

PART IV

FOREIGN INVESTMENT AND THE FOREIGN INVESTMENT REVIEW BOARD

The committee is charged by the Senate in its terms of reference *inter alia* to examine the activities, guidelines and procedures of FIRB. The role of this advisory body and the secrecy that shrouds its advice to the Treasurer, has become a major concern of the committee, media and the public during the course of the inquiry.

The chapters that constitute this part of the report address issues and committee findings on:

- Foreign Investment Policies in Australia
- Foreign Investment Administration in Australia
- The FIRB Dilemma
- A Revamped FIRB

FIRB has existed for almost 18 years but information about its operations has been constrained by the confidentiality of commercial and government operations imposed on or applied by FIRB. The Treasury submission states that:

by providing information about FIRB and FIRB processes, Treasury also hopes to counter a degree of misunderstanding that appears to exist in some areas about the Board and its functions within the Government's handling of foreign investment applications.¹

¹ Treasury Submission p 4

Whether misunderstood or not, FIRB has been examined by several Parliamentary committees.² Their reports reflect concerns about its operations which the government has chosen to ignore, avoid or refuse to change. The reason for this reticence may have been that FIRB was not the subject, but an adjunct to the scope, of those committee's enquiries. This committee, however, is specifically directed to examine FIRB. The results of its inquiries are detailed in this part of the report.

The committee sought information about FIRB in the context of the Treasurer's decisions in 1991 and 1993 to permit the increase of foreign ownership in newspapers and, more generally, FIRB's effectiveness and significance in the field of regulating foreign investment inflows into Australia. The process of attempting to obtain information from government representatives (the Treasurer as well as FIRB members and ex-members) about the former topic has been described elsewhere in this report.

The committee obtained information about FIRB generally from a number of sources. In this regard the Treasury provided a submission and agreed to give the committee access to earlier submissions to parliamentary inquiries to obtain factual data about FIRB and its operations. The committee also commissioned the Parliamentary Research Service to prepare several papers which were of assistance in the preparation of this part of the report. The committee also was assisted by the written and oral evidence of a number of expert witnesses in foreign investment issues and the print media.

Based on this body of material the committee believes it has a sound base to analyse FIRB's appropriateness and effectiveness as:

- a model for public policy decision making in foreign investment matters; and
- as a body well-placed to make foreign investment policy recommendations in respect of the print media.

The committee's conclusions on these subjects and others are contained in this part of the report.

² The House of Representatives Select Committee on the Print Media, *The News & Fair Facts*, AGPS, Canberra, March 1992 and the Senate Standing Committee on Environment, Recreation and Arts, *The Australian Environment and Tourism Report*, AGPS, Canberra, September 1992

CHAPTER 7

FOREIGN INVESTMENT POLICIES IN AUSTRALIA

Overview of foreign investment policy

7.1 A pithy and authoritative statement about Australia's foreign investment policy was made by the then Treasurer Dawkins in 1992:

The Australian government welcomes foreign investment. The government recognises the substantial contribution foreign investment has made, and can continue to make, to the development of Australia's industries and resources.

Capital from other countries supplements Australia's domestic savings and adds to the funds available for investment. It provides scope for rates of growth in economic activity and employment to be higher than otherwise. Foreign capital also provides access to new technology, management skills and overseas markets.

The government's policy is, therefore, to encourage foreign direct investment consistent with the needs of the Australian community, including the expansion of private investment, the development of internationally competitive and export-oriented industries and the creation of employment opportunities. This attitude to foreign investment is reflected in the substantial liberalisation of foreign investment policy announced in the government's One Nation Statement in February 1992.³

7.2 The structure of Australia's external accounts and balance of payments is such that Australia has traditionally been a large net importer of capital. Foreign investment has been and will continue to be a major supplement to Australia's domestic savings. Views differ on the benefits of this form of private sector investment, though proponents like the then Treasurer point to access to new markets, and the technical product and managerial expertise new owners can bring to ventures as demonstrating the benefit of foreign investment to our economy.

³ The Hon J S Dawkins as reported in Department of the Treasury, *Australia's Foreign Investment Policy*, AGPS, Canberra, September 1992, page v

The need for a foreign investment regime

7.3 The arguments for and against foreign investment in the Australian context, at least, have been softened in recent years during the period of internationalisation and globalisation of world trade and currency flows. The committee believes that the debate is a useful one and cannot be discouraged.

