Foreign Investment Review Board

Annual Report 2010-11
The Hon Wayne Swan MP
Deputy Prime Minister and Treasurer
Parliament House
CANBERRA ACT  2600

Dear Deputy Prime Minister and Treasurer

I am pleased to present the annual report of the Foreign Investment Review Board for the year ended 30 June 2011. This report has been prepared in accordance with the Board’s responsibility to advise the Government on foreign investment matters. It outlines the activities of the Board, provides a summary of the year’s foreign investment proposals, and also contains an overview of the main provisions of the Foreign Acquisitions and Takeovers Act 1975.

The Board’s key function is to examine the more significant foreign investment applications and advise on potential national interest concerns. This year the Board considered one of the most significant cases to come before it — the proposed takeover of the Australian Securities Exchange by the Singapore Stock Exchange. This is the only occasion since 2001 that a business proposal was found by the Treasurer to be contrary to the national interest. The Board undertook detailed analysis of the proposed transaction and its potential ramifications, and sought the input of ASIC, APRA and the RBA on the proposal. On the basis of all the information, the Board concluded that the proposal, as presented, was contrary to Australia’s national interest, and recommended to the Treasurer that it not be approved.

In 2010-11, the majority of business applications were in the resources sector, continuing a trend from the previous year. Excluding real estate applications, mineral exploration and development applications accounted for around 41 per cent of the value of approvals. The United States was again the largest investor in 2010-11 in terms of the value of approvals (16 per cent of the total value), followed by the United Kingdom, China, Canada and India. This is the third consecutive year that China has been ranked in the top three sources of proposed investment and the first time that India has been ranked in the top five and mirrors increased trade with these two countries.

The year has been characterised by continued media and community interest in foreign investment, notably in agricultural land and businesses. This area has also been the subject of a number of Parliamentary inquiries and hearings and proposals for legislative change. The Board has closely monitored the policy issues in this area.

On 18 January 2012, the Government released a Policy Statement on Foreign Investment in Agriculture which provides guidance on factors the Board and the Government typically consider in assessing foreign investment applications involving the agricultural sector. The Government also announced funding for expanded
agriculture sector survey work to be undertaken by the ABS. This will help inform future policy making and assessments of foreign investment proposals.

Over the course of the year, the Board continued to implement the changes announced in April 2010 to the way temporary residents acquiring established residential property are examined. There has also been continued improvement in data collection and internal monitoring processes.

The Board continues to foster a better awareness and understanding, both locally and abroad, of Australia’s foreign investment arrangements. In March 2011, the easy-to-read version of Australia’s Foreign Investment Policy released on 30 June 2010 was also released in Mandarin, Japanese and Bahasa.

This year has also seen the continued development of the Board’s strategy for engagement with the business community and their advisers. The Board worked with the Secretariat on its outreach and education program for the real estate sector, including real estate agents and solicitors. This program, including visits to state and territory peak industry bodies, has enhanced awareness of the revised requirements introduced in April 2010 and also of the general screening arrangements.

The Board has also developed a strategy for engaging with business advisers in relation to business cases promoting a better flow of information to support applications. In addition to presentations and seminars, this strategy will be supported by detailed guidance for business on issues that have been identified by business, the Board and the Secretariat.

In February 2011, the Investment Protocol to the Australia-New Zealand Closer Economic Relations Trade Agreement was signed. Once implemented, it will reduce compliance costs for Trans-Tasman investors by providing higher monetary thresholds at which inward foreign investments will be screened. The Board has followed these developments with interest, given a major focus of the Board’s deliberations has continued to be on ensuring the right balance between protecting Australia’s national interest and ensuring that Australia remains an attractive destination for foreign investment.

