

Chapter 2

Australia's foreign investment review framework

Legislative and regulatory framework

2.1 The legislative and regulatory foundation of Australia's foreign investment review framework is provided by the *Foreign Acquisitions and Takeovers Act 1975* (FATA) and the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (FATFIA), along with their associated regulations: the Foreign Acquisitions and Takeovers Regulation 2015 and the Foreign Acquisitions and Takeovers Fees Imposition Regulation 2015.¹ In order to provide a framework for the implementation of the Acts and their associated regulations, the Commonwealth Government has produced a Foreign Investment Policy, which guides the Government's decision-making process in relation to proposals for foreign investment.²

2.2 The Foreign Investment Review Board (FIRB) was established in 1976 as a non-statutory body tasked with advising the Treasurer and the Government.³ FIRB's primary responsibility is to examine proposals for foreign investment in Australia that are subject to FATA. It is also responsible for providing the Treasurer with advice on the operation of, and compliance with, the requirements set out in FATA. As a non-statutory body, FIRB only provides advice to the Treasurer and Government, with the Treasurer exercising final responsibility for making a determination on all proposals for foreign investment that fall under FATA.⁴ FIRB also provides advice to the Treasurer in relation to the Government's Foreign Investment policy and its administration.

2.3 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 Treasury. The division provides secretariat support to FIRB, a responsibility that

1 An overview of the FATA, including the 2015 amendments, is available at <https://www.comlaw.gov.au/Details/C2015C00577> (accessed 1 March 2016). The associated regulations are available at <https://www.legislation.gov.au/Details/F2015L01854> and <https://www.legislation.gov.au/Details/F2015L01862> (accessed 18 March 2016).

2 The Treasury, *Australia's Foreign Investment Policy*, December 2015, http://firb.tspace.gov.au/files/2015/09/Australias_Foreign_Investment_Policy_December_2015_v2.pdf (accessed 18 March 2016).

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

4 FIRB, *About FIRB*.

includes the day-to-day administration of the Government's Foreign Investment Policy.⁵

2.4 Australia's foreign investment review framework is based on a system of differentiated categories for foreign investment.⁶ These categories are based on monetary thresholds, which range from \$0, the most restrictive, to \$1,094 billion, the least restrictive. The nature of the proposed investment and the investor's country of origin determine which category is applicable to the investment proposal.⁷

2.5 It is important to note that all investment proposals by foreign government investors, as opposed to foreign private sector investors, are subject to Australian Government review, regardless of the value and nature of the proposed investment. In practice, this means that all foreign government investors are generally subject to the most restrictive monetary threshold of \$0.⁸ According to the Treasury, a foreign government investor is defined as:

- A foreign government or separate government entity
- A corporation or trustee of a trust, or a general partner of a limited partnership, in which:
 - a foreign government or separate government entity holds a substantial interest of at least 20 per cent; or
 - foreign governments or separate government entities of more than one foreign country (or parts of more than one foreign country) which hold an aggregate substantial interest of at least 40 per cent.⁹

2.6 Foreign government investors are generally required to submit investment proposals to FIRB if they intend to acquire a direct interest in an Australian business, regardless of the value of the investment itself. According to the Treasury, a direct interest is generally defined as an investment of at least 10 per cent.¹⁰ This means that, in practice, a threshold of \$0 applies if a foreign government investor proposes to make an investment in an Australian business.

2.7 Some exemptions that apply to foreign non-government investors are not applicable to foreign government investors. If a foreign *private* investor wishes to

5 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. The final member of the Board, Mr David Peever, was appointed in December 2015 and took up his position on 1 February 2016.

