

Chapter 3

Foreign investment review framework

3.1 This chapter provides an overview of the foreign investment review framework, including recent legislative and regulatory changes, and considers the Government's Foreign Investment Policy. It also examines the responsibilities of FIRB.

3.2 The foreign investment review framework comprises the *Foreign Acquisitions and Takeovers Act 1975* (the Act), its associated regulations and Australia's Foreign Investment Policy. In addition, two further Acts inform the way in which FIRB administers the review process:

- *The Foreign Acquisitions and Takeovers Fees Impositions Act 2015*.
- *Register of Foreign Ownership of Agricultural Land Act 2015*.¹

Foreign Investment Review Board

3.3 As a non-statutory agency tasked with advising the Treasurer and the Government, FIRB was established in 1976 under the *Foreign Acquisitions and Takeovers Act 1975* (the Act).²

3.4 FIRB's primary responsibility is to examine proposals for foreign investment in Australia that are subject to the Act. It is also responsible for providing the Treasurer with advice on the operation of, and compliance with, the requirements set out in the Act. Since it is not a statutory agency, however, FIRB is only empowered to provide advice to the Government of the day, with the Treasurer exercising final responsibility for making a determination on all proposals for foreign investment that fall under the Act.³

3.5 In order to provide a framework for the implementation of the Act and its associated regulations, the Commonwealth Government produced a Foreign Investment Policy, which guides the Government's decision-making process in relation to proposals for foreign investment. FIRB has responsibility for providing advice to the Treasurer in relation to the policy and its effective administration.

3.6 FIRB consists of five part-time members, including a Chairman, Mr Brian Wilson, who was appointed to the position in 2012. In addition to the part-time members, FIRB also includes a full-time Executive Member, Mr Robert Donnelly, who currently heads the Foreign Investment and Trade Policy Division within the

1 For an overview of both acts, see: http://www5.austlii.edu.au/au/legis/cth/num_act/faatfia2015515/ and <https://www.comlaw.gov.au/Details/C2015C00620>, respectively.

2 Foreign Investment Review Board (FIRB), *About FIRB*, <https://firb.gov.au/about/> (accessed 11 January 2016).

3 FIRB, *About FIRB*, <https://firb.gov.au/about/> (accessed 11 January 2016).

Treasury. The division provides secretariat support to FIRB, a responsibility that includes the day-to-day administration of the Government's Foreign Investment Policy.⁴

3.7 Since its commencement in 1975, the Act has been amended on four occasions, beginning in 1976. It was further amended in 1989 (*Foreign Takeovers Amendment Act 1989*); in 2010 (*Foreign Takeovers Amendment Act 2010*); and, most recently, in 2015 (*Foreign Acquisitions and Takeovers Legislation Amendment Act 2015*).

3.8 The most recent review of the Act was requested by the Government on 6 October 2015. The Committee was unable to establish the Government's reasons for requesting a review at this time, but notes that its timing coincides with FIRB's advice that the Port of Darwin sale was not subject to review, as it fell under the exemptions listed in Section 12(7)(a) of the Act.

3.9 The most recently amended version of the Act entered into force on 1 December 2015. This introduced a number of changes to the operation of Australia's foreign investment review framework, including, for example, lowering the threshold for foreign investments in agribusinesses to \$55 million.⁵

Exemption of Commonwealth, state and territory businesses and land

3.10 The 2015 Amendment Act removed Section 12A(7)(a)(b), which explicitly exempted from Government scrutiny any acquisition of Australian land that was owned by the Commonwealth, a State or a Territory or local governing body, or by a corporation that was constituted for a public purpose by a law of the Commonwealth, a State or a Territory.

3.11 Despite the removal of Section 12A(7)(a)(b) from the Act, however, an equivalent provision has been included in the Foreign Acquisitions and Takeovers Regulation 2015.

3.12 Regulation 31 explicitly exempts from FIRB's scrutiny any acquisition of land that is owned by the Commonwealth, a State, a Territory or a local governing body. Regulation 31 also places beyond FIRB's competence the acquisition of an Australian

4 At the time of writing, in addition to the Chairman, Mr Brian Wilson, and the Executive Member, Mr Robert Donnelly, FIRB comprises the following part-time members: Mr Michael D'Ascenzo, who was appointed in January 2013; Mr Patrick Secker, who was appointed to FIRB in December 2013; Ms Alice Williams, whose appointment commenced in July 2015; and Mr David Irvine, whose term began in December 2015. In addition, Mr David Peever's appointment to the Board was announced in December 2015. He took up his position on 1 February 2016.