7.4 During the inquiry the committee took evidence from several foreign investment experts. Dr Robertson, a member of the FIRB division during its early years, suggested that the problems re the Fairfax decision would not have arisen had the market been left to 'sort out who was going to buy the shares'. He questioned the need for any interventionist model of FIRB and canvassed a case for there being no 'national interest' test ... 'as long as the economy is being well run ...'⁴

7.5 Frank Stilwell, professor of economics at Sydney University, on the other hand, advocated the need for a 'strong foreign investment' policy alerting the committee to six specific problems which are extant in the 'internationalised world':

- The reliance upon overseas investment, together with corporate borrowing, is responsible for many of Australia's economic difficulties. In this regard the massive capital inflows of the 1980s have led to substantial interest and dividends. Payment commitments are one of the largest items in the current account deficit;
- There are dependency problems whereby the fortunes of the local economy have become reliant on decisions taken overseas;
- Foreign capital inflows have the potential to accumulate boom and bust cycles;
- The reliance on foreign capital is not conducive in many respects to the development of local business;

⁴ Evidence pp 75 and 77

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- Some overseas companies may not be appropriately discharging their obligation to pay taxes to the Australian government; and
 - Cultural imperialism, for example, in the media may also be a problem.⁵

7.6 The adverse consequences of too great a reliance on foreign capital inflows was taken up by Dr Vince Fitzgerald in his report on National Savings. That report indicated that overall debt is 'very high', that 'premiums' are now part of debt financing costs and that the risk of exposure to international stocks is unacceptably high.⁶

7.7 But against these considerations it is prudent to weigh up the benefits of foreign capital inflow, especially in targetted sectors. The print media sector is one in which the government has encouraged foreign capital inflows. In the following chapters a number of references have been made to the costs and benefits which have accrued to print media firms consequent to foreign capital inflows. For example, Dr Craik, an expert in foreign investment policy, advised that, from her observations, the internationalisation of the print media industry had not resulted in any noticeable improvement in journalism, competition between and within the media, or newspaper technology or know-how.⁷

Community expectations

7.8 It would be an understatement to say that, in general, Australians are somewhat cautious in expressing unreserved support for increased foreign investment. Consistently, opinion polls reveal that a substantial section of the population has reservations about the benefits of foreign capital inflows. For example, in relation to the **quantum** of foreign investment in Australia, 57 per cent of a sample said that there was 'too much', 22 per cent said 'about right' and 11 per cent 'too little'.⁸ As to whether we should **welcome** foreign

⁵ Evidence pp 98-99

⁶ V W Fitzgerald, *National Savings - A Report to the Treasurer*, AGPS, Canberra, 1993

⁷ Evidence p 367

⁸ *The Bulletin*, 'Foreign Investment is cause for concern', 7 May 1991

investment' 24 per cent said 'no' in respect of European investment, 40 per cent said 'no' in respect of Asian investment and 23 per cent said 'no' in respect of American investment.⁹

7.9 The contentious Campbell's takeover of one of Australia's industrial icons, Arnotts, is but one example of significant community opposition to foreign investment. The numerous radio stations that conducted a poll on the Arnott's buy-out reported overwhelming opposition to the loss of Australian control. A radio 2GB spokesman reported a record 'volume of calls'.¹⁰ The Fairfax takeover itself was, and still is, a matter of public concern and controversy. These expressions of apprehension should not go unnoticed. It is the duty of any responsible government to take account of community expression in this sensitive area of public policy and to develop a decision-making process which is open, transparent, consistent and reflects community expectations.

Australia's obligations to the international community

7.10 Australia was a signatory to the Organisation for Economic Co-operation and Development (OECD) Declaration on International Investment and Multinational Enterprises of 1976. The OECD declaration, inter alia, requires member nations to strengthen co-operation in the field of international direct investment. It also exhorts members 'to endeavour to make local regulations and administrative practices as transparent as possible so that their importance and purpose can be ascertained and that information on them can be readily available'.¹¹

7.11 Notwithstanding the OECD declaration, amongst member countries there are widespread foreign investment restrictions. Table 7.1 provides a most useful snapshot of these restrictions across the 24 member nations. Australia's regulatory net relative to other nations appears to be neither too restrictive nor too open.