6 The Treasury, *Australia's Foreign Investment Policy*, December 2015, p. 13.

7 The Treasury, *Australia's Foreign Investment Policy*, December 2015, p. 13.

8 The Treasury, *Submission 14*, p. 9.

9 The Treasury, *Submission 14*, p. 9.

10 The Treasury, *Submission 14*, p. 9.

acquire an interest directly from a State or Territory Government, then that transaction is unlikely to require foreign investment approval.¹¹ In the case of a foreign *government* investor, however, this exemption does not apply, and the proposed investment can be formally examined by FIRB.¹² The additional requirements that must be met by foreign government investors apply equally to all countries. According to the Treasury, Australia has not, on the basis of its Free Trade Agreements (FTAs), granted preferential treatment to any foreign government investors.¹³

2.8 Foreign government investors also require Australian Government approval, through the Treasurer, if they propose to start a new business; acquire an interest in land; acquire a legal or equitable interest in a tenement; or an interest of at least 10 per cent in securities in a mining, production or exploration entity.¹⁴

2.9 Although FATA gives the Treasurer the authority to make determinations in relation to all foreign investment proposals that are subject to Government review, the Treasurer does not formally 'approve' investment proposals. Rather, when the Treasurer is informed – through the review process overseen by FIRB – that a foreign person proposes to undertake an action that is covered by the review framework, then the Treasurer is authorised to take one of the following actions:

- decide not to object;
- allow the action to proceed, provided the person complies with one or more conditions; or
- decide that taking the action would be contrary to the national interest and make an order prohibiting the proposal.¹⁵

2.10 In cases where the Treasurer determines that the investment is contrary to Australia's national interest after the investment transaction has occurred, the Treasurer has the authority to make an order requiring the investor to divest themselves of the investment.¹⁶

2.11 Australia's foreign investment review framework does not contain a precise definition of the national interest. Australia's framework contrasts in this regard to a number of comparable countries. New Zealand's *Overseas Investment Act 2005* (OIA) provides a legislated definition of the national interest.¹⁷ By contrast, under FATA, the

11 The Treasury, *Submission 14*, p. 9.

12 The Treasury, *Submission 14*, p. 9.

13 The Treasury, *Submission 14*, p. 9.

14 The Treasury, *Submission 14*, p. 9.

15 The Treasury, *Submission 14*, p. 9.

16 The Treasury, *Submission 14*, p. 9.

17 For New Zealand's *Overseas Investment Act 2005*, see http://www.legislation.govt.nz/act/public/2005/0082/latest/DLM356881.html?search=ts_act_overeas+investment&sr=1; (accessed 2 March 2016).

Treasurer is given the authority to determine, on a case-by-case basis, whether a proposed investment subject to Government review is contrary to the national interest.¹⁸ Australia's national interest test is essentially negative in character. On the basis of advice provided by FIRB, the Treasurer determines whether a foreign investment proposal would adversely affect Australia's national interest. As a negative test, Australia's foreign investment review framework is based on the presumption that foreign investment proposals will be 'allowed to proceed unless found to be contrary to the national interest'.¹⁹

2.12 In its submission, the Treasury pointed out that Australia's foreign investment review framework was designed to provide a high degree of flexibility in reviewing proposals for foreign investment.²⁰ The Treasury also observed that, by privileging flexibility over a legislated definition of the national interest, the Government is in a position to respond quickly to factors that are likely to affect the national interest.²¹ It further noted that:

A codified national interest test with a rigid set of criteria incorporated into the legislative framework risks being inflexible, prescriptive and may require ongoing amendments (such amendments may be difficult to implement because Australia's free trade agreement commitments would limit the Government's ability to make subsequent changes). Further, enshrining specific national interest factors in legislation may expose the Government to an increased risk of litigation, as well as provide additional avenues for opponents of an investment to challenge it.²²

2.13 Given the restrictions and requirements outlined above, a foreign investment proposal will generally require review if the following conditions are met:

- The proposed investment has a value of \$252 million or more, unless the investor is from a country with which Australia has signed a Free Trade Agreement (FTA), in which case a higher threshold of \$1.094 billion would apply;
- The proposed investment is in a business or in land that has been designated as 'sensitive'; and
- The proposed investment is in an agribusiness or in agricultural land.²³

