

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Supplementary Budget Estimates

19 – 20 October 2011

Question No: SBT 808

Topic: Continuous Disclosure of State-Owned Enterprises

Hansard Page: Wednesday 19 October 2011, Pg 116-117

Senator Xenophon asked:

Senator XENOPHON: Is there a duty of continuous disclosure that if at the time there is no apparent link to a state owned enterprise but there is subsequently a link after the purchase is made—in other words, the company might get in trouble and whilst the owner is still the same you find that backing is guaranteed by a state owned enterprise? Once the purchase has been approved, to what extent can there be continuous disclosure?

Mr Di Giorgio: Once an approval has been made, that finishes that particular part of the process. If the ownership changes in the future, they are obliged to—

Senator XENOPHON: No—the ownership remains the same but you have a guarantee from a state owned enterprise. These are genuine questions about policy. Does the act and the current rules preclude a duty of continuing review or scrutiny of such a transaction? In other words, if circumstances change, even though the ownership structure is nominally the same, can you look into such a transaction? I think the answer is no from what you have said.

Mr Di Giorgio: I do not believe so.

Mr Murphy: If there were some suspicion of that or the potential for that, you could impose a condition. That would bring it back in—

Senator XENOPHON: Just a minute: time is short and I want to drill down on this issue. Would it be unreasonable to say, in terms of the powers of the Foreign Investment Review Board or of Treasury, that if the board had the power to look at transactions that had been approved and became aware of new circumstances, such as the ownership being the same but there now being the guarantee of a state owned enterprise behind it, that there could be a safeguard so that a de facto change of ownership or control would be something that was subject to scrutiny. In other words: an overarching condition.

Mr Hill: It is conceivable that, in the future, if circumstances change in some way that link to ownership but not explicitly we could have powers under the act to reinterpret whether the national interest is affected or not.

Senator XENOPHON: Are you saying you have those powers now?

Mr Hill: I think we might have in some circumstances.

Senator XENOPHON: Would you take it on notice?

Mr Murphy: Yes, we'll take it on notice.

Mr Hill: It is a complex area, and derivative instruments that exchange hands after the event could culminate in an acquisition of interests—it might not be a direct interest, but it could be a derivative interest. We made changes to legislation just last year to capture more-complex transactions. That could reopen the powers that the Treasurer has under section 26.

Mr Murphy: We'll give you written advice.

Senator XENOPHON: I'd be grateful if you would provide that on notice.

Answer:

The *Foreign Acquisitions and Takeovers Act 1975* (the FATA) applies to certain arrangements that would result in a change in the control of Australian corporations, even where those arrangements would not involve any change in the ownership of the corporation's shares. This suggests that post-approval changes in commercial arrangements between parties may trigger the reopening of notification obligations by investors under the FATA and a re-examination of the investment by the FIRB and the Treasurer.

Where third party commercial arrangements such as underwriting agreements or guarantees lead to potential changes in control of an Australian corporation, including in connection with earlier approved investors, FIRB would re-examine the nature of the investment. This re-examination would include, if necessary, consideration of any adherence by existing investors to earlier commitments, undertakings or conditions. In providing any further approval, or in considering commitments made against any earlier approvals, FIRB would also consider the character of an investor and the extent to which Australian laws generally have been upheld. FIRB routinely monitors as part of its compliance program the extent to which foreign investment obligations arise for investors in the market. This includes monitoring of earlier agreed conditions and undertakings.

Foreign investors, like all members of the community, must abide by Australian law. The broader body of legal obligations which foreign investors must observe compliment Australia's foreign investment regulatory framework.