⁹ *The Age*, 'Asian rejected poll finds', 21 April 1992

¹⁰ *The Canberra Times*, 6 February 1993

¹¹ The Department of the Treasury, *Australia's Foreign Investment Policy*, AGPS, Canberra, September 1992

Chart 7.1

OECD MEMBERS RESTRICTIONS ON FOREIGN INVESTMENT

Table 2. Restrictions on main sectors^a

Country	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Australia	LR		L	L		C	L	L	L		L*	L			L	C	L*
Austria	R	R	C	C	C	C	C	L	L	L	L	L*	LR	L		L	C
Belgium	R	R		L	C	C	L	L		C	L		R				C
Canada	LR*	LR*	L	L	C	C	L	L	L*	L*	L*	L*		L*	L*	L*	L*
Denmark	R	R	L	L	C	C	L	L			L					C	C
Finland	LR*	R	C	L	R	C	L	L	L		L					C	C
France	LR	LR	L	L	R	C	L	L	L	R	L*		R	R	LR	L	L
Germany	LR		L	L	C	C	LR	L*									C
Greece	LR	LR	C	C	C	C	C	L	L	C	L	L	R	C		C	C
Iceland	L	L	L	C		C	L			C	C	L	L				C*
Ireland	LR	LR		C		C	C	LR			C					C	C
Italy	LR	LR	C	C	C	C	LR	L	R		L		R			C	C
Japan	LR	L	L	L	L	L	L	L	C	C	L					L	C
Luxembourg				C	C	L	L					L					C
Netherlands	LR	L	L	L	C	C	L	L			L						C
New Zealand			L	L		C	L	L			L						C
Norway	LR	LR	C	L	C	C	L	L			L		L			C	C
Portugal	LR	L	L	C		C	C	R						L		C	C
Spain	R	R	L	L		C	L	L				L				C	L
Sweden	L	L	L	L		C	L	L				L		C		L	C
Switzerland	R	L	L	C		C	L	L				L					C
Turkey	LR	LR	C	C		C	L	L			L		L			C	C
United Kingdom	R	R	L	L		C	L	L	L	L	L		L			C	C
United States	R	R*	L	L		C*	L	L	L		L	R*				L*	

L = Limited.

R = Reciprocity.

C = Closed.

* Measures at a subnational level.

1. Banking (including financial services).

2. Insurance.

3. Radio broadcasting and television.

4. Post and telecommunications.

5. Road transport.

6. Rail transport.

7. Air transport.

8. Maritime transport.

9. Mining.

10. Oil and/or gas.

11. Fishing and Fish-Processing.

12. Real estate.

13. Tourism.

14. Audiovisual works (including film distribution).

15. Publishing.

16. Public utilities (including energy, water, gas and electricity distribution).

17. Gaming, casino, lotteries and lotteries, etc.

Notes: This table covers mainly measures upon establishment that are regarded as restrictions in the sense of the Code of Liberalisation of Capital Movements and not covered by the general authorisation procedures in Table 1.

"C" refers to activities in a given sector that are closed to foreign competition, including monopolies and/or concessions shown in Table 3.

Source: International direct investment policies and trends in the 1980s (OECD Paris 1992) p 38

7.12 The committee sought information from the Treasury on the legislative and prescriptive arrangements of other OECD countries in relation to foreign investment in the media. In an additional submission dated 9 February 1994, the Treasury supplied information which suggests 'most other OECD countries, except Belgium and Ireland, have restrictions on foreign participation in radio, broadcasting and the television sector'. The type and extent of those restrictions are not disclosed by the Treasury information.

7.13 The House of Representatives Select Committee on the Print Media reported its understanding that, 'with the exception of Australia, Canada and France, there are no limits on foreign ownership in the print media in OECD countries.' That committee also noted the statement by the same source:

In Canada, foreign investment is permitted only if it takes the form of a joint venture controlled by Canadian interests.¹²

7.14 The committee points to the differing outcomes achieved by these two ostensibly similar systems. The Australian government's published reasons for justifying the increase of foreign shareholding in Fairfax in 1993 were:

This case has been assessed against the objective of limiting foreign involvement in mass circulation newspapers. It also reflects the valid need of foreign investors to safeguard their financial and managerial commitment to their newspapers.¹³

7.15 While the Canadian system seeks to maintain Canadian equity and control, it could be argued that the Australian system, at least in this case, worked expressly to maintain and enhance foreign control.