2.14 With the exception of agribusiness, which forms a separate category to which a cumulative threshold of \$55 million applies, the Foreign Investment Policy defines 'sensitive' businesses as the following:

18 The Treasury, *Submission 14*, p. 6.

19 The Treasury, *Submission 14*, p. 6.

20 The Treasury, *Submission 14*, p. 6.

21 The Treasury, *Submission 14*, p. 6.

22 The Treasury, *Submission 14*, p. 6.

23 The Treasury, *Australia's Foreign Investment Policy*, December 2015, p. 13.

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- 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.²⁴

2.15 Apart from 'sensitive' businesses, some types of land have also been designated as 'sensitive'.²⁵ This is in addition to the category of agricultural land, to which a lower and cumulative threshold of \$15 million applies, with the exception of private investors from Chile, New Zealand or the United States. For investors from these countries, the threshold is \$1.094 billion. This derives from Australia's FTA obligations.²⁶

2.16 According to the Treasury, 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 the 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;
 - 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

24 The Treasury, *Australia's Foreign Investment Policy*, December 2015, p. 4.

25 Vacant commercial land, as well as all residential land, is covered by the most restrictive threshold – \$0 – which means that all proposals for foreign investment require, by default, approval through the Treasurer. This requirement applies to investors from both FTA and non-FTA countries. *Australia's Foreign Investment Policy*, December 2015, p. 13.

26 The Treasury, *Australia's Foreign Investment Policy*, December 2015, p. 13. However, for investors from Singapore and Thailand, where the land in question is used wholly and exclusively for a primary production business, a threshold of \$50 million applies (Otherwise, the land is not agricultural land).

- 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).²⁷

2.17 The threshold for investments in sensitive developed commercial land is either \$252 million, if the investor is from a country with which Australia does not have a FTA, or \$1.094 million, if the investor is from an FTA country that has access to the higher threshold.²⁸ A lower threshold of \$55 million applies, however, if the proposed investment is in sensitive land that is being used for the purposes of critical infrastructure, such as an airport or a port.²⁹

Changes to the FIRB regulatory framework

2.18 On 18 March 2016, the Treasurer, the Hon. Scott Morrison MP, announced that the Australian Government had secured the agreement of the states and territories to bring all foreign investment proposals in critical infrastructure assets held by the

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

28 The Treasury, *Australia's Foreign Investment Policy*, December 2015, p. 13.

29 The Treasury, *Australia's Foreign Investment Policy*, December 2015, p. 13.

states and territories under FIRB's jurisdiction.³⁰ The Treasurer announced that this would be achieved through changes to the Foreign Acquisitions and Takeovers Regulation 2015.³¹ Beginning on 31 March 2016, FIRB will review all proposals for the sale of critical infrastructures assets by State and Territory Governments to foreign investors.³²

2.19 The state and territory critical infrastructure assets that will become subject to formal FIRB review will include: public infrastructure (an airport or airport site; a port; infrastructure for public transport; electricity, gas, water and sewerage systems); existing and proposed roads, railways, inter-modal transfer facilities that are part of the National Land Transport Network or are designated by a State or Territory government as significant or controlled by the Government; telecommunications infrastructure; and nuclear facilities.³³ Additionally, the Treasurer maintained that these changes will serve to further strengthen the rigour and transparency of the foreign investment review process:

The Turnbull Government is committed to strengthening our foreign investment framework. While we welcome foreign investment in Australia it is imperative that critical infrastructure sales are scrutinised to ensure any potential national security risks can be addressed. These new measures reflect the Turnbull Government's policy to be open, transparent and sovereign in foreign investment decisions.³⁴

Foreign investment review frameworks of New Zealand and United States

2.20 Given the case-by-case approach that defines Australia's foreign investment review framework, it is useful to compare the process by which foreign investment proposals are screened in this country with comparable nations. New Zealand and the United States (US) provide good points of comparison.

