeed, the very similar quotes from the 1978 and 1992 *Guide to Investors* about newspaper application procedures can be interpreted as reflecting a continuity of policy when the opposite is the reality.

8.22 The rhetoric of both the government in media statements and the Treasury in its annual FIRB reports leaves the impression that the present watchdog regime monitors all foreign investment applications and moves against any undesirable applications. The reality is that the system has, with few exceptions, always retained the 'open slather' approach of the 1960s.

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<sup>14</sup> Evidence p 12

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## Features of the FIRB regulatory system

### *Statistics*

8.23 While the regime was never intended to block desirable investment, FIRB now administers a system that considered 3,825 applications, with the Treasurer or Assistant Treasurer rejecting a total of 58 in the financial year, 1992-1993. It is important to note that only a small proportion of applications is actually examined by FIRB members. During 1992-93 the Board considered and made recommendations in respect of 43 applications. It was given four 'post examination' copies of advice prepared by Treasury officers in respect of 971 cases, but did not sight material relating to 2,646 cases. During 1992-93 the Treasurer or Assistant Treasurer approved 172 applications and rejected 58.<sup>15</sup> The numbers of rejections for the last five financial years are comparable to the 1992-93 figure of 58. In other words, the approval rate is in the order of 98 to 99 per cent each year. Furthermore, 'most of the rejections were in the real estate sector and related to applicants failing to qualify for approval to acquire established residential real estate.'<sup>16</sup>

8.24 The dollar value costs and benefits could be expressed as FIRB having an operating cost of around \$1 million each year applied to the approximately \$100 million of undesirable foreign investment (mainly in the real estate sector) rejected by FIRB in 1992-93.

### *Methods of communicating policies*

8.25 As explained in chapter 7, Australia's foreign investment policy is set out in the Broadcasting Services Act, the Foreign Acquisitions and Takeovers Act, and Ministerial statements and Departmental publications. The role of the legislation as the repository of foreign ownership rules has waned because new policy and revisions of old policy have been announced via irregular media releases by the Treasurer.

8.26 *The Foreign Acquisitions and Takeovers Act 1975* has been amended to reflect changes on only four occasions, while the *Trade Practices Act 1974*, economic legislation of a similar vintage, has been amended 43 times.

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<sup>15</sup> Treasury Supplementary Submission of 20 April 1994

<sup>16</sup> The Treasury, *FIRB Report 1992*, AGPS, Canberra, p 7



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This comparison points to a general conclusion that foreign investment rules are neither recorded in one or even a series of Acts nor updated regularly following parliamentary scrutiny. Rather, foreign investment rules have been the exclusive province of the executive government.

8.27 Legislation by press release is a practice that has been the subject of adverse comment by Senate committees because the use of this mechanism has the potential to undermine the position of the Parliament in the legislative process. Unfortunately, a number of key foreign ownership policy decisions have been made in this way.

### **Application guidelines under FIRB**

#### *The process*

8.28 Chart 8.1 depicts FIRB process. A number of points can be drawn from this depiction which are relevant to the committee's deliberations about FIRB.

8.29 The Treasury claims that much of the information required by FIRB to assess a particular proposal will be of sensitive commercial-in-confidence nature:

All information provided to the Board and the Executive by foreign investors is treated in strict confidence and the Board and the Executive do not disclose details of proposals other than to the parties involved, except in special circumstances where the information provider's consent is first obtained.<sup>17</sup>

#### *Domestic bids*

8.30 The Treasury claims that a 'normal' report to the Treasurer on a foreign investment proposal includes:

**views of other Commonwealth and State government departments and authorities and information presented by the parties who may be opposing or otherwise affected by**

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<sup>17</sup> Treasury Submission p 12

