CHAPTER 9

THE FIRB DILEMMA

9.1 The previous chapters of Part IV record the history and development of current policies and administrative practices dealing with foreign investment in Australia. Those chapters identify and discuss a number of features of the current system. This chapter identifies the flaws in that system and foreshadows the means for its enhancement. Chapter 10 contains a series of recommendations aimed at codifying policy and transferring certain responsibilities from the administrative arm of government to a properly constituted, autonomous body responsible to the Parliament for foreign investment administration.

Introduction

9.2 Changes are long overdue given that the Foreign Investment Review Board (FIRB) has not been the subject of a focussed external review in its 18 years:

Senator Kernot:	Has FIRB ever been the subject of an external review by, for example, the Auditor-General's department?
Mr Hinton:	Not to my knowledge[1].

9.3 However, the committee notes that FIRB has been the subject of a degree of parliamentary scrutiny by a Senate inquiry into tourism and a House of Representatives Select Committee on the Print Media. In neither case was FIRB the central focus.

9.4 The failure to review FIRB is contrary to government policies. In its response to another Senate committee, the government agreed that its future policy would be that:

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[1] Evidence p 56

> Reviews should be conducted every 3-5 years; they should address the need for the NSB's [non-statutory body - in this case, FIRB's] existence, and, if there is a continuing need for the NSB, its functions and organisation.[2]

9.5 This parliamentary committee is the first body to examine FIRB, reporting as it is, on the 1991 and 1993 Fairfax decisions. In the absence of any previous formal review it may not surprise that the committee did not discover an accountable, open body which consults widely on foreign investment matters. Instead, it found an informally constituted group with an excessive preoccupation with secrecy in its dealing with applicants and parliamentary committees.

9.6 The ability of the committee to identify and address the issues in its terms of reference was limited by the obfuscation of the Treasurer, Treasury and FIRB in this regard.

The government's right to govern ...

9.7 Underlying the Treasurer's instruction to members and ex-members of FIRB is the contention of the executive government, given voice in the repeated claims of public interest immunity in respect of matters for which incorrect advice may have been prepared, that this inquiry is a threat to the government's right to govern.

9.8 The committee recognises that there are those who consider elected governments should simply be allowed to get on and govern. This view asserts that governments should proceed to implement their election platforms without the need for consultation, presumably because they have all the answers to complex problems or, if that is not the case, then public involvement will only delay the government implementing whatever becomes a desired solution. This view further asserts that members of the community have their voice in government at election time only, and any subsequent parliamentary review is seen as unnecessary or politically motivated.

9.9 The unquestioned acceptance of such a notion is based on a simplistic and unfortunate view of the democratic process. Democratic participation in Australia is not limited to a vote once every three years from a limited list of candidates. Democracy is not just about one party winning an election

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2 Senate Standing Committee on Finance and Public Administration, *Non-Statutory Bodies - Further Report*, AGPS, May 1988, p 33

with the unfettered right to govern and the electors enjoying the fruits or suffering the consequences of their choice. The committee believes consultation and accountability processes are very important factors in designing accountable public policy decision-making systems. The foreign investment regime in Australia is one such key decision-making system.

... versus the public's right to know ...

9.10 The committee is not questioning the right of elected governments to make certain decisions without having first consulted the community. Often, there is no practical alternative. The committee believes, however, that the right of the government to implement its policies must be subject to parliamentary review and public accountability. However, in the case of the Fairfax decisions, the government used a national interest criterion with no formal mechanism for assessing such interest.

What is wrong with the FIRB model

9.11 The previous chapters in Part IV describe a foreign investment system that was created by Commonwealth enactment. It was designed to address legitimate concerns of the Australian community about unrestricted foreign investment. The system can be described as placing some restrictions on sensitive sectors of the economy while encouraging investment in the remainder. In that sense, the system endeavoured to balance two, sometimes competing, imperatives; encouraging foreign investment generally; but at the same time flagging areas where investment should be discouraged so as to give preference to Australian ownership.

9.12 The committee believes that this system is fundamentally flawed. The problem is not that wrong decisions are made, but that the system detached itself from scrutiny, both direct public scrutiny and the vicarious scrutiny on behalf of Australian citizens performed by the Parliament. A viable decision-making system must be able to withstand the rigorous critique of players. It should not hide behind the artifice of secrecy to escape scrutiny. The possibility of corruption, deal-making or political favouritism will always exist in such an environment. A general election is an inadequate redress for parties adversely affected by apparently unsound foreign investment decisions.