New Zealand's framework: a positive national interest test

2.21 The New Zealand foreign investment review framework is administered by the Overseas Investment Office (OIO). The OIO is a regulatory unit within Land

30 The Hon. Scott Morrison MP, Treasurer of the Commonwealth of Australia, 'Critical asset sales to fall within foreign review net', *Media Release*, 18 March 2016, <http://sjm.ministers.treasury.gov.au/media-release/031-2016> (accessed 23 March 2016).

31 The Hon. Scott Morrison MP, Treasurer of the Commonwealth of Australia, 'Critical asset sales to fall within foreign review net', *Media Release*, 18 March 2016, <http://sjm.ministers.treasury.gov.au/media-release/031-2016> (accessed 23 March 2016).

32 The Hon. Scott Morrison MP, Treasurer of the Commonwealth of Australia, 'Critical asset sales to fall within foreign review net', *Media Release*, 18 March 2016, <http://sjm.ministers.treasury.gov.au/media-release/031-2016> (accessed 23 March 2016).

33 The Hon. Scott Morrison MP, Treasurer of the Commonwealth of Australia, 'Critical asset sales to fall within foreign review net', *Media Release*, 18 March 2016, <http://sjm.ministers.treasury.gov.au/media-release/031-2016> (accessed 23 March 2016).

34 The Hon. Scott Morrison MP, Treasurer of the Commonwealth of Australia, 'Critical asset sales to fall within foreign review net', *Media Release*, 18 March 2016, <http://sjm.ministers.treasury.gov.au/media-release/031-2016> (accessed 23 March 2016).

Information New Zealand, the Government department with responsibility for handling land titles and managing Crown land and property.³⁵ The OIO is accountable to the New Zealand Minister of Finance and is tasked with the administration of three pieces of legislation and one set of regulations:

- *The Overseas Investment Act 2005* (OIA).
- *Overseas Investment Regulations 2005* (the regulations).
- *Sections 56 to 57J of the Fisheries Act 1996* (FA).³⁶

2.22 Collectively, these provide the legislative and regulatory basis of New Zealand's foreign investment framework. The OIO deals with proposals for foreign investment in sensitive New Zealand assets. This definition encompasses sensitive land, high value businesses (worth more than \$100 million) and fishing quota.³⁷

2.23 Unlike FIRB, which is only empowered to advise the Treasurer on foreign investment applications, the OIO has wider delegated powers. In respect of proposals for foreign investment in sensitive land, some decisions authorising investment have been directly delegated to the OIO by the Minister for Finance. Further, decisions authorising foreign investment in significant business assets have been directly delegated to the OIO. However, this delegation does not extend to decisions rejecting a proposed investment. The full scope of these delegations is outlined in a *Designation and Delegation Letter*, the latest version of which was issued by the Minister for Finance in April 2009.³⁸

2.24 In direct contrast to FIRB, which does not publish the reasons behind decisions to authorise or refuse foreign investment proposals, the OIO publishes summaries of its decisions on its website. These summaries include information about the individual or company proposing the investment and the value of the investment itself.³⁹

35 For a brief overview of the Overseas Investment Office, see Land Information New Zealand, *About the OIO*, <http://www.lin.govt.nz/regulatory/overseas-investment/about-oio/legislation-ministers-delegated-powers> (accessed 2 March 2016).

36 For the relevant Acts and the Regulations, see: http://www.legislation.govt.nz/act/public/2005/0082/latest/DLM356881.html?search=ts_act_overseas+investment&sr=1; http://www.legislation.govt.nz/regulation/public/2005/0220/latest/DLM341366.html?search=ts_regulation_overseas+investment&sr=1; and http://www.legislation.govt.nz/act/public/1996/0088/latest/DLM394192.html?search=ts_act_fisheries&sr=1 (accessed 2 March 2016).

