CHAPTER 10

A REVAMPED FIRB

Overview

10.1 The terms of reference direct the committee to review the procedures followed by the Foreign Investment Review Board (FIRB). The committee obtained evidence about the operation of the current foreign investment policy and some valuable criticisms of present practices. However, the committee has only obtained limited evidence on desirable changes to the system. The views contained in this chapter reflect the collective experience of committee members, who in the course of their parliamentary duties examine the administration of public sector structures, and the insights of witnesses. The scope of this inquiry, the limited timeframe in which it has been conducted and the reluctance of the government to canvass before the committee options for reform, have combined to restrict the capacity of the committee to present as detailed a plan as would have been desirable.

Basic aims of foreign investment policy

10.2 The initial focus of any review of any of FIRB's procedures should be on the basic aims of foreign investment policy. This is a precondition for any rational discussion of plans to restructure the present system. There is a clear consensus in the community for the retention of some form of foreign investment control in Australia. Any changes to foreign investment systems should focus on the nature of the controls.

10.3 Views of witnesses and members of the committee on the desirable features of the controls vary substantially, but there is a common desire for a system that provides for the reasonable access of foreign investors, while upholding Australia's right, based on 'national interest' concerns to preserve certain industry sectors. This is consistent with OECD practices referred to in chapter 7.

10.4 The committee also discerns the world trend since the 1970s towards an even more open system. FIRB reports record increasing liberalisation of foreign investment policy in Australia.

10.5 For some people, the objective in a perfect world would be that the system be open. In the 1990s, however, there is strong public support for the

maintenance of regulatory 'checks and balances' on foreign equity investment. This was alluded to in chapter 7.

10.6 The policy statements of the four political parties represented by member Senators on this committee recognise the desire for sensible and realistic controls on foreign investment, and all believe the continuance of a regulatory body is warranted. Similarly, the players in the John Fairfax saga accepted the existence of a set of rules and endorsed that framework.

10.7 Even within the divergent views of the foreign investment experts who gave evidence, the common thread is a call for a more open and accountable process:

> **Prof Stilwell:** I would like to see restructuring so as to permit a wider array of community interests to be represented in that process rather than allowing the decisions to be retained effectively by the Treasurer.
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> **Chairman:** What about the Treasurer publishing reasons for a decision?
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> **Prof Stilwell:** I would welcome that.[1]
>
> ooo
>
> **Dr Craik:** ... we do need a transparent policy process that is accountable. I understand the problem with confidential business information ... but I would have thought there are ways around that kind of matter as there are in courts of law.[2]

10.8 Dr Robertson, a champion of deregulation of foreign investment controls, argued the advantage of permitting the market mechanism to determine matters; 'if a firm makes a mistake the market will tell them'[3]. The market mechanism requires accurate and timely information for all participants to make their judgements. In that sense, the market mechanism is open and transparent and is the antithesis of a closed system where only selected parties are informed of decisions and benefit from that information.

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[1] Evidence p 101-2

[2] Evidence p 376

[3] Evidence p 75

10.9 Media industry experts like the Australian Press Council and the Communications Law Centre (CLC) hold similar views:

> We [the Australian Press Council] proposed that if - I stress the if - there were to be a level of foreign investment in the press that should be determined by legislation, by the parliament. Any decisions taken in relation to the refusal or acceptance of a proposal concerning foreign investment should be subject to review by the courts.[4]

> In our [the CLC] view the ideal structure for these matters [FIRB process] would have the following characteristics: that notice be given; that consultation occur; that there be more transparency - in particular disclosure of decisions and reasons for them - and that there be opportunity for challenging decisions.[5]

10.10 The committee believes that a system of control continues to be warranted in the 1990s and beyond. The aims of the system should remain the same; they must encourage desirable foreign investment while preserving declared areas of our economy from undesirable foreign interest and/or loss of strategic control. The question becomes the method of giving effect to these aims.

Restructure of the system

The features of the revised regulatory system

10.11 The major thrust of this part of the report is a call for greater accountability and consultation in the foreign investment regime. The committee believes that an appropriate mechanism to bring about changes to the present system should involve public consultation and a commitment by the government to that process. The following recommendations are aimed at setting an agenda for this process of consultative change. Ensuring that this debate encompasses a wide audience through an open process will go a long way toward addressing the problems identified in this report. The process should be initiated via the introduction of legislation in the Parliament to facilitate critical and representative debate by all political parties.