Problems in the design and operation of FIRB

9.13 The foreign investment system has two serious flaws; one related to the system design and the other to its administration.

Parliamentary scrutiny

9.14 The essence of our parliamentary democracy is a system of checks and balances that operates to mitigate the exercise of excessive arbitrary power by any one arm or level of government. The scrutiny processes of the Houses of Parliament place a brake on the power of any executive that exceeds its powers. It could be argued that the foreign investment system was established by legislation, but that the system, in effect, permitted the executive government to make unilateral changes to the rules. While this mechanism may be expedient, it would appear that the government has used this power to avoid the original intention of the system as embodied in legislation.

9.15 Often, amendments to foreign investment rules are made by the executive via media release, and thereby avoid the processes of Parliament.

Public scrutiny

9.16 The other serious flaw is that FIRB has embraced a culture of secrecy that has become the by-word for its foreign investment administration. Proponents of the system contend that frank and candid disclosure by applicants to FIRB requires that a cloak of secrecy surround disclosure of that information to third parties in perpetuity. The flaw in this argument is that both for FIRB and for outside players, the verification of information becomes difficult, if not impossible.

9.17 The committee has cited the example of other regulatory agencies that operate effectively without the self-imposition of secrecy on their investigations. In the face of these examples of agencies operating even within the Treasury portfolio, FIRB and the government continue to argue for the retention of the present secret system.

9.18 The secrecy provisions permit FIRB to avoid being scrutinised by interested third parties who may well be able to provide different information. In embracing the purported fiduciary duty to preserve the secrecy of information supplied by applicants, FIRB exempts itself from the best form of accountability, namely public oversight of its operations. It appeared in evidence that no-one was supposed to know what applications were before FIRB so the opportunity for critical third party comment was avoided or severely limited. Only the most interested person would lodge views with FIRB when that body neither confirms nor denies the existence of a particular application. In reality, FIRB only has to satisfy itself that the application meets the criteria and this process is administratively so much easier if consultation is excised from the system except in the extraordinary cases.

FIRB as a processor of applications

9.19 In successive annual reports FIRB attests to the speed at which it is able to process the thousands of applications received each year. The success rate of applications demonstrates the considerable ability of staff assisting FIRB to advise applicants to ensure compliance with the established criteria. It would appear that as a processor of applications, FIRB has few peers. Eighteen staff took 40,000 telephone calls and processed 3,800 applications in the financial year 1992-93.

9.20 However, this high volume of activity may have taken its toll in other areas, for example record taking, briefings, procedural reviews and reporting:

Chairman: I take it from what you have said that there are no written rules of procedure or written constitutions. Has anyone sought to bring together the institutional memory of the process?

Mr Hinton: Exercises like making our submission to this committee are useful, in that they provide opportunities to put down on paper the operations of FIRB. .... Therefore, this process - that is, this committee hearing and our submission to it - provides ... the history.

Chairman: But no-one has sought to formalise that?

Mr Hinton: The nature of the consultative process and the advice to government has not really generated a strong demand for that to be set in any sort of formalised system.[3]

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[3] Evidence pp 15-16

9.21 The point is that FIRB and its support staff apparently do not recognise that recording its operations is a necessary function of sound administrative practice. The absence of even an outdated description of the activities of FIRB makes any review difficult, especially when confronted with an attitude that such recording is a distraction from the proper function of FIRB.

FIRB and print media policy

9.22 It appears that FIRB has significant difficulty when an application is lodged that does not comply with existing policy. This difficulty is not a reflection on the policy formulation skills of FIRB or staff assisting the FIRB, but rather it is an observation based on the processes undertaken by this body when dealing with the extraordinary application. How does a body, whose focus is processing proforma applications, deal with politically charged applications about the ownership of a media icon involving considerations not covered by established policy parameters? The John Fairfax decisions were prime examples of this dilemma.

9.23 FIRB knew that newspaper ownership was restricted as it had been written in every FIRB publication since 1975. The difficulty was in the interpretation of 'restricted'. For Rupert Murdoch, restricted had one meaning, for Robert Maxwell another. What did it mean for Conrad Black and Tony O'Reilly and what impact, if any, did the interests of the Australian consortium, AIN, have on the thinking of FIRB about the foreign consortiums?