37 Land Information New Zealand, *Overseas Investment*, <http://www.lin.govt.nz/regulatory/overseas-investment> (accessed 3 March 2016).

38 For the full text of the *Designation and Delegation Letter*, see New Zealand Government, *About the OIO*, <http://www.lin.govt.nz/regulatory/overseas-investment/about-oio/legislation-ministers-delegated-powers> (accessed 2 March 2016).

39 For a full list of available decisions, see <http://www.lin.govt.nz/regulatory/overseas-investment/decision-summaries-statistics> (accessed 2 March 2016).

2.25 Since the OIO publishes all of its decisions, New Zealand's foreign investment review framework possesses a more 'positively focussed' character than its Australian counterpart. Decisions are outlined and justified with reference to the ways in which proposed foreign investments will benefit New Zealand's national interest.

2.26 In the Australian foreign investment review framework, the concept of the national interest is only publically invoked to provide a background to the reasoning behind the rejection of a proposal for foreign investment, such as the Treasurer's decision to block the sale of S.Kidman and Co Ltd. Australia's foreign investment review framework, therefore, is based on a 'negative' test.

2.27 The OIO has the following broad functions and responsibilities, in addition to those specifically delegated by the Minister for Finance:

- receiving and processing applications;
- consulting with government departments and other agencies, as appropriate;
- providing information about overseas investment to applicants and the public generally;
- monitoring approved applications for compliance with any required conditions of consent; and
- enforcing breaches of the Act and the relevant provisions of the Fisheries Act.⁴⁰

2.28 As a case in point, in a decision made in December 2015 to authorise the sale of sensitive agricultural land, the OIO justified its decision with reference to the criteria outlined in the *Overseas Investment Act 2005* and the *Overseas Investment Regulations 2005*. The case involved a proposal by EGI-NZ Dairy LLC (100 per cent US-owned) to acquire 55 per cent of Dairy Farms NZ Limited, in order to fund the acquisition of approximately 1,206 hectares of land at Otapiri. The decision was based on the following criteria:

- **Overseas Investment Act 2005**
 - 17(2)(a)(iii) – Increased export receipts.
 - 17(2)(a)(iv) – Greater efficiency or productivity.
 - 17(2)(a)(v) – Additional investment for development purposes.
 - 17(2)(a)(vi) – Increased processing of primary products.
- **Overseas Investment Regulations 2005**
 - 28(d) – Owner to undertake other significant investment.
 - 28(e) – Previous investments.
 - 28(g) – Enhance the viability of other investments.

40 New Zealand Government, *About the OIO*, <http://www.linz.govt.nz/regulatory/overseas-investment/about-oio/legislation-ministers-delegated-powers> (accessed 2 March 2016).

- 28(j) – Oversight and participation by New Zealanders.⁴¹

2.29 Unlike Australia's foreign investment review framework, New Zealand's OIA and its associated regulations provide specific criteria to guide the assessment of proposals for foreign investment. If a foreign investor applies to make an investment in sensitive land, then the following criteria, made explicit in the Act, are applicable to a decision about whether the proposal will be of benefit to New Zealand:

- (1) If section 16(1)(e)(ii) applies, the relevant Ministers—
 - (a) must consider all the factors in subsection (2) to determine which factor or factors (or parts of them) are relevant to the overseas investment; and
 - (b) must determine whether the criteria in section 16(1)(e)(ii) and (iii) are met after having regard to those relevant factors; and
 - (c) may, in doing so, determine the relative importance to be given to each relevant factor (or part).
- (2) The factors are the following:
 - (a) whether the overseas investment will, or is likely to, result in—
 - (i) the creation of new job opportunities in New Zealand or the retention of existing jobs in New Zealand that would or might otherwise be lost; or
 - (ii) the introduction into New Zealand of new technology or business skills; or
 - (iii) increased export receipts for New Zealand exporters; or
 - (iv) added market competition, greater efficiency or productivity, or enhanced domestic services, in New Zealand; or
 - (v) the introduction into New Zealand of additional investment for development purposes; or
 - (vi) increased processing in New Zealand of New Zealand's primary products:
 - (b) whether there are or will be adequate mechanisms in place for protecting or enhancing existing areas of significant indigenous vegetation and significant habitats of indigenous fauna, for example, any 1 or more of the following:
 - (i) conditions as to pest control, fencing, fire control, erosion control, or riparian planting:
 - (ii) covenants over the land:
 - (c) whether there are or will be adequate mechanisms in place for—
 - (i) protecting or enhancing existing areas of significant habitats of trout, salmon, wildlife protected under section 3 of the Wildlife Act 1953, and game as defined in sections 2(1) of that Act (for example, any 1 or more of the mechanisms referred to in paragraph (b)(i) and (ii)); and