5 The Hon. Joe Hockey, MP, Treasurer of the Commonwealth of Australia, 'Government Strengthens the Foreign Investment Framework', *Media Release*, 2 May 2015, <http://jbh.ministers.treasury.gov.au/media-release/034-2015/>

business that is carried on (whether alone or together with one or more other persons) by the Commonwealth, a State, a Territory or local governing body.⁶

3.13 These exemptions apply to foreign-owned entities and foreign persons, but do not come into force if the land is acquired by a foreign government. In the case of a proposed investment by a foreign government, regardless of the value or type of that investment, assessment by FIRB is still triggered by default. In effect, this means that a monetary threshold of \$0 applies to any proposed investment by a foreign government.

3.14 In evidence at the committee's hearing on 15 December 2015, Mr Robert Donnelly, FIRB's Executive Member, explained that the provision in the regulations is equivalent to the previous Section 12A(7)(a)(b) in the Act:

For all intents and purposes, it acts in the same way. The provision in the regs, regulation 31, might be a little difficult to follow because this is not a stand-alone section, but it says the excluded provisions do not apply in relation to an Australian business that is carried on—I am paraphrasing—or the acquisition of an interest in Australian urban [sic] land from any one of the following persons: the Commonwealth, a state, a territory or a local governing body, or an entity wholly owned by the Commonwealth, a state, a territory or a local governing body.⁷

Thresholds for FIRB consideration

3.15 The Act and its associated regulations provide the basis for the Australian Government's policy on the assessment of proposals for foreign investment. The policy document, which is publically available on FIRB's website, sets out the thresholds, both financial and jurisdictional, that determine whether an investment proposal must be considered by FIRB.⁸ It also provides an overview of the assessment process that is undertaken by FIRB in the event that a proposed investment requires Government approval.

3.16 On the basis of the current policy, which was released in December 2015 and reflects recent changes to the Act and the regulations, all proposals for foreign investment are subject to a financial threshold test. The level of the threshold is dependent on the sector of the economy in which a foreign individual or entity proposes to make an investment. For example, a general business acquisition is

6 *Foreign Acquisitions and Takeovers Regulation 2015*, reg. 31(1). In addition, regulation 31 also stipulates that land acquired from an entity controlled by the Commonwealth, a State, a Territory or a local governing body is exempt from further scrutiny.

7 Mr Robert Donnelly, Department of Treasury, *Committee Hansard*, 15 December 2015, p. 39.

8 The policy documents that outline the conditions of FIRB's involvement, along with the process that is followed if an assessment is required, can be accessed at:
<https://firb.gov.au/resources/policy-documents/>

exempt from Government scrutiny if the total value of the purchase or investment is \$252 million or less.⁹

3.17 The policy also provides for further exemptions in specific sectors if the potential investor is from a country with which Australia has signed a Free Trade Agreement (FTA). At the time of writing, Chile, China, Korea, Japan, New Zealand and the United States are able to acquire an Australian business in a non-sensitive sector without Government review, up to a threshold of \$1.094 billion.¹⁰ Investors from these nations are accorded the status of 'agreement country investors'.¹¹

3.18 However, where a business is classified as 'sensitive', the lower threshold of \$252 million applies¹², even if the investor is from an agreement country. According to the policy, 'sensitive' businesses include:

- media and telecommunications;
- transport;
- defence and military related industries and activities;
- encryption and securities technologies and communication systems;
- the extraction of uranium or plutonium; and
- the acquisition of nuclear facilities.¹³

3.19 Further, if a foreign investor proposes to acquire more than a five per cent stake in any Australian media enterprise, then that proposal, regardless of the investor's status or the overall value of the investment, will require Government authorisation through the review process.

3.20 The general threshold of \$252 million does not apply if an investor from a non-agreement country applies to acquire a stake in land that has been defined as 'sensitive'. In these cases, assessment by FIRB is triggered at the lower threshold of \$55 million. Developed commercial land can be designated as 'sensitive' if one or more of the following criteria apply to it at the time that an investor seeks to acquire an interest in that land:

- the land will be leased to the Commonwealth, a State, a Territory or a Commonwealth, State or Territory body;
- the land will be fitted out specifically for a business of the following kinds:
 - the storage of bulk data;

9 Treasurer, *Australia's Foreign Investment Policy* (as at December 2015), p. 13, http://firb.tspace.gov.au/files/2015/09/Australias_Foreign_Investment_Policy_December_2015_v2.pdf (accessed 18 January 2016).