9.24 FIRB did not have an accepted process set out in its statute to address the challenge of change. FIRB had to develop its own procedures to identify and discuss the issues arising from each of the Fairfax applications against the backdrop of the secrecy undertakings that have become part of its *raison d'être*. The difficulties for FIRB became apparent as it realised that newspaper ownership policy was a movable feast. The policy depends as much on the personal views of the Treasurer of the day as on the previously established policy. Each instance was resolved after months of negotiations, but made redundant upon the lodgement of a new application.

Accountability

9.25 Public consultation is a natural expression of the democratic process. That process legitimises final decisions. The challenge created by urgent, individual matters not contemplated at election time or included in party platforms is to decide them in an open and accountable manner. The urgent case still needs to be decided according to the principles of established policy or, at least, policy developed through public consultation to deal with the problem when identified.

9.26 The absence of consultation has the potential to create suspicion of the type which has been attached to FIRB in respect of the Fairfax decisions.

9.27 The committee's reservations on FIRB's accountability are highlighted by the FIRB document of 5 December 1991 from Mr Pooley to the Treasurer. This document demonstrates that a lack of accountability has resulted in FIRB producing a report containing grossly inaccurate information.

9.28 The committee emphasises that, in the first instance, this document was not released by FIRB or the government. Indeed, the government went to extraordinary lengths to avoid confirming its existence despite the fact it had been public for over a year.

9.29 The Minute dated 5 December 1991 which was leaked to the AIN consortium in January 1993 contains factual errors about AIN, and unsubstantiated assertions that were not tested with AIN.

9.30 Several witnesses, including the Acting Chair of FIRB Mr Stone and his fellow board member Mr Halsted, spoke highly of the work produced by the Treasury support staff. Mr Stone described it as the 'best reporting I have ever come across in my life', 'superb' and 'very deep'.[4] Mr Halsted supported those comments and added 'absolutely first class'.[5]

9.31 As the Minute of 5 December 1991 is the only document of FIRB recommendations to a Treasurer known to have leaked into the public

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4 Evidence p 607

5 Evidence p 607

domain in FIRB's history, the committee is able to comment only on this one document as an example of FIRB's quality of analysis and recommendations. The committee finds that it falls well short of the standards suggested by the current board members.

9.32 The government has defended the FIRB minute on two grounds:

- that the FIRB minute was not reporting to the Treasurer about AIN; it was about the two competitive foreign consortiums, Tourang and INP; and

- that FIRB comments had no bearing on the receiver's ultimate decision to determine the successful bid.[6]

9.33 The committee believes that the FIRB report raises the following questions:

> *What other unsubstantiated statements or factual errors exist in this or other FIRB material?*
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> *Why was the AIN bid not assessed in the context of the "contrary to the national interest" test which could have seen the only Australian bidder given preference over the foreign bidders by rejecting Tourang and INP?*
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> *What value can future Treasurers place on an advisory body that produces work so patently inaccurate?*
>
> *If the Treasurer does not rely on FIRB for foreign investment advice, who does he rely upon for such critical advice?*

9.34 These questions only give greater force to the demand that FIRB disclose all relevant materials, at least on an 'in camera basis' and answer its critics in the open forum of this committee. They also point to what is the ultimate question, the credibility of FIRB in future foreign investment decisions.

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6 Attachment 5 of the AIN Submission contains a complete set of the lopsided correspondence between the Government and that disgruntled bidder

9.35 No other FIRB documents conveying advice to the Treasurer have been released by the government. Therefore, the committee has no evidence supporting the capacity of that body to arrive at cogent and defensible conclusions.

The way forward is to start again

9.36 The ultimate check on any administration is public opinion and scrutiny. This is only effective if there are structures and systems to ensure the public is properly informed. Secrecy is an impediment to accountability which can divert and even corrupt decision-making processes. The safety net of a review by the Parliament has also been avoided by the present system for foreign investment. The withholding of material evidence only demonstrates the absence of accountability and heightens concern as to the effectiveness of the process and procedures observed in this case.

9.37 The committee believes that the entire foreign investment process in Australia requires dramatic structural and procedural changes to be undertaken as soon as practicable.