Yours sincerely

M.J. Phillips AO
Chairman
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Acronyms and abbreviations

ABS  Australian Bureau of Statistics
AFP  Australian Federal Police
ASX  Australian Securities Exchange
ATO  Australian Taxation Office
DIAC Department of Immigration and Citizenship
FATA  Foreign Acquisitions and Takeovers Act 1975
FIMS Foreign Investment Management System
FIRB (/the Board) Foreign Investment Review Board
FOI Freedom of Information
FOI Act  Freedom of Information Act 1982
Privacy Act  Privacy Act 1988
Secretariat (/the Division) the Treasury’s Foreign Investment and Trade Policy Division
the Policy Australia’s Foreign Investment Policy
Regulations  Foreign Acquisitions and Takeovers Regulations 1989
<table>
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<th><strong>Glossary</strong></th>
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<tr>
<td><strong>Aggregate substantial interest in a corporation</strong></td>
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<td><strong>Applications approved</strong></td>
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<td><strong>Applications considered</strong></td>
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<td><strong>Applications decided</strong></td>
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<td><strong>Applications rejected</strong></td>
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<td><strong>Australian rural land</strong></td>
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<td><strong>FIMS</strong></td>
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<td><strong>Final Order</strong></td>
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Foreign governments and their related entities include:

- a body politic of a foreign country;
- companies or other entities in which foreign governments, their agencies or related entities have more than an aggregate 15 per cent interest; or
- companies or entities that are otherwise controlled by foreign governments, their agencies or related entities.

Foreign Investment Review Board (FIRB or the Board)

A non-statutory body established in 1976 to advise the Treasurer on the Policy and its administration.

Foreign person

(a) A natural person not ordinarily resident in Australia;

(b) a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest;

(c) a corporation in which two or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest;

(d) the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or

(e) the trustee of a trust estate in which two or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.

(Section 5 of the FATA)

Interim Order

An Order that extends the available statutory examination period and prohibits a proposed acquisition for up to 90 days.

Offshore takeover

Where an offshore company (foreign person) that holds Australian assets or conducts a business in Australia is acquired by another foreign person, and the Australian assets or businesses of the target company are valued at less than 50 per cent of its global assets.
<table>
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<tr>
<th>Term</th>
<th>Definition</th>
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<tr>
<td>Off-the-plan</td>
<td>An acquisition of a dwelling under construction or completed that has not been lived in for 12 months or more, or previously sold (that is, the dwelling is purchased from the developer).</td>
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<tr>
<td>Proposed investment</td>
<td>Proposed investment associated with foreign investment proposals comprises the aggregate of acquisition costs and development expenditure in the case of existing businesses, and the aggregate of establishment costs and development expenditure in the case of new businesses.</td>
</tr>
<tr>
<td>Substantial interest in a corporation</td>
<td>Where a person, alone or together with any associate(s), is in a position to control not less than 15 per cent of the voting power or potential voting power, or holds interests in not less than 15 per cent of the issued shares or rights to issued shares, of a corporation (section 9 of the FATA).</td>
</tr>
<tr>
<td>Threshold</td>
<td>Monetary figure under either the Policy or the FATA at which foreign persons are expected or required to notify an investment proposal to the Treasurer.</td>
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Main points

• In 2010-11, 10,293 proposals received foreign investment approval, compared with 4,401 in 2009-10 (the sectoral breakdown below excludes reorganisations).
  – The real estate sector recorded 9,771 approvals, compared with the 3,897 approvals in 2009-10. The increase is largely attributable to the reintroduction from 24 April 2010 of the screening of temporary residents purchasing residential real estate.
  – Other sectors also had an increase in approvals with 448 approvals in 2010-11, compared with 426 approvals in 2009-10.

• Approvals in 2010-11 involved proposed investment of $176.7 billion. This represented a 27 per cent increase on the previous year’s approvals of $139.5 billion. However, this was comparable to the $181.4 billion approved in 2008-09, before the onset of the global financial crisis.
  – In real estate, approved proposed investment was $41.5 billion in 2010-11, compared with $20.0 billion in 2009-10. The increase is largely attributable to the reintroduction from 24 April 2010 of the screening of temporary residents purchasing residential real estate, which resulted in an increase in the number of proposals approved, from 3,897 in 2009-10 to 9,771 in 2010-11.
  – In other sectors, approved proposed investment in 2010-11 was $135.2 billion, compared with $119.5 billion in 2009-10, representing an increase of 13 per cent.