41 For a full overview of the Dairy Farms NZ decision, see <http://www.lin.govt.nz/regulatory/overseas-investment/decision-summaries-statistics/2015-12/201510086-201520009> (accessed 2 March 2016).

- (ii) providing, protecting, or improving walking access to those habitats by the public or any section of the public:
- (d) whether there are or will be adequate mechanisms in place for protecting or enhancing historic heritage within the relevant land, for example, any 1 or more of the following:
 - (i) conditions for conservation (including maintenance and restoration) and access:
 - (ii) agreement to support the entry on the New Zealand Heritage List/Rārangī Kōrero of any historic place, historic area, wahi tapu, or wahi tapu area under the Heritage New Zealand Pouhere Taonga Act 2014:
 - (iii) agreement to execute a heritage covenant:
 - (iv) compliance with existing covenants:
- (e) whether there are or will be adequate mechanisms in place for providing, protecting, or improving walking access over the relevant land or a relevant part of that land by the public or any section of the public:
- (f) if the relevant land is or includes foreshore, seabed, or a bed of a river or lake, whether that foreshore, seabed, riverbed, or lakebed has been offered to the Crown in accordance with regulations:
- (g) any other factors set out in regulations.⁴²

2.30 The Overseas Investment Regulations 2005 deepen the criteria applicable to determining whether a foreign investment proposal is of benefit to New Zealand. Regulation 28, provides additional criteria for assessing the benefit of foreign investment in sensitive land.

Transparency and public confidence

2.31 The 'positively' focussed character of New Zealand's foreign investment review framework, in which the criteria for decision making are legislated and all decisions are published, means that the process is more open and transparent than its Australian counterpart. In New Zealand's review framework, both the general public and foreign investors are provided with more information on the government's decisions in relation to foreign investment proposals. The assessed national benefit of foreign investment in New Zealand is made explicit.

2.32 In its submission, the Australia-China Relations Institute (ACRI) maintained that one of the most important criteria for determining whether Australia's national interest is being protected is the degree to which the public's preferences are taken into account in the design of the review process.⁴³ According to ACRI, this is especially

42 See, in particular, section 17 of the *Overseas Investment Act 2005*, <http://www.legislation.govt.nz/act/public/2005/0082/latest/whole.html#DLM358019> (accessed 2 March 2016).

43 Australia-China Relations Institute, *Submission 24*, p. 1.

significant when FIRB considers proposals for investment in assets that are of strategic importance or national significance.⁴⁴

2.33 ACRI observed that one of the principal reasons for the inclusion of a national interest test in the review framework was to reassure the public that Australia's interests are being furthered through foreign investment, not weakened or undermined. One of the central aims of the foreign investment review framework is to assure the Australian people that foreign investment is being effectively monitored and that it will produce significant national benefits.⁴⁵ ACRI explained that:

...when considering whether Australia's national interests are being protected, the preferences of the public must be at the heart of this assessment. This is particularly the case when assets of strategic or national significance are being considered. All too often the debate around the foreign investment review framework turns into one between economists and business leaders on the one hand, who generally favour more liberalisation of the regime, and security analysts on the other, who generally favour more controls.⁴⁶