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[4] Evidence of Prof Flint p 426

[5] Evidence p 439

Recommendation 10.1

That the government introduce legislation in the Parliament to amend Australia's foreign investment laws in accordance with the recommendations of this report.

Setting the legislative scene

Need for a single statute for foreign investment policy

10.12 In its 1988-89 report, FIRB reports on 'Changes to Foreign Investment Legislation':

> In keeping with the long-standing foreign investment practice, and to maintain flexibility and avoid excessive legalism, the criteria for examining proposals notified pursuant to the legislation continue to be set down by way of Ministerial statement and published in guideline form.[6]

10.13 There are numerous reasons for consolidating foreign investment policies in a single statute rather than the present combination of aging legislation, Treasurer's media releases and FIRB publications. Traditionally, the community looks to the statutes for its laws rather than relying on media reports of changes to policy and guidelines issued irregularly and infrequently. The Tourang experience, in structuring its original bid for Fairfax around its interpretation of the existing legislation, demonstrates this point. The cost of preparation of foreign investment applications requires greater certainty and clarity in defining policy and procedures. The existing uncertainty and red tape adds to business overhead costs, which ultimately are borne by the community at large. The difficulty for the community in complying with rules not freely available has been the subject of numerous parliamentary committee reports.

[6] *FIRB Report 1988-89*, p 1

Recommendation 10.2

That the government incorporate all components of its foreign investment policy into a single statute.

Identify key sectors

10.14 The present system identifies specific requirements for certain industries and types of foreign investment. The committee accepts that the current structure of the legislation remains an appropriate model for the new statute:

> The process of notification, examination and recommendation seems to me perfectly sound ...[7].

10.15 The statute should specify exemptions or limitations and the statutory tests and sanctions that apply to each sector.

Recommendation 10.3

That the legislation include a comprehensive statement of the goals of foreign investment policy and identify those sectors of the economy which should be subject to foreign investment regulations.

Signposts for the 'national interest'

10.16 The committee acknowledges that the present test of 'contrary to the national interest' has not been defined previously because of the perceived difficulty in anticipating all possible permutations and scenarios[8].

10.17 In the words of one witness, Mr Cameron O'Reilly of AIN:

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[7] Evidence of Prof Stilwell, p 100

[8] Evidence of Mr Hinton, p 29-30 and p 57 explains the difficulties and indicates that a set of criteria is not available

> It seems to me it is not a job I would particularly like, to be trying to define what is and is not in the national interest. So I think there will always be a certain amount of mystery...[9]

10.18 In chapter 3, other witnesses gave evidence of where this definition resides, namely, in the mind of the Treasurer. Whatever the proposed review process identifies as the appropriate test or tests in the new legislation, the clients will be better served by clear and unequivocal statements of legislative intent. The thousands of applications considered since the change of the test in 1986 should assist the legislative drafters and instructing officers to distil those precedents and draft new sections of the Act that could help to define or exemplify the revised tests. The task may be a difficult one, but the many precedents suggest it is possible.

10.19 Should the matter prove too difficult to incorporate in legislation, the committee believes that the administering body should, at the very least, publish its views on the matters relating to the 'national interest'. Other government agencies facing similar tasks have assisted their clients by providing written information and interpreting legislation; thereby identifying what applicants can do safely and what conduct is at risk. For example, the Australian Taxation Office and the Trade Practices Commission have produced useful interpretative material on the application of their respective statutes.

Recommendation 10.4

That the legislation contain the criteria which should be used to determine applications by foreign investors and that it should also provide, where appropriate, that the interests of domestic bidders be taken into account.

Review sanctions and remedies

10.20 *The Foreign Acquisitions and Takeovers Act 1975* includes criminal sanctions of fines of $50,000 or 2 years jail for breaches by individuals and fines of $250,000 by corporations. The legislation also contains administrative

[9] Evidence p 325

mechanisms permitting the Treasurer to issue wide-ranging orders to remedy problems in specified circumstances.

10.21 While these sanctions appear to 'cover the field', the committee observes that the Treasurer has not exercised his powers under the Act except on three occasions. On two of these occasions, the Treasurer issued divestiture orders under the Act requiring foreign persons to dispose of their interests in residential real estate within six months from the issuance of the orders.[10]

10.22 The committee believes that any regulatory system is only as effective as the appropriateness of the remedies to redress breaches and the capacity of the regulator to conduct compliance activities. The absence of resolve or capacity to use the sanctions is a matter addressed in a later recommendation. It may be that the current sanctions are appropriate, but their lack of use suggests that this matter should be examined by the government in preparing its legislation.