• In 2010-11, 43 proposals were rejected, compared with three in 2009-10. All except one of these related to real estate purchases. The rejection in April 2011 of the proposed $8.4 billion takeover of the Australian Securities Exchange by the Singapore Stock Exchange was the first business proposal rejected since the proposed takeover of Woodside Petroleum Limited by Shell Australia Investments Limited in April 2001.

• The mineral exploration and development sector was the largest destination by value, with approvals in 2010-11 of $54.9 billion. In 2010-11, the other major destinations were: services, with approved proposed investment of $47.5 billion; and real estate, with approved proposed investment of $41.5 billion (see above).

• The United States ($27.6 billion) was the largest source country for approved proposed investment in 2010-11. The United Kingdom ($15.4 billion), China ($15.0 billion), Canada ($14.9 billion) and India ($11.3 billion) were the other major source countries of approved proposed investment in 2010-11. Canada and India replaced Japan and Switzerland in the top five sources of proposed investment.

• Mr Brian Wilson has been appointed as Chair of the Foreign Investment Review Board for a five-year period with effect from 16 April 2012, succeeding Mr John Phillips AO, who is retiring from the Board at the end of his term after having served in the role for 15 years.
CHAPTER 1

FOREIGN INVESTMENT REVIEW BOARD
Foreign Investment Review Board

The Foreign Investment Review Board (the Board or FIRB) is a non-statutory body established in 1976 to advise the Treasurer and the Government on Australia’s Foreign Investment Policy (the Policy) and its administration. The FIRB annual reports, which are not statutorily mandated, provide information on the operation of Australia’s foreign investment review arrangements. This chapter covers the role of the FIRB and administration of these arrangements.

Functions of the Board

The Board’s functions are advisory only. Responsibility for making decisions on the Policy and proposals rests with the Treasurer. The Treasury’s Foreign Investment and Trade Policy Division (the Division) provides secretariat services to the Board and is responsible for the day-to-day administration of the arrangements. The Division also provides advice to the Treasury portfolio ministers on foreign investment matters.

The role of the Board, including through its secretariat, is to:

- examine proposed investments in Australia that are subject to the Policy and supporting legislation, and to make recommendations to the Treasurer on these proposals;

- advise the Treasurer and other Treasury portfolio ministers on the operation of the Policy and the *Foreign Acquisitions and Takeovers Act 1975* (the FATA), and on proposed investments that are subject to each;

- foster an awareness and understanding, both in Australia and abroad, of the Policy and the FATA;

- provide guidance to foreign persons and their representatives/agents on the Policy and the FATA;

- monitor and ensure compliance with the Policy and the FATA; and

- provide advice to the Treasurer on the Policy and related matters.

Information on the operation of the Policy and the FATA is provided in Chapter 3.
Board membership

The Board comprises four part-time Members and a full-time Executive Member.

Mr John Phillips AO was first appointed Chairman of the Board on 16 April 1997 and was reappointed for a further term of five years on 18 April 2007. He has extensive high-level experience in the public, finance and business sectors, including as Deputy Governor of the Reserve Bank of Australia. He has also been a director of a number of leading Australian companies. Mr Phillips is retiring from the Board on 15 April 2012, and Mr Brian Wilson will be appointed as Chair from 16 April 2012.

Mr Hamish Douglass was appointed to the Board on 10 December 2009. He has extensive experience in global foreign investment and in the origination and execution of corporate finance transactions and, in particular, public company mergers and acquisitions. He has had extensive experience in corporate finance transactions in the mining industry. He is the Chief Executive Officer of Magellan Financial Group, a specialist global fund management group which is listed on the Australian Securities Exchange (ASX). He was previously Co-Head of Global Banking for Deutsche Bank AG in Australia and New Zealand and prior to that he was Head of Mergers and Acquisitions. He is a member of the Australian Government’s Takeovers Panel, a member of the Young Global Leaders, a forum of the World Economic Forum and a member of the Financial Literacy Board.