10 Treasurer, *Australia's Foreign Investment Policy*, December 2015, p. 2.

11 Treasurer, *Australia's Foreign Investment Policy*, December 2015, p. 2.

12 Treasurer, *Australia's Foreign Investment Policy*, December 2015, p. 13.

13 Treasurer, *Australia's Foreign Investment Policy*, December 2015, p. 4.

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- the supply of training or human resources to the Australian Defence Force or other defence forces;
 - the manufacture or supply of military goods, equipment or technology to the Australian Defence Force or other defence forces;
 - the manufacture or supply of goods, equipment or technology able to be used for a military purpose;
 - the development, manufacture or supply of, or the provision of services to, encryption and security technologies and communications systems; or
 - the extraction of, or the holding of rights to extract, uranium or plutonium or the operation of nuclear facilities.
- land that will be fitted out to store, handle or dispose of biological agents on the List of Security-sensitive Biological Agents (within the meaning of the *National Health Security Act 2007*);
 - where an authorisation under law of the Commonwealth, a State or a Territory will allow materials that are regulated under that law to be produced or stored on the land;
 - the land will be under prescribed airspace (within the meaning of section 81 of the *Airports Act 1996*);
 - a mine, oil, gas well, quarry or similar operation will operate on the land;
 - a stored communication (within the meaning of the *Telecommunications (Interception and Access) Act 1979*) will be stored on the land;
 - the failure of part of a telecommunications network unit (within the meaning of the *Telecommunications Act 1997*) on the land would result in telephone or internet services not being provided on other land;
 - servers critical to an Authorised Deposit-taking Institution (within the meaning of the *Banking Act 1959*) or a stock exchange in Australia will be stored on the land; or
 - land used for public infrastructure (defined as an airport or airport site; a port; infrastructure for public transport (whether or not the infrastructure is operated or owned by a Commonwealth, State or Territory body) or a system or facility that is used to provide various services to the public, including the generation, transmission distribution or supply of electricity; the supply of gas; the storage, treatment or distribution of water; or the treatment of sewerage.¹⁴

3.21 As a result of recent changes, foreign investors who do not possess 'agreement country' status must apply for authorisation if they wish to invest in agricultural land

14 Treasury, answer to question on notice, 15 December 2015 (received 11 January 2016).

and the cumulative value of the investment – including the portion for which they are seeking authorisation – is greater than \$15 million. Investors from Chile, the United States and New Zealand, in accordance with Australia's FTA obligations, have access to the higher exemption threshold of \$1.094 billion.¹⁵

3.22 The threshold for foreign investment in agribusinesses has been lowered to \$55 million, regardless of the overall value of the business. This threshold applies if a foreign investor stands to gain a direct or controlling interest in an agribusiness, which the policy defines as a stake in the company of at least 10 per cent or the 'ability to influence, participate in or control' the business.¹⁶ Consistent with Australia's FTA commitments, an exemption threshold of \$1.094 billion applies to investors from the United States, New Zealand and Chile.¹⁷

3.23 Investors from China, Japan and Korea, though having agreement country status for general business acquisitions, are subject to lower limits for agricultural land and agribusiness acquisitions.

3.24 The foreign investment review framework, as a tool for assessment, is based on a national interest test which is applied irrespective of the nature of the proposed investment and the threshold that applies to it. The review framework is designed to further Australia's national interest by ensuring that a proper balance is struck between the need to encourage significant foreign investment – across a range of sectors of the economy – and the equally important need to ensure that the nation's strategic and national security interests are advanced and protected.

National interest

3.25 The Act confers upon the Treasurer the power to decide in each case whether a particular investment would be contrary to the national interest. However, as the Act, associated regulations and policy document do not provide a definition of the 'national interest', this remains a matter that is open to interpretation.

3.26 The legislation empowers the Treasurer with a significant degree of discretion in interpreting and applying the requirements of the Act and the regulations. According to the policy, the discretion of the Treasurer to decide in each case whether a particular investment would be contrary to the national interest provides flexibility to maximise investment flows while 'protecting Australia's interests'.¹⁸

15 Treasurer, *Australia's Foreign Investment Policy*, December 2015, p. 4.

16 Treasurer, *Australia's Foreign Investment Policy*, December 2015, p. 4.

17 Treasurer, *Australia's Foreign Investment Policy*, December 2015, p. 4.

18 Treasurer, *Australia's Foreign Investment Policy*, December 2015, p. 1.