10.23 In preparing the legislation, it is possible that the government might find that the sanctions are adequate but that the fact that compliance enforcement is restricted to the office of Treasurer, limits overall compliance resolve. In Australian competition law, some civil remedies are available to parties other than the Minister and the regulator. Australian competition law has generated a strong incentive to avoid breaches because those affected by anti-competitive conduct can take legal action. Injunctions and damages actions by aggrieved parties offer an opportunity for industry regulation not envisaged under the present regime. The changes to foreign investment policy should encompass the appropriate sanctions together with the classes of litigants permitted to apply for redress.

[10] Treasurer's Press Release No 150 of 24 November 1993

Recommendation 10.5

That the legislation to reform foreign investment rules reflect a realistic and appropriate range of sanctions to remedy possible breaches, and that there be a duty on the part of the administering body to monitor and enforce compliance.

Need for clear consultation processes

10.24 Based on its experiences during this inquiry, the committee believes the legislation should clearly state the procedures necessary to guarantee consultation.

Recommendation 10.6

That the legislation include procedures that the regulatory body should adopt to consult with applicants and other interested parties preparatory to it exercising any administrative discretions conferred by the statute.

Balancing publication and confidentiality

10.25 An integral feature of the present system is the requirement to maintain the confidentiality of information supplied by applicants. To do otherwise would breach the duty created when accepting the 'commercial-in-confidence' information. The committee does not accept that the system should be predicated on such 'in perpetuity' secrecy undertakings.

10.26 To gain a better understanding of the problems that other government organisations encounter in receiving, handling and making decisions on information which might be of a confidential nature, the committee surveyed the Trade Practices Commission[11], the Australian Broadcasting Authority[12] and the Industry Commission[13]. Each of these organisations

[11] Submission No 31

[12] Supplementary Submission of 18 April 1994

has a legislative charter which requires that they gather information that might be classed as confidential. These agencies come into contact with commercial material which has the same general features as that which is encountered by FIRB. Some of the material pertains to the corporate strategy of the client firm, other material is of a pre-contractual nature and other material might include costing and pricing data. In many instances the corollary of the receipt of 'in-confidence' material is that decisions based on that material should also be made in a veil of secrecy. The committee upholds the view expressed in the TPC submission that confidentiality should be an emergency process to protect commercial interests and should not be invoked to protect the deliberations of a government agency.[14]

10.27 Each of these agencies is able to operate in a way which strikes a balance between the rights of the three parties: the client firm, and the government agency are able to preserve a degree of confidentiality, and at the same time allow the community an acceptable degree of access. From the material submitted by these three agencies, the following 'best practices' are particularly worthy of serious consideration. What is important in respect of these agencies is that, unlike FIRB's procedures, there is no automatic prior assumption that the mere labelling of material as 'confidential' will ensure that it will never be released.

Recommendation 10.7

That the legislation provide that all applications and accompanying documentation would be accessible to the public after 12 months unless the affected party was able to demonstrate that the public interest required such material to be kept confidential.

Getting the administering agency right

10.28 The preceding recommendations are relevant to the legislative reform and address broad policy concerns. The next series of recommendations may also require incorporation into the statute, but focus on the role and functions of the body administering foreign investment regulations. These

[13] Submission No 30

[14] See also AIN supplementary Submission of 19 April 1994

recommendations address the means by which the regulatory body will implement the rules embodied in the legislation.

A Foreign Investment Commission (FIC)

10.29 FIRB was originally envisaged as eventually becoming a statutory body.[15] It is now time for that event to occur. FIRB should be replaced by a new independent statutory authority to be known as the Foreign Investment Commission (FIC). FIC would assume responsibility for administering foreign investment policies; making decisions on applications in non-key sectors; and referring proposals involving key sectors to the Treasurer accompanied by recommendations which would be made public. The print media industry would be one of these key sectors.

10.30 Parliamentary scrutiny, good administrative practice and the recommended public interest litigation functions of FIC require that this body be created by statute.[16]

Recommendation 10.8

That the new statute contain provisions establishing an independent statutory authority to be known as the Foreign Investment Commission (FIC) which will replace the non-statutory FIRB.

The role of the Foreign Investment Commission

10.31 As stated in chapter 8, FIRB is assisted by an executive which is part of Treasury. In 1992-93, this Branch of Treasury employed 18 staff who handled 3,825 proposals and something like 40,000 phone inquiries.

10.32 The picture created by these measures of the work of FIRB and their staff is that of an organisation processing increasing numbers of applications.