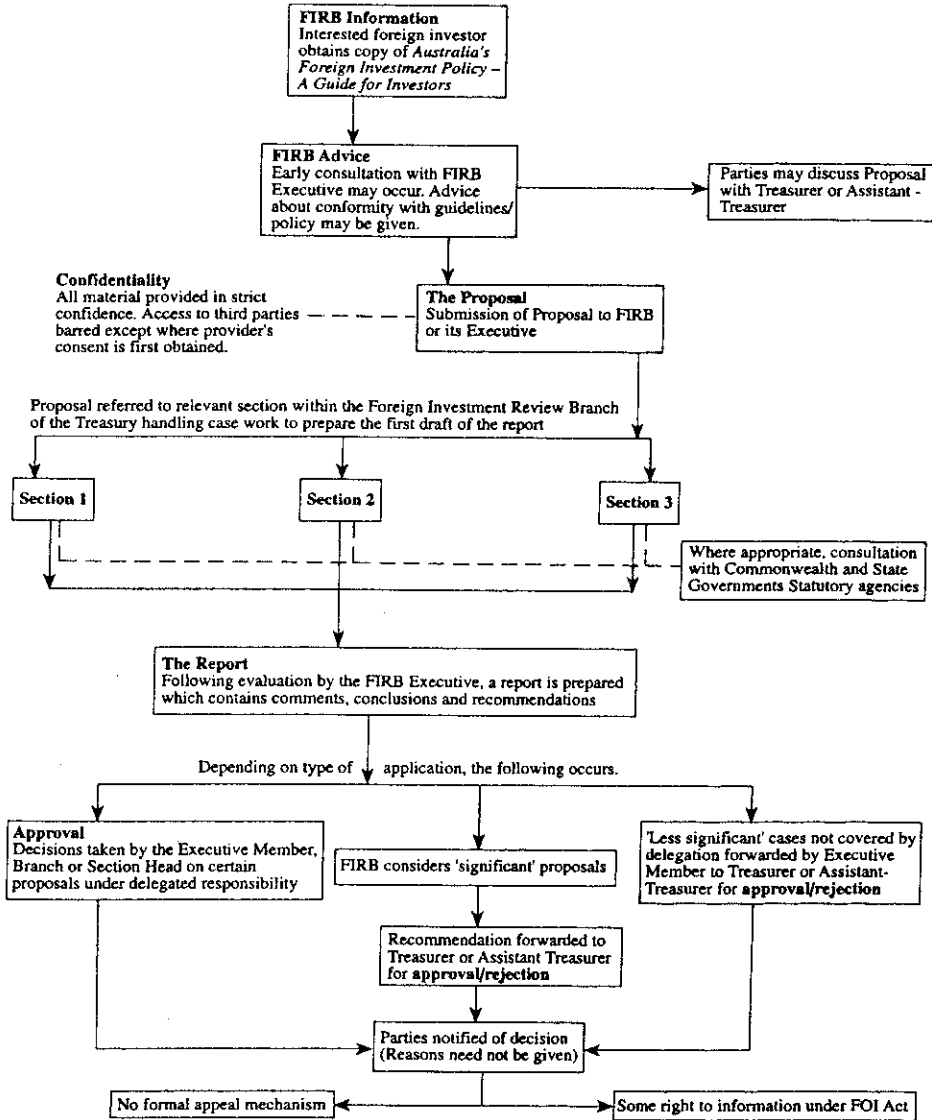
the proposal (e.g. the target company or **a competing Australia bidder**).<sup>18</sup> [emphasis added].

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<sup>18</sup> Treasury Submission p 11

Chart 8.1

## The FIRB Process\*



\* Source: Treasury Submission 2 February 1994

8.31 Whilst this might be the general policy, it is unclear whether FIRB has in place a communications strategy to inform Australian bidders on this matter. Also unclear are the procedures which FIRB uses to process Australian applications or submissions about a foreign investment proposal.

8.32 The Treasury publication *Australia's Foreign Investment Policy* lists the objectives of FIRB, defines what a foreign interest is, sets out the types of proposals which should be notified, describes how proposals are processed and states the government's policy in respect of overseas participation in key sectors of the economy. However, it is difficult in that publication to find any specific reference to the procedures that FIRB follows in considering domestic bids. It is not surprising that this matter has not been addressed in FIRB's official publication. The committee is of the view that within FIRB there is confusion about what FIRB's role should be in considering domestic bids alongside overseas bids.

