

**Senate Economics Legislation Committee**

**ANSWERS TO QUESTIONS ON NOTICE**

**Treasury Portfolio**

Supplementary Budget Estimates

2014 - 2015

**Department/Agency: Treasury**

**Question: SBT71-73**

**Topic: Foreign Investments Review Board**

**Reference: written - 31 October 2014**

**Senator: Xenophon, Nick**

**Question:**

In 2012, in order to avoid a foreign ownership limitation in the Air Navigation Act 1920, Virgin Australia Holdings Limited (VAH) created a corporate structure that separated its domestic and international operations. The share register of the new entity, Virgin Australia International Holdings Pty Ltd (VAIH) is effectively frozen and held by a Trustee with the intention that “VAIH will not be controlled by, or be a Related Body Corporate of, VAH. However, VAH will continue to provide long term economic and operational support to VAIH...”. [Source: VAH Ltd Information Statement (23 Feb 12)]

However, the 2013 VAH Annual Report lists VAIH and its operating companies as controlled subsidiaries and consolidates the VAIH accounts with those of other “Virgin Group” companies. Note 36 (9) to the accounts justifies the consolidation of VAIH as a controlled entity as follows:

“(9) The Company consolidates these entities despite holding minimal issued capital, as the Company has the ability to govern their financial and operating policies through a funding agreement and other contractual arrangements so as to obtain benefits from their activities.”

Clearly, these two documents offer up a conflict in regard to the control of VAIH by VAH.

71. For the purposes of the Foreign Acquisitions and Takeovers Act 1975, does FIRB consider VAIH to be “an Australian business controlled by foreign persons” in accordance with s21(5)(a)?
  - a. If not, why not?
  - b. If not, what evidence is required and criteria are applied when a s21(5)(a) determination is made?
  
72. Is a business formally declared to be “an Australian business controlled by foreign persons” or is such a determination an in-house transaction-specific process?

Recently, Virgin Australia Holdings Limited (VAH) announced a move to full ownership of Tigerair Australia, subject to FIRB approval. Presumably, FIRB is looking at the effects of VAH as an Australian business controlled by foreign persons taking over an Australian business, notwithstanding that TigerAir Australia is also controlled by foreign persons.

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73. What would be the FIRB involvement should VAH decide to on-sell TigerAir Australia to Virgin Australia International Holdings Pty Ltd (VAIH) as a means to reduce the foreign ownership level to below 49% in order to qualify for the grant of an Australian International Airline licence?

**Answer:**

71. The *Foreign Acquisitions and Takeovers Act 1975* (the Act) provides legislative support for the Government's foreign investment policy. The Act applies with reference to foreign acquisitions and takeovers, which are examined against the Act on a confidential, case-by-case basis. It is not appropriate, nor is it Government policy, to apply or otherwise use definitions within the Act in isolation or without reference to a specific foreign acquisition or takeover.
- a. Refer to above statement.
  - b. The Government reviews foreign investment proposals against the national interest on a case-by-case basis. Assessment with reference to s21(5)(a) is likely to be applied in instances where:
    - 1) an acquisition is subject to the Act; and
    - 2) the acquisition under examination involves an entity that can otherwise influence or exert control over the acquirer. The concept of 'control' is determined on a case-by-case basis. Factors that may be considered include:
      - preferential, special or veto voting rights;
      - the ability to appoint directors or asset managers;
      - contractual agreements including, but not restricted to, agreements for loans, provision of services and/or off take agreements; or
      - arrangements or agreements that would enable a shareholder to exercise control, for example, through the provisions of finance, technology, materials markets and marketing or managerial expertise.
72. No formal declarations are made.
73. The Government respects the commercial-in-confidence nature of foreign investment applications and does not discuss or disclose details of cases. All proposals received are examined on a case-by-case basis and cannot be fully assessed until a formal application has been lodged.