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[15] Statement by Treasurer, Hon P Lynch, to House of Representatives, 1 April 1976

[16] The committee notes that on 17 December 1992 the Australian Democrats tabled a draft Bill which inter alia provided for the establishment of a statutory Foreign Investment Review Commission intended to replace FIRB - Senate Hansard, 17 December 1992, p 5322

FIRB annual reports refer to a reduction in the average time taken to process an application and the increase in the average number of applications dealt with by staff each year. These productivity improvements in processing applications, however, have been achieved at the cost of other functions of FIRB.

Senator Kernot: Some of the approvals are made with conditions. Is that right?

Mr Hinton: That is correct ... .

Senator Kernot: Who follows them up? How do you do it?

Mr Hinton: With difficulty. ... We do not have the resources to examine in detail real estate acquired for construction of a house within, say, 12 months time if there are several thousand a year ... .

Senator Kernot: With the best will in the world, how can you really find the time to investigate compliance and follow through properly? ... You do not have the capacity to **initiate** the follow through properly, do you? [emphasis added]

Mr Hinton: ... We do not have a so-called foreign investment police force out there ... . The important consideration is that if they are found to have not complied with that condition, the powers of penalty and divestiture are very substantial.[17]

10.33 A later exchange established that sampling is not undertaken to establish levels of applicant compliance with imposed conditions.

10.34 FIRB and its support staff exhibit a culture somewhat removed from that of a regulator. The committee observes that:

- Senior staff deplore the notion of active policing of the conditions imposed on approved applicants.

[17] Evidence pp 52-55

- Litigation for a breach of the Foreign Acquisitions and Takeovers Act (FATA) has never been instituted.

- Legal doubts about the administrative powers of the Treasurer in the FATA were not redressed until amendments in the late 1980s with the result that only three divestiture actions have been undertaken in almost 20 years of operation.

10.35 Laws creating an administrative system to benefit the community are only as good as the will to see those laws enforced. Without adequate resources and enforcement skills, the regulator charged with administering the laws cannot operate effectively and compliance with the laws will be diminished. FIC will need to address the appropriate balance between regulator and processor.

Recommendation 10.9

That the legislation establish the FIC as a regulator, as opposed to an 'application processor'.

Joint role of FIC and the Treasurer

10.36 There will need to be a clear delineation between the powers of decision-making vested in FIC and those which would remain with the Treasurer. The legislation will need to identify those classes of decisions which will be made by FIC. Those decisions to be made by the Treasurer would be first considered by FIC with a view to formulating a recommendation to the Treasurer.

Recommendation 10.10

That FIC be empowered to make binding decisions in respect of certain categories of applications, applying the tests established under the Act and that the Treasurer, on FIC's recommendation, make decisions in respect of more significant applications, for example, those in key sectors. These decisions would be made according to the national interest and would be accompanied by a statement of reasons.

Recommendation 10.11

That for those categories of decisions to be made by the Treasurer, FIC prepare briefing material and recommendations and that this material be published prior to its dispatch to the Treasurer.

Recommendation 10.12

That FIC maintain a public register of all foreign investment proposals and decisions and that the register of proposals and decisions for each financial year be included in the FIC report which would be tabled annually in Parliament. The register would be limited to providing details of the receipt and status of applications.

Review of FIC decisions

10.37 It is in the national interest that FIC decisions be subject to administrative law and/or judicial review.

Recommendation 10.13

It is essential that in protecting the interests of all parties, any review process be both speedy and effective. It is therefore recommended that the legislation provide that decisions of FIC be subject to the processes of administrative law review.

FIC's communications strategy

10.38 Foreign investment is a subject which continues to stimulate public interest and debate. It is essential that this debate be well-informed and mature. Any new regulatory body will need to prepare written material which reports on policy developments, outlines topics of national concern, communicates key FIC and government decisions, and reports sectoral trends in foreign investment.

10.39 FIRB's annual report attempts to do this, but its effectiveness is limited by its timing (publication once yearly), and style, which is overly bureaucratic. Likewise, FIRB's *Guide for Investors* also has a strong bureaucratic/procedural focus. It is worth noting that Investment Canada, Canada's equivalent to FIRB, publishes a twice-yearly newsletter entitled *Investors in Canada.* This document reports on topical foreign investment cases, industry forums and statistical developments.

Recommendation 10.14

That the legislation require FIC to prepare an ongoing communications strategy. This would be included in its annual report to Parliament and comprehensively address the information needs of both potential foreign investors and the Australian community.