8.33 FIRB's evidence on this matter is inconsistent in a number of respects. For example, FIRB stated that the AIN bid 'did not involve foreign interests and therefore, did not involve FIRB processes'<sup>19</sup> but Mr Breese from Barings stated that Dr Roberts, a FIRB case officer, contacted him seeking information on the AIN bid<sup>20</sup>. Similarly, the FIRB Minute of 5 December 1991 contained information, much of it erroneous, about AIN. To say that AIN had not become involved in the FIRB process borders on the unbelievable.

8.34 If FIRB has a view that officially it does not treat Australian bidders as part of a process to assess foreign investment, then any unofficial treatment, as appears to have happened in the case of AIN, could be seen as being contrary to national interest in that it encouraged foreign bids over domestic bids. Surely, in considering the national interest FIRB is obliged to assess properly the qualities of any domestic bidder.

#### *Notification of reasons for decision*

8.35 The Treasury stated that FIRB provides advice of the outcome of the Treasurer's decision to the parties, but that advice:

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<sup>19</sup> Evidence p 40

<sup>20</sup> Submission No 33

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is confined to whether or not there are objections to the proposal ... and to noting any conditions that may be attached to an approval. **Formal notification of the reasons for a decision by the Treasurer is not normally made**, although it is open for the parties to a proposal to request the reasons for a proposal being regarded as inconsistent with policy in cases where the proposal is rejected, or to request an explanation for any conditions imposed. Although **there are no formal or legal avenues for appeal** of a decision by the Treasurer or Assistant-Treasurer, it is open for the parties to a proposal that is rejected to seek its reconsideration as a new proposal on the basis of additional information bearing on the proposal or the modification of its features.<sup>21</sup> [emphasis added].

### *Excessive secrecy*

8.36 The lengths to which FIRB/Treasury will go to protect the confidentiality of information provided in foreign investment applications was manifested during the public hearings. Mr Chadwick, representing the Communications Law Centre, said of his dealings with FIRB:

What troubled us at times was that we would get answers like 'This is awkward and confidential and no, I cannot confirm or deny the existence of an application in this matter, notwithstanding that it is notorious in the press'.<sup>22</sup>

8.37 Mr Mark Ryan, of the Media Entertainment & Arts Alliance, commented that since 1986 he had found FIRB to be 'consistently secretive, inconsistent and probably irrelevant to the actual decisions that have been made. It has been secretive to the point of stupidity'. He cited an instance where the Board wrote to seek his consent for the release of an Australian Journalists' Association (AJA) submission made on The Herald Weekly Times takeover by News Ltd company. The AJA consented to the release, but according to Mr Ryan, the Board declined to release the papers, including those submitted by the AJA.<sup>23</sup>

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<sup>21</sup> Treasury Submission p 12

<sup>22</sup> Evidence p 440

<sup>23</sup> Evidence p 171

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*Freedom of information (FOI) data*

8.38 FIRB's record in handling FOI requests, confirms its apparent obsession with secrecy and confidentiality. An examination of successive FIRB reports<sup>24</sup> reveals that its handling of FOI requests is at variance with its stated policy, and well below the norms for other Australian government agencies. FIRB's 1989-90 report states:

Wherever practicable, requests for information are answered without applicants needing to have recourse to the provisions of the FOI Act.<sup>25</sup>

8.39 The 1989-90 report reveals that 50 per cent of FOI applications resulted in a full release and 50 per cent in partial release. The overall figures for years 1988 to 1993 are even less impressive with, on average, only 27 per cent fully released, 38 per cent partially released, 16 per cent withdrawn and 19 per cent rejected.

8.40 Public service-wide FOI release data for 1989-90 published by the Royal Australian Institute of Public Administration (RAIPA) reveals that 75 per cent of all requests were fully granted, 96.7 per cent fully or partially released and 3.3 per cent rejected.<sup>26</sup>

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<sup>24</sup> See Table 8.1

<sup>25</sup> *FIRB Report 1989-90*, p 9

<sup>26</sup> S Zifcak, Paper delivered to the Royal Australian Institute of Public Administration (RAIPA) (ACT Division) and Australian Institute of Administrative Law, at the *Fair and Open Decision Making: 1991 Administrative Law Forum*.