History of foreign investment in Australia

7.16 Australia has always welcomed foreign investment and prior to the early 1970s had no mechanism for regulating its flows.

7.17 During the 1960s and early 1970s, some sections of the community expressed concern at rising levels of foreign ownership and control of

¹² *News & Fair Facts*, op cit, p 37

¹³ Treasurer, Press Release, *Foreign Investment Policy: Mass Circulation Newspapers*, 20 April 1993

Australian industries and resources. Governments of both persuasions reacted by introducing measures designed to screen foreign investments in certain sensitive sectors of the economy while maintaining an 'open door' approach to foreign investment generally.

7.18 The Foreign Acquisitions and Takeovers Act (FATA) was a Labor government initiative. It established a regime for screening takeovers and authorising proposals to establish new businesses, investments by foreign governments and real estate purchases. To succeed under the initial FATA regime foreign investment proposals had to be of demonstrable benefit to Australia. There was also a provision that Australian interests had had an adequate opportunity to purchase the business or property in question.¹⁴

7.19 In April 1976, the then Coalition government announced a package of measures addressing foreign investment controls. The centrepiece was the establishment of FIRB. Replacing the existing committee of public servants, FIRB was to consist of three members, two with business sector experience and a senior Treasury official. The explanation for the change focused on the government's perceived need to obtain independent expert advice from persons who reflect community and business sector interests.¹⁵

7.20 Since that time, the Hawke and Keating governments have announced a number of significant changes to Australia's foreign investment policy.

7.21 In 1986, the test requiring applicants to demonstrate net economic benefits, and that Australians had had the opportunity to purchase the target businesses, was dropped.

7.22 The new test assessed whether a proposal for foreign investment was contrary to the national interest. Treasury said: 'In effect, this shift in emphasis was implicit endorsement that foreign direct investment was typically of benefit to the recipient economy'.¹⁶ The committee notes, however, that the then Finance Minister Senator Walsh, in the second

¹⁴ Treasury Submission No 16, p 5

¹⁵ The then Treasurer, the Hon P Lynch explained the purpose of the amendments in *Foreign Investment in Australia*, an attachment to the *Foreign Investment Review Board Report 1977*, AGPS, Canberra, pp 26-38

¹⁶ Treasury Submission No 16, p 5

reading speech for the Foreign Takeovers Amendment Bill 1986 incorporating these amendments, stated:

The proposed amendments to ... the *Foreign Takeovers Act 1975* represent only one part of the overall package of foreign investment policy modifications announced ... last year. The changes announced at that time that did not require statutory implementation have already been implemented by administrative action. Under those changes, the 'opportunities test' was abolished, certain thresholds under foreign investment policy were increased significantly and the policy in respect of merchant banks, other non-bank financial institutions, insurance companies and real estate was liberalised. ... Based on past experience, the changes will either exempt from examination or simplify and streamline the examination process for around one-third of proposals that have been subject to foreign investment screening. The government has demonstrated its commitment to the removal of those parts of regulations which are burdensome and contribute little benefit to Australia.¹⁷

7.23 The amendments appear to have facilitated the application process more than embraced the benefits of totally unfettered direct foreign investment. Moreover, Australian policy has not wavered from a regime that identifies particular economic sectors like the media for special consideration and specific rules. In the event, the committee notes that these changes to foreign investment policy were made by administrative fiat rather than legislation.