2.34 ACRI further observed that the available surveys of public opinion, such as the Lowy Institute's 2012 poll⁴⁷ of public attitudes to foreign investment, have shown that Australians are generally wary of foreign investment. The greatest concerns are reserved for foreign investments in ports and agriculture.⁴⁸ ACRI concluded that any changes to Australia's foreign investment review framework have to be clearly articulated by the Government, in order to maintain the confidence of the Australian people.⁴⁹

2.35 Since Australia's foreign investment review framework is based on a negative test, as opposed to New Zealand's approach of outlining the national benefits of foreign investment, it is generally more difficult to ensure that the review process is communicated to the Australian public in a transparent and open manner. ACRI further observed that, in order to ensure that public support for foreign investment is not eroded, the preferences of the Australian people need to be incorporated into the review framework. The views of special interest groups, including economist and national security specialists, should not be accorded undue weight.⁵⁰

44 Australia-China Relations Institute, *Submission 24*, p. 1.

45 Australia-China Relations Institute, *Submission 24*, p. 2.

46 Australia-China Relations Institute, *Submission 24*, p. 1.

47 Lowy Institute, *Lowy Institute Poll 2012: Public Opinion and Foreign Policy*, <http://www.lowyinstitute.org/publications/lowy-institute-poll-2012-public-opinion-and-foreign-policy> (accessed 21 March 2016). For Australians' concerns about foreign investment in ports, see Lowy Institute, *Lowy Institute Poll 2014*, <http://www.lowyinstitute.org/publications/lowy-institute-poll-2014> (accessed 21 March 2016).

48 Australia-China Relations Institute, *Submission 24*, p. 2.

49 Australia-China Relations Institute, *Submission 24*, p. 2.

50 Australia-China Relations Institute, *Submission 24*, p. 3.

The US' framework: national security and critical infrastructure

2.36 Unlike Australia's foreign investment review framework, in which applications for foreign investment are assessed on the basis of an unlegislated national interest test, the foreign investment review framework of the US is explicitly focussed on assessing the national security implications of investment proposals. The legislated concept of national security extends to critical infrastructure, such as ports and airports. On the basis of the *Foreign Investment and National Security Act 2007* (FINSA), the US equivalent of Australia's FATA, critical infrastructure is defined as follows:

The term 'critical infrastructure' means, subject to rules issued under this section, systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security.⁵¹

2.37 The US counterpart of FIRB, the Committee on Foreign Investment in the United States (CFIUS), assesses proposals for foreign investment with explicit reference to national security.⁵² CFIUS is charged with coordinating US policy in relation to foreign investment and has responsibility, unlike FIRB, for identifying threats and risks to national security that might flow from foreign investment in the US. On the legislative basis provided by FINSA, CFIUS is authorised to assess any transaction that comes under the definition of a 'covered transaction'. The legislation defines 'covered transactions' as follows:

The term 'covered transaction' means any merger, acquisition, or takeover that is proposed or pending after August 23, 1988, by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States.⁵³

2.38 CFIUS is an inter-agency committee within the Office of the President, and generally comprises the heads of sixteen federal agencies, including the Departments of Treasury, Justice, Homeland Security, Defence, State, Energy and Commerce. Additionally, the Office of the U.S. Trade Representative and the Office of Science and Technology Policy are also full representatives on the committee. The Director of National Intelligence and the Secretary of Labor are both *ex officio* members of CFIUS, with their respective roles and responsibilities defined by statute and regulation.⁵⁴

2.39 Like FIRB, which operates without a statutory footing, CFIUS does not possess the authority to independently block proposals for foreign investment. Rather,

51 *Foreign Investment and National Security Act 2007*, p. 2, <https://www.treasury.gov/resource-center/international/foreign-investment/Documents/FINSA.pdf> (accessed 21 March 2016).

52 *Foreign Investment and National Security Act 2007*.