Mr Brian Wilson was appointed to the Board on 10 December 2009. In his 33-year career as an investment banker specialising in corporate financial advice he advised more than 40 of Australia’s top 100 companies and numerous international groups. Mr Wilson retired in 2009 as a Managing Director of the global investment bank Lazard, after co-founding the firm in Australia in 2004 and was previously a Vice-Chairman of Citigroup Australia and its predecessor companies. He is currently Deputy Chancellor of University of Technology, Sydney, a non-executive director of Bell Financial Group and a member of the Payments System Board of the Reserve Bank of Australia. He was also a member of the Australian Government Review of Australia’s Superannuation System and is currently a member of the Australian Taxation Office (ATO) Superannuation Reform Steering Committee.

Ms Anna Buduls was appointed to the Board on 15 July 2010. Through her corporate advisory work and 17 years of non-executive company directorships, Ms Buduls has gained wide commercial experience across a broad range of companies and industries. She is currently owner and Chairman of a travel software group, and has been a non-executive director of listed companies SAI Global Ltd since October 2003 and Centro Properties Group and Centro Retail Limited since October 2009. Late in 2011 Anna was appointed to the Board of Elders Limited and the Australian Social Inclusion Board.
Ms Deidre Gerathy became the General Manager of Treasury’s Foreign Investment and Trade Policy Division (the Division) and commenced as the Executive Member of the Board on 7 March 2011. Ms Gerathy has had a broad range of public policy experience spanning senior roles in the Treasury and ATO. This includes oversight of the Department’s Corporate Services Group and its Tax Design Division, as well as General Manager responsibility for the Ralph Review of Business Taxation.

Mr Patrick Colmer was the General Manager of the Division and the Executive Member of the Board from 20 November 2006 until 6 March 2011. Mr Colmer has an extensive background as a public policy adviser in a variety of government agencies. He was the General Manager of Treasury’s Indirect Tax Division from 2002 to 2006 and was an Assistant Commissioner in the ATO from 1999 to 2002.

Relationship of the Division to the Board

The Executive Member of the Board provides the link between the Board and the Treasury. As the secretariat to the Board, the Division is responsible for the initial examination of proposals received, and for preparing recommendations to the Treasury ministers or the Divisional officers the Treasurer has authorised to make decisions under the Policy and the FATA. It also provides a contact point for foreign investors and their representatives or agents.

The Board provides advice on the application of the Policy and the FATA across the range of proposals received by the Division and on foreign investment policy issues. It provides specific advice on the more significant applications received and also reviews the general handling of other applications. The Board performs this role with the benefit of weekly reports prepared by the Division on proposals received and through regular meetings and telephone discussions with the Executive Member. Formal Board meetings are generally held monthly, with telephone discussions taking place in the intervening weeks. The Board members draw on their considerable collective and individual professional and commercial experience in discharging their advisory role.

Administration of the Policy

Information, advice and education

In keeping with the Board’s role of fostering awareness and understanding of Australia’s foreign investment review arrangements and the Policy, the Division regularly engages with potential foreign investors, their representatives or agents and Australian businesses to provide information on the operation of the Policy and the FATA and their application, including to specific proposals.
The Division also provides a telephone inquiry line, +61 2 6263 3795, an email address, firbenquiries@treasury.gov.au, and a website, www.firb.gov.au, for people seeking information or advice on the Policy and the FATA. A compliance hotline and email address have also been introduced (1800 050 377 and FIRBCompliance@treasury.gov.au).