7.24 The Treasury reports a number of other subsequent 'major liberalisations' to Australian's foreign investment policy:

- Minimum Australian equity and control requirements for takeovers, new businesses and projects in most industry sectors in which they were imposed (mining, oil and gas, primary industries, forestry and fishing, real estate, finance and insurance) were progressively abolished;
- Higher thresholds (below which proposals do not require approval) were progressively introduced, such that most takeovers and new businesses in most sectors did not require prior approval;

¹⁷ Second Reading, Foreign Takeovers Amendment Bill 1986, Senate Hansard 1986, p 1203

- In 1984, sixteen foreign banks were invited to apply for a banking authority. In 1992, the government decided that other foreign banks could apply for banking licences, subject to their being of sufficient standing and where the bank agrees to comply with Reserve Bank prudential supervision and arrangements; and
- There also occurred a progressive deregulation of Australia's non-bank financial sector, with easier access to merchant banking, stockbroking and insurance.¹⁸

FIRB's jurisdiction

7.25 The scope of FATA provides that the following proposals be submitted to FIRB:

- (i) acquisitions of interests in urban real estate regardless of value ...;
- (ii) acquisitions of shareholdings of 15 per cent or more in Australian companies that have total assets valued at more than \$5 million (more than \$3 million if greater than 50 per cent of the assets of the company are in the form of rural land);
- (iii) takeovers of Australian companies and businesses by means other than the acquisition of shares, viz:
 - (a) by the purchase of assets or interests in assets;
 - (b) by agreements in relation to board representation or by alteration of the articles of association or other constituent documents of a company; or
 - (c) by arrangements for leasing, hiring, managing or otherwise participating in the profits of a business -

where the total assets of the target company or business are valued at more than \$5 million (more than \$3 million if greater than 50 per cent of the assets are in the form of rural land); and
- (iv) takeovers of off-shore companies that have Australian subsidiaries or assets valued at \$20 million or more, or where the value of the

¹⁸ Treasury Submission No 16, p 6

Australian subsidiaries or assets is more than half of the value of the global assets of the target company.¹⁹

7.26 In addition, FIRB examines proposals not subject to FATA but which fall into the following categories:

- (i) any proposals in the media sector irrespective of size;
- (ii) proposals to establish new businesses in other sectors of the economy where the total amount of the investment is \$10 million or more (total investment means the total expenditure expected to be associated with the proposal, including the value of any assets leased); and
- (iii) direct investments by foreign governments or their agencies, regardless of size, (excluding investments related to their diplomatic representation).²⁰

7.27 Government policy also provides that once registered, the following proposal will normally not be examined or required to comply with the 'national interest' criteria:

- the acquisition of 15 per cent or more of a company or business valued by total assets and consideration below \$50 million;
- the establishment of a new project or business with a total investment below \$50 million; and
- the takeover of an off-shore company with Australian subsidiaries or assets valued below \$50 million and not exceeding half the global asset value.²¹

Foreign investment policy for the media

7.28 Foreign investment in television licences also is regulated under the provisions of the *Broadcasting Services Act 1992* which provides that a foreign person may not be in a position to exercise control over television licences or have interests in a licence exceeding 15 per cent and that two or

¹⁹ *Australia's Foreign Investment Policy*, p 2

²⁰ *Australia's Foreign Investment Policy*, p 3

²¹ *Australia's Foreign Investment Policy*, p 4

more such persons shall not have such interests exceeding 20 per cent in total.²²

Cross-media rules

7.29 In addition, there are rules which straddle both the electronic and print media to promote diversity of control over media in the same area. Charts 7.2, 7.3 and 7.4 are a succinct survey of these provisions.²³

7.30 In effect, persons are prohibited from exercising control of a commercial radio or television station (free-to-air or pay) and a mass circulation newspaper in the same 'market'. The penalties in the Act, however, are directed to the broadcast or television interests of the owner, not their newspaper operations.

7.31 However, it is worth noting that if the cross-media rules were meant to achieve a strict ownership separation between major information mediums such as print and television they have obviously failed to do so.

7.32 The largest shareholder in Channel 7 is Rupert Murdoch, easily the most dominant player in the Australian print media. Ownership of the most successful commercial television station Channel 9 has not stopped Kerry Packer from acquiring a 14.9 per cent stake in the Fairfax group.

7.33 Indeed by allowing cross holdings of up to 15 per cent the rules have simply encouraged major stakeholders to press for more. Rupert Murdoch recently made it clear that he would like to acquire at least a major holding in Channel 7 and there is little doubt that Kerry Packer would be very interested in being able to hold a controlling interest in both Channel 9 and the Fairfax organisation.