**FOREIGN INVESTMENT REVIEW BOARD**  
**FREEDOM OF INFORMATION REQUESTS**

1985 - 1993

**Table 8.1**

Year	No of Applications Processed	Full Release	Partial Release	Withdrawn	Rejected*
1985-86	9			5	
1986-87	4				
1987-88	6				
1988-89	6	2	2		2
1989-90	4	2	2		0
1990-91	7	2	3	1	1
1991-92	6	1	1	3	1
1992-93	14	3	6	2	3
Total (1988-93)	37	10	14	6	7
Percentage (1988-93)	100	27	38	16	19

\* Assumed rejected as Annual Reports for FIRB do not state that applications for documents were rejected. Instead it is claimed that applications for documents under FOI are outstanding as they are still before the Administrative Appeals Tribunal or time has lapsed.

### *Leaks*

8.41 Paradoxically, when FIRB discovered that one of its most crucial and controversial minutes had leaked it elected **not** to take measures to establish the source of the leak. The Treasury submission indicates that a failure to maintain complete confidentiality would 'irreparably harm the basis of the Board's existence and curtail its usefulness'<sup>27</sup>. It is of interest to the committee that in being questioned about the leak, FIRB's Executive Member indicated that the broader considerations in taking a decision not to investigate the leak included the fact that the receiver's decision had been made and that, subsequently, the document had a 'shelf life' that had passed.<sup>28</sup> This revelation undermines considerably the Treasurer's insistence that each of the four FIRB minutes sought by the committee were of a 'public interest immunity' character. This evidence also suggests that FIRB's policy of blanket secrecy may not be justified.

### **Comparison of FIRB with other regulatory or review agencies**

#### *Handling sensitive and confidential material*

8.42 To assist its understanding and appreciation of FIRB and its processes, the committee wrote to a number of other regulatory and review agencies, that operate in similar environments, to obtain statements of their *modus operandi*. The committee chose to limit inquiries to three such agencies: the Trade Practices Commission (TPC); the Industry Commission (IC); and the Australian Broadcasting Authority (ABA).

8.43 The rationale for selecting these agencies was straightforward. The TPC and IC are statutory agencies reporting to the Treasurer within the Treasury portfolio as does FIRB. The ABA administers the television and broadcasting regime and addresses print media matters insofar as 'restrictions are placed on participation in the Australian broadcasting media if certain interests are held in the Australian print media'<sup>29</sup>. The committee sought to canvass agencies with knowledge of:

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<sup>27</sup> Submission No 14 p 12

<sup>28</sup> Evidence p 590

<sup>29</sup> Evidence p 107



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- the foreign investment review process;
  - the specifics of print media;
  - the culture of the Treasury bureaucracy; and
  - the difficulties of conducting investigations testing what may be commercially sensitive material in the marketplace.

#### *Trade Practices Commission (TPC)*

8.44 Under the Trade Practices Act, the scheme of the confidentiality provisions entails putting all material submitted during the authorisation process on the Public Register, but confidentiality can be claimed by those providing the information for commercial concerns such as trade secrets etc. If the confidentiality is not granted, the client firm can withdraw its application.

8.45 In cases of non-statutory claims for confidentiality the TPC will examine whether the claim is genuine. The material from the TPC indicates that in examining these claims, often these claims are 'over cautious'.

8.46 Much of the TPC information becomes dated and some years later may not be confidential. As a consequence, the TPC will often give the public access to this material.

#### *Industry Commission (IC)*

8.47 Submissions to the Industry Commission (IC) may contain confidential information and the IC Act provides for the protection of such information. The IC explains to client firms the benefits of public information and sometimes such material is narrowed down and separated into an annex which is treated as commercial-in-confidence material.

8.48 Submissions to the IC are generally available to the public.

8.49 Public hearings of the IC are held and transcripts are made available to interested parties.

8.50 Commission reports are submitted to government and tabled in Parliament.

*Australian Broadcasting Authority (ABA)*

8.51 A significant amount of information collected by the ABA is of a commercial-in-confidence nature, presumably the balance of such information is not so protected.

8.52 On occasions the ABA publishes reports dealing with confidential information but every effort is made to ensure that the confidentiality is not breached.