Consideration timeframe

The FATA provides a 30-day statutory period for a decision to be made on proposals lodged under the FATA, with up to a further 10 days after the day of the decision to advise the applicant of the decision. The statutory period commences from the day after the receipt of a completed notice under section 25, section 26 or section 26A. The FATA also provides for the issue of an Interim Order, which extends the available examination period and prohibits the proposal for up to 90 days. Interim Orders are usually issued to allow the applicant additional time to provide adequate information for assessing the proposal. Proposals subject to the Policy but not the FATA are decided (where possible) within the 30-day statutory deadline set by the FATA.

The Treasurer has provided an authorisation (effectively a delegation) to the Executive Member and other senior Division staff to make decisions on foreign investment proposals that are consistent with the Policy or do not involve issues of special sensitivity. Over 94 per cent of proposals were decided under this authorisation.

These arrangements, along with the use of notification forms for residential and non-residential real estate purchases, streamline the application and approval process. The forms, once completed, signed and submitted together with any required additional supporting information, facilitate a timely decision on applications. In July 2011, the Board reintroduced an online application system for residential real estate applications.

Examination and approval process

Proposals are initially examined by the Division, in its role as Board secretariat, with the Board’s direct and early involvement in significant applications. The Division also undertakes associated compliance work. Proposals are examined as to whether they conform with the requirements of the Policy and the FATA, including the proponent’s fulfilment of any conditions attached to past approvals. While the overwhelming majority of proposals proceed without objection, the Treasurer has powers under the FATA to prohibit proposals that are contrary to the national interest or to raise no objections to them subject to conditions that are considered necessary to ameliorate national interest concerns. Decisions are advised in writing to the applicants or their representatives or agents. Where the Treasurer makes a decision on a significant proposal, he may also issue a media release.
Consultation arrangements

In examining significant proposals, consultations are undertaken by the Board’s secretariat with Australian, state and territory government departments and authorities with responsibilities relevant to the proposals. Advice and comments provided by such agencies are important in assessing the implications of proposals and, in particular, in determining whether they raise any national interest issues. Such consultation is undertaken on a strictly confidential basis to protect the information provided by the applicants. The Board regards this liaison with key stakeholders as an integral part of the administration of the Policy. Where major proposals are in the public domain, the Board may also receive submissions from third parties.

National interest

The FATA empowers the Treasurer to prohibit an acquisition if he is satisfied it would be contrary to the national interest. However, the general presumption is that foreign investment proposals will serve the national interest. This reflects the positive stance of successive Australian governments towards foreign investment, given the important role it plays in our economy and Australia’s national development.

The national interest, and hence what would be contrary to it, is not defined in the FATA. Instead, the FATA confers upon the Treasurer the power to decide in each case whether a particular investment would be contrary to the national interest.

In preparing the Board’s advice, consideration is also given to whether an investment is consistent with the Policy (see the Board’s website at www.firb.gov.au. This website also contains information on Australia’s foreign investment screening arrangements and on national interest matters, especially relating to real estate and other sectors with specific requirements).

A proposal that does not meet the requirements set out in the Policy would ordinarily be regarded as being contrary to the national interest. The Policy provides additional guidance on the national interest considerations, including:

- national security;
- competition;
- impact on other Government policies (including taxation);
- impact on the economy and the community; and
- the character of the investor.

The Policy released by the Treasurer in June 2010 also provides guidance on consideration of proposals involving direct investment by foreign governments and their related entities.
Where a proposal involves a foreign government or a related entity, the Australian Government also considers if the investment is commercial in nature or if the investor may be pursuing broader political or strategic objectives that may be contrary to Australia’s national interest. This includes assessing whether the prospective investor’s governance arrangements could facilitate actual or potential control by a foreign government (including through the investor’s funding arrangements). Proposals from foreign government related entities operating on a fully arms length and commercial basis are less likely to raise national interest concerns than proposals from those that do not.

Where the potential investor has been partly privatised, the Government considers the size, nature and composition of any non-government interests, including any restrictions on the exercise of their rights as interest holders.