7.34 The 15 per cent rule is just as ineffective in relation to foreign ownership. Conrad Black continues to press the government to be allowed to increase his holding to at least 35 per cent and, if given a chance,

²² *Broadcasting Services Act 1992*, Section 57

²³ The Australian Broadcasting Authority (ABA) provided this summary of the operation of the cross-media rules to the committee at the public hearing on 11 February 1994, Evidence pp 109-110

majority ownership. As he told *ABC PM's* Peter Martin 'you cannot get enough of a good thing'.²⁴

7.35 Similarly Canwest's nominal limit of 15 per cent direct voting interest in the third commercial television station has not stopped it from being widely regarded as being in effective control of Channel 10. This matter is taken up in the ensuing section.

²⁴ *PM*, 21 April 1993

Chart 7.2 - CROSS-MEDIA RULES**Free-To-Air Television**

A person is prohibited from being in a position to exercise control of:

- a commercial **television** broadcasting licence and a commercial **radio** broadcasting licence that have the same licence area; or
- a commercial **television** broadcasting licence and a **newspaper** that is associated with the licence area of the licence; or
- a commercial **radio** broadcasting licence and a **newspaper** that is associated with the licence area of the licence.

Free-to Air Television - Directorships

- A person is prohibited from being a director of a company that controls, or companies that between them control, a prohibited combination of media outlets (TV/radio, TV/newspaper, radio/newspaper).
- A person who controls one or more commercial broadcasting licences or newspapers is prohibited from being a director of a company with media holdings, if, between them, the person and the company control a prohibited combination of media outlets (TV/radio, TV/newspaper, radio/newspaper).

Pay Television (Primarily Satellite Licence A)

- Controllers of large circulation newspapers may not control, or have more than a 2 per cent company interest in licence A.
- Controllers of commercial television broadcasting licences may not control, or have more than a 2 per cent company interest in licence A.
- Controllers of telecommunications carriers may not control, or have more than a 2 per cent company interest in licence A.
- The ABA, in consultation with the Trade Practices Commission, must monitor the cross-media ownership of the holders of non-satellite pay TV broadcasting licences in the context of the objects of the Act.

Chart 7.3

Newspaper

A newspaper is defined in the Act as a newspaper in English published on at least 4 days a week.

Associated Newspaper Register

Section 59 of the Act requires the ABA to maintain a register of newspapers which are associated with the licence area of a licence, ie where at least 50 per cent of the circulation of a newspaper is within the licence area of a commercial television broadcasting licence or a commercial radio broadcasting licence.

Large Circulation Newspaper Register

Section 105 of the Act requires the ABA to maintain a register of newspapers with an average daily circulation in Australia over 100,000.

Chart 7.4

Company Interests

These are a percentage of:

- a shareholding interest, or
- a voting interest, or
- a dividend interest, or
- a winding-up interest

held by a person in a company.

If the person has two or more such interests, the relevant company interest is whichever of those interests has the greater or greatest percentage.

Canwest - control and influence

7.36 The committee took a particular interest in the Canwest acquisition from Westpac of its interests in Channel 10. Under that arrangement, Canwest, an overseas company, acquired a 57.5 per cent interest in Channel 10 in the form of subordinated debentures, some of which are debentures convertible to shares. The Australian Broadcasting Authority (ABA) stressed that such an interest could be classified as a 'financial interest' but was not a 'company interest', because they have no voting rights. The committee was advised that the ABA was of a view that the arrangement fell within its Act, but that it was concerned about the 'actual control' of the channel, which it believed depended on one or a number of the following considerations:

- the composition of the board;
- right of veto by persons over board decisions;
- programming arrangements; and
- management arrangements.²⁵

7.37 The committee found that Canwest was represented on the board of Channel 10 by two of its representatives both of whom have a media background.²⁶ Under the Broadcasting Services Act (Section 58) not more than 20 per cent of each commercial television licence may be owned by foreign persons, unless the ABA has approved a higher percentage, and that may be once only and shall not exceed 28 days. On the basis of the evidence given by the ABA, it would appear that Canwest, whilst it is not in a position to exercise control via a formal shareholding, has a significant influence over the corporate direction of Channel 10 as a consequence of the arrangement for it to have two board positions.