**Testing the validity and accuracy of information**

8.53 The receipt of information which is then made available to the public provides any government agency with a useful and potentially rigorous checking mechanism. Should the information be provided on a less than fully public basis, the work of verification falls squarely on the shoulders of the agency making the report and/or preparing a recommendation for government. The three agencies responded to the verification question in the following way:

*Trade Practices Commission*

8.54 The TPC tendency is to make marketplace inquiries to verify material. Another layer of accountability in information processing and gathering is provided in the form of annual reports and other relevant publications, some of which are published in draft form to allow the public to verify and test certain data and conclusions.

*The Australian Broadcasting Authority*

8.55 The ABA tests data by seeking information from other parties who have access to the same data, by obtaining authorised copies of certain documents and by seeking additional information to substantiate claims.

*The Industry Commission*

8.56 The IC contends that it verifies data by discussing it with the participant and by entering into a process of public analysis which draws on the data in such a way as not to disclose it to the public.

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*Applications to FIRB*

8.57 The procedures used by the TPC, ABA and the IC to verify and validate raw data could be successfully adopted by FIRB. This matter is developed further in the following chapters.

**FIRB record keeping and internal processes**

8.58 On a number of occasions during the inquiry the committee sought details of the listings of files and folios in relation to the 1991 and 1993 decisions. Following the receipt of the first list of files and folio documents the committee resolved that a further letter be written to the Treasurer to obtain his assurance that it had been given a complete list of the relevant documents. On the basis of the first list it seemed that the information provided only included the correspondence received by FIRB, the internal correspondence from FIRB to the Treasurer and a list of other publicly available documents such as press releases.

8.59 The Treasurer responded in such a way as to indicate that the committee had been given all relevant correspondence. What concerns the committee is the fact that there appears to be no notes to file relating to meetings between FIRB officers, no minutes of meetings/telephone conversations between FIRB officers and players in the Fairfax decision and no notes to file following telephone conversations between FIRB officers and the Treasurer's office. The committee is particularly concerned that there appears to be no support documentation of an internal nature to justify the conclusion reached by Mr Pooley in his Minute of 5 December 1991 about the qualities of the AIN bid. Another concern of the committee is that, in respect of a decision of enormous consequence to the control of the print media in Australia, there appeared to be no evidence of an exchange of ideas either amongst FIRB officers or between FIRB officers and FIRB members on the merits of a decision, other than the final Minute of 5 December 1991.

8.60 In short, there appears to be no documents or analysis on file to support the extraordinary comments made. This paucity of written information does little to assist FIRB's corporate memory, particularly as several of its former key senior officers have experienced difficulty in recollecting significant events.

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### The Committee's view of FIRB guidelines

8.61 The FIRB process can be characterised as 'one of administrative advice and executive discretion.'<sup>30</sup> FIRB is not subject to the *Administrative Decisions (Judicial Review) Act 1977* (ADJR) which means that a person aggrieved over a decision made under the *Foreign Acquisitions and Takeovers Act 1975* is unable to use ADJR provisions which include obtaining a statement of reasons for a particular decision. Although FIRB is subject to the *Freedom of Information Act 1982*, there is a range of grounds that the Treasury can and has used to claim exemption from disclosure of documents. The safeguards of Australia's administrative law have only limited application to FIRB and its processes.

8.62 As the Communications Law Centre (CLC) submitted:

The Treasurer is not required to give reasons for a decision on how the national interest is affected by any proposal and has protected advice given by FIRB from public scrutiny under the Freedom of Information Act, by issuing a conclusive certificate. ... Neither the public nor an applicant has a right to make submissions on the question of the national interest, and the FIRB does not disclose details of proposals to anyone other than the parties directly involved.<sup>31</sup>

8.63 FIRB guidelines permit the system to be characterised as being politically rather than administratively driven with decisions that appear to be, at best, political pragmatism at its most blatant. The absence of reasons for a decision, the absence of independent appeal, the absence of transparent accountability and the absence of a body of decisions from which policies can be discerned make any other conclusion difficult to justify.

8.64 The interrelated issues of best administrative practice, natural justice and the absence of review of FIRB decisions and procedures are matters that are developed in chapters 9 and 10.

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<sup>30</sup> CLC Submission, p 9

<sup>31</sup> CLC Submission, p 9