The Government looks carefully at proposals from foreign government entities that are not operating on a fully arms length and commercial basis. The Government does not have a policy of prohibiting such investments but it looks at the overall proposal carefully to determine whether such investments may be contrary to the national interest.

Mitigating factors that assist in determining that such proposals are not contrary to the national interest may include: the existence of external partners or shareholders in the investment; the level of non-associated ownership interests; the governance arrangements for the investment; ongoing arrangements to protect Australian interests from non-commercial dealings; and whether the target will be, or remain, listed on the ASX or another recognised exchange. The Government will also consider the size, importance and potential impact of such investments in considering whether or not the proposal is contrary to the national interest.

**Handling of commercial-in-confidence and personal information**

The Board recognises that much of the information required to assess a proposal will be commercially sensitive or be private to the applicant. Consequently, appropriate procedures are in place to ensure that confidentiality is protected.

Moreover, the Government is required to respect the privacy and sensitivity of personal and commercial information that is provided by applicants to the Board, in accordance with the requirements of the relevant legislation, including the Privacy Act 1988 (Privacy Act) and the Freedom of Information Act 1982 (FOI Act). However, in accordance with the Privacy Act, to provide whole-of-government advice to the Treasurer on applications or where the applicant may have breached the FATA or the Policy, other government agencies may be consulted and relevant information may be provided to those agencies. Those agencies include the Department of Immigration and Citizenship (DIAC) and the ATO.
In the event that third parties outside government seek access to confidential information, it would not be made available without the permission of the person(s) who provided it, except upon order by a court of a competent jurisdiction or, in some circumstances, through the operation of the FOI Act.

In 2010-11, the Division received twenty three applications under the FOI Act (eight in 2009-10) seeking information concerning foreign investment matters. The FOI Act provides criteria to determine whether particular documents or parts of documents are available or exempt from release. These include, for example, that the document contains commercially sensitive information where its release would cause harm to its provider. In line with the provisions of the FOI Act, the Division may consult with the parties to a proposal about documents they provided which are the subject of an FOI request, to seek their views on their possible release to an FOI applicant.

2010-11 outcomes

Cost of the Board’s operations

Total Board expenses in 2010-11 were $169,662 ($130,436 in 2009-10). Remuneration of Board members was around 90 per cent of total Board expenses, with the remainder expended on local travel, car hire and incidentals. Board members’ fees are determined by the Remuneration Tribunal.

Total expenses of the Division for 2010-11 were $4.1 million ($3.2 million in 2009-10). These expenses mainly comprised employee salary (including superannuation and accruing leave entitlements) and administrative costs. Over the course of 2010-11, the Division employed an average of 34 staff.

Consideration of proposals and enquiries

In 2010-11, a total of 10,865 applications for foreign investment approval were considered, with 10,293 approved, 43 rejected, 390 withdrawn and 139 exempt as not subject to the Policy or the FATA. Of the 10,336 applications decided in 2010-11 (that is, those approved or rejected but not those withdrawn or exempt), 9,734 were decided within the Division under the Treasurer’s authorisation and 602 were decided by a Treasury minister.

Additionally, in 2010-11 the Division handled approximately 5,300 telephone enquiries and 5,600 items of correspondence\(^1\) in relation to potential proposals, compliance with conditional approvals, the Policy and the FATA.

\(^1\) This figure excludes all correspondence in relation to proposals that were yet to be finalised when the correspondence was received.
In 2010-11, three non-real estate related Interim Orders were made and published in the Commonwealth of Australia Gazette. No Divestiture Orders were made and one non-real estate related Final Order was made. Final Orders are issued where a proposal, assessed in terms of the Policy, is considered to be contrary to the national interest. Divestiture Orders are issued where an acquisition has already occurred and is subsequently assessed, in terms of the Policy, as being contrary to the national interest.

The Board and the Division endeavour to ensure that all foreign investment proposals are dealt with in a timely and efficient manner and every effort is made to avoid any unnecessary delays to business decision-making.