7.38 The committee's understanding of Canwest's interest in Channel 10 vis-a-vis FATA is that the debenture holders do have a financial interest in the company, but such an interest does not come under section 18 (acquisition of shares), section 19 (acquisition of assets) or section 20 (directorship of corporation) for the reason that a debenture is a loan not an interest which

²⁵ Evidence pp 111-115

²⁶ Evidence p 114

gives immediate and actual control. The committee was advised, however, that FIRB could rely on section 8 of FATA to examine those debentures which have an option for conversion to shares.²⁷ But the evidence points to the fact that the decision by Canwest to hold debentures in Channel 10 has ultimately given it a form of control. The committee believes that these sections of FATA require amendment to remove any doubt about whether loan arrangements, which result in control over print or electronic media organisations, should be the subject of normal FIRB procedures.

Recommendation 7.1

That the government prepare amendments to the Foreign Acquisitions and Takeovers Act and the Broadcasting Services Act which will ensure that limits on foreign ownership cover both economic (non-voting) and voting interests.

7.39 The committee endeavoured to confirm whether FIRB had considered the Canwest interest but, consistent with FIRB policy, was unable to gain information on this matter. Yet the chair of the ABA indicated that ABA had 'dealings' with FIRB in respect of Canwest.²⁸ The committee reiterates its view that it is extraordinary that such ex post advice cannot be given. Yet again, this highlights the need for FIRB to maintain a public register of all proposals which come under its regulatory net. This information, along with a list of rejections/approvals for all proposals, should be incorporated in FIRB's annual report which is tabled in the Parliament.

Foreign investment policy for newspapers

7.40 Newspapers have been identified specifically as a sensitive area since 1976 when the government policy was announced in the then Treasurer's statement:

We will restrict foreign investment in certain basic sectors of the economy. These areas, some of which are already covered by legislation, are banking

²⁷ Mr B Bailey, Parliamentary Research Service Paper on 'Subordinated Debentures' prepared for the committee on 23 May 1994

²⁸ Evidence p 108

(both savings and trading), radio, television, **daily newspapers** and certain aspects of the civil aviation industry.²⁹ [emphasis added].

7.41 This statement continues to reflect government policy though the level of acceptable foreign involvement in print media has been adjusted over time.

7.42 In the first edition of *Australia's Foreign Investment Policy*, newspaper policy was recorded as:

All proposals for foreign investment in newspapers in Australia, irrespective of size of the proposed investment, are subject to a case-by-case examination. **Foreign investment in mass circulation papers is restricted.** Further, approval is not normally given to proposals by foreign interests to invest in ethnic newspapers in Australia, unless there is substantial involvement by the local ethnic community and effective control of editorial policy;³⁰ [emphasis added]

and the most recent edition in 1992 contains a similar statement:

Foreign investment in mass circulation newspapers is restricted. All proposals by foreign interests to establish a newspaper or acquire an interest in an existing newspaper business in Australia are subject to a case-by-case examination irrespective of the size of the proposed investment. Approval is not normally given to proposals by foreign interests to establish ethnic newspapers in Australia, unless there is substantial involvement by the local ethnic community and effective local control of editorial policy.³¹ [emphasis added].

Sources to ascertain government policies relating to newspapers

7.43 Australian government rules for foreign investment can be found in Acts of Parliament, media releases and Treasury publications. Market concepts about company control, ownership of shareholdings and voting rights are intermingled with social or public interest concepts of national interest and, more recently, of what is contrary to the national interest. For instance, with respect to foreign investment in daily newspapers, the regime

²⁹ Treasury Submission No 16, p 6

³⁰ The Treasury, *Australia's Foreign Investment Policy*, AGPS, 1978

³¹ *Australia's Foreign Investment Policy*, p 7

is contained in not only one Act but also in several media releases and the latest edition of the *Guide to Investors*. The FATA stipulates the Treasurer must approve individual foreign persons acquiring an interest in excess of 15 per cent of shares of an Australian company valued at \$5 million or more. In the absence of other legislative provisions, the reader could be forgiven for believing an application for a smaller percentage is not required, but this is not the case according to the *Guide for Investors*. This misunderstanding did however occur in the 1991 Fairfax decision. Under the Act, the Treasurer may reject the acquisition if satisfied that the share acquisition would result in control passing to the foreign owner.