53 *Foreign Investment and National Security Act 2007*, p. 1, <https://www.treasury.gov/resource-center/international/foreign-investment/Documents/FINSA.pdf> (accessed 21 March 2016).

54 U.S. Department of the Treasury, *Composition of CFIUS*, <https://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-members.aspx> (accessed 21 March 2016).

CFIUS is charged with assessing the potential implications for national security of foreign investment proposals, before recommending a course of action to the President. In general, CFIUS has thirty days to conduct an assessment of a proposed investment, and it is empowered to request additional information from applicants, if this is determined to be necessary to fulfil its legislated obligations.⁵⁵

2.40 If national security concerns are identified in the course of the assessment, then CFIUS is authorised to extend its investigation by a further fifteen days. It also has the delegated authority to negotiate a range of mitigation measures to address any identified concerns:

If CFIUS finds that the covered transaction does not present any national security risks or that other provisions of law provide adequate and appropriate authority to address the risks, then CFIUS will advise the parties in writing that CFIUS has concluded all action under section 721 with respect to such transaction. If CFIUS finds that a covered transaction presents national security risks and that other provisions of law do not provide adequate authority to address the risks, then CFIUS may enter into an agreement with, or impose conditions on, parties to mitigate such risks or may refer the case to the President for action.⁵⁶

2.41 Unlike Australia's foreign investment review framework, potential foreign investors are not required to notify CFIUS of their intentions. However, if notification of a 'covered transaction' is not filed with CFIUS, then the power of the President to intervene has no time limitation. By contrast, the general timeframe for a presidential decision is fifteen days.⁵⁷ The President's powers in cases where a notification is not filed are retrospective.⁵⁸

2.42 If a transaction is found to have national security implications after the fact, then the President is empowered to order an individual or entity to divest themselves of the asset.⁵⁹ In 2011, for instance, CFIUS recommended to President Obama that the proposed acquisition of 3Leaf, a US technology firm, by the Chinese telecommunications corporation Huawei should be blocked on national security grounds. In that instance, Huawei, after being informed of CFIUS' decision, chose to voluntarily withdraw its application before President Obama issued a divestment order.⁶⁰

55 U.S. Department of the Treasury, *Process Overview*, <https://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-overview.aspx> (accessed 21 March 2016).

56 U.S. Department of the Treasury, *Process Overview*, <https://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-overview.aspx> (accessed 21 March 2016).

57 *Foreign Investment and National Security Act 2007*, p.11, <https://www.treasury.gov/resource-center/international/foreign-investment/Documents/FINSA.pdf> (accessed 21 March 2016).

58 *Foreign Investment and National Security Act 2007*, p. 11.

59 *Foreign Investment and National Security Act 2007*, p. 11.

60 Reuters, 'Huawei backs away from 3Leaf acquisition', <http://www.reuters.com/article/us-huawei-3leaf-idUSTRE71I38920110219> (accessed 21 March 2016).

2.43 Unlike Australia's foreign investment review framework, in which national security considerations form part of a broader and negative national interest test, FINSA makes explicit that CFIUS must launch a national security investigation if a proposed investment could see US critical infrastructure assets pass into the control of a foreign person. According to the requirements laid out in FINSA, CFIUS must undertake an investigation if:

the transaction would result in control of any critical infrastructure of or within the United States by or on behalf of any foreign person, if the Committee determines that the transaction could impair national security, and that such impairment to national security has not been mitigated by assurances provided or renewed with the approval of the Committee, as described in subsection (l)...⁶¹

2.44 In the case of Australia's foreign investment review process, critical infrastructure assets – including, for example, electricity transmission networks like Transgrid – are not automatically treated differently than other assets, such as general businesses or developed commercial land.

61 *Foreign Investment and National Security Act 2007*, p. 5, <https://www.treasury.gov/resource-center/international/foreign-investment/Documents/FINSA.pdf> (accessed 21 March 2016).