7.44 Obviously, the lay person's interpretation of the FATA and the government's stated policies contained in the *Guide to Investors* requiring notification of all applications (and not just applications for more than 15 per cent) in the print media sector, are at odds.³² The committee observes that the use of both legislation and media release to communicate government policy has been criticised by authorities in the past. There are obvious grounds for avoiding a system that requires the community to search for its laws in other than the statutes. This point was taken up by the Australian Press Council whose chair, Professor Flint, submitted:

If there were to be a level of foreign investment in the press, that should be determined by legislation, by the Parliament.³³

Newspaper policy in the 1990s

7.45 Notwithstanding the lack of apparent legislative authority underpinning statements requiring notification of all applications, the

³² For example, *Australia's Foreign Investment Policy*, p 2 & 3:

- a) The Government requires the following categories of proposals by foreign interests to be notified to the Foreign Investment Review Board.
- b) Investment proposals not coming under the Foreign Acquisitions and Takeovers Act, but falling within the following category:
 - any proposals in the media sector irrespective of size

³³ Evidence p 426

government has announced through media releases, a number of decisions that appear to reflect a policy or, at least, a developed position on foreign ownership of newspapers. There remains the conundrum of whether newspaper foreign investment decisions to date establish a clear policy that future applicants can rely upon to guide their investment decisions.

7.46 The statements of the government which assert a case-by-case approach and the changes in the Fairfax shareholding thresholds accepted by successive Treasurers add weight to a conclusion that the merits of each application will be judged according to the circumstances of the day. The two announcements of approval in 1991 and 1993 for the Tourang consortium advised that the government would not permit higher share holdings than what was approved at that time.³⁴

7.47 However, Australian Provincial Newspapers (APN) gave evidence which suggested that this system develops policy which binds the government to make a like decision for future similar applications. Speaking about the revised Tourang bid that mirrored the foreign ownership levels of the already approved Independent consortium, Mr Cameron O'Reilly said:

But at the end of the day, again it was a mechanical process. As soon as they [Tourang] adjusted and revised their bid to the 20 per cent limit, they were approved as well.³⁵

7.48 Similarly, when APN became aware of the then Treasurer's decision to increase The Telegraph plc stake to 25 per cent of Fairfax, Mr O'Reilly's family trust applied and obtained approval to increase its shareholding to that same level in APN. Mr O'Reilly and his family have a significant investment in Australia and are very familiar with the foreign investment processes.

7.49 The point is that as an experienced player, APN, believes that the principles of the 'rule of law' apply in foreign investment decisions; like decisions for like cases. Indeed, the media release from the then Treasurer Dawkins, on 20 April 1993, records an industry wide policy:

³⁴ Media release by Treasurer Willis, 13 December 1991 and media release by Treasurer Dawkins, 20 April 1993

³⁵ Evidence p 320

The government has decided to increase the maximum permitted foreign interest involvement in mass circulation newspapers by a single shareholder to 25 per cent.

In considering this change in policy, the government has also made a decision on the foreign investment application for The Telegraph plc (Telegraph) to increase its interest in John Fairfax Holdings Limited (Fairfax) to 25 per cent.

7.50 The published position of the government, however, permits expedient decision-making and within this position, precedent is only one of a number of factors to be considered. The current policy provides scope for the government to decide differently for like applicants.

Conclusion

7.51 The committee believes the state of affairs described in this chapter is untenable and advocates a number of measures, which are recorded in chapter 10, to address this deficiency in foreign investment policy and procedures. It could be argued that the policy is untenable because it places in the hands of government a discretion to use its executive power to alter foreign investment percentages at its whim. This discretion may give, or be seen to give, a government power over the editorial content of newspapers. Essentially, this is what is alleged to have occurred in the 1993 decision. An unfettered and seemingly unaccountable discretion of this type over the ownership of the print media, a sector of the mass media highly regarded for its ability to shape political opinion, cuts across the long-cherished democratic ideal of a free and independent press.

7.52 The committee believes that in relation to print media ownership rules there is no place for a 'halfway house' policy. Either there should be no intervention whatsoever or there should be clearly established legislative rules which are administered openly and transparently.