In 2010-11, 95 per cent of proposals were decided within 30 days, compared with 94 per cent of proposals in 2009-10. Proposals that took more than 30 days to decide were generally delayed by a lack of sufficient information from the parties, or because the application involved significant complexity or sensitivity.

**Monitoring and compliance activity**

The FATA provides wide-ranging powers to enforce the decisions made, including the ability to:

- order the unwinding or divestment (by requiring the parties to sell shares, assets or property) of transactions that have gone ahead, without prior foreign investment approval having been obtained, where that purchase was inconsistent with Policy;

- prosecute a foreign person (including a natural person or a company) that failed to obtain prior approval;

- prosecute a foreign person that failed to comply with an order to sell shares, assets or property; and

- prosecute a foreign person that failed to comply with conditions attached to any approval granted under the FATA.

Provisions of the *Crimes Act 1914* and the *Criminal Code Act 1995* make it an offence to provide false or misleading information, or to enter into any schemes for the purpose of avoiding the provisions of the FATA.

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2 The FATA provides the Treasurer with the power to make orders prohibiting an acquisition (an Interim Order or a Final Order) or having the effect of requiring an interest to be disposed (a Divestiture Order). While the prohibition under a Final Order is not subject to any time limitations, an Interim Order prohibits the acquisition proceeding during the period from gazettal until the earlier of an additional 90 days, or until a decision has been made.
In examining proposals, the applicant’s compliance with any conditions relating to past proposals is taken into account. Instances of lack of compliance with conditions may result in future proposals being rejected. It is general policy to report potential breaches of the FATA to DIAC, the ATO, the AFP and other government agencies as appropriate.

In order to ensure compliance with the Policy, the Division systematically monitors whether foreign persons are complying with the conditions of their approvals. This involves cooperation with relevant members of the business community, local government authorities, the legal profession, and on occasion, the general public.

Part of FIRB’s compliance work involves liaising with other agencies and through education and publicity. Recent activities include enhancements to online information and education and the proactive provision of information to individuals and organisations affected by the Policy. An example of the enhancements to online information is the introduction of Guidance Notes, which are available on the FIRB website, www.firb.gov.au.

The Division has built upon its existing compliance capacity and is moving toward a systemic and structured regime which includes the following measures:

- a regime of education and information distribution to individuals and organisations affected directly and indirectly by the Policy;
- a robust program of Quality Assurance to ensure internal process is adhered to in a consistent manner;
- a systemic series of targeted investigations of non-compliance by foreign investors;
- interagency co-operation and liaison within the Fraud Control Policy of the Commonwealth;
- formalising FIRB interaction with the Commonwealth Director of Public Prosecutions; and
- structured case investigation triggered by information received from members of the public (public denunciations).

The Division’s compliance and monitoring procedures and documentation processes will continue to be subject to ongoing review.
CHAPTER 2

FOREIGN INVESTMENT PROPOSALS
Foreign investment proposals

This chapter provides an overview and statistical information on applications considered in 2010-11. It provides information on proposed investments that fall within the scope of Australia’s Foreign Investment Policy (the Policy), including under the Foreign Acquisitions and Takeovers Act 1975 (the FATA). The Policy and the FATA can be accessed through the FIRB website, www.firb.gov.au.

The term ‘proposed investment’ is used widely throughout this report. Proposed investment is the aggregation of the following estimates at the time of the approval:

- acquisition costs (including shares, real estate or other assets);
- development costs following some acquisitions; and
- costs of both establishment and development in the case of new businesses.

Features of the FIRB statistics

Methodological and data caveats

While this chapter provides a useful source of data on proposed foreign direct investment in Australia, the Board urges particular caution in the use of these statistics, including when making comparisons with earlier years.

- There are also substantial differences between the FIRB statistics on proposed investments and actual investment flows. The latter are more reliably captured by Australian Bureau of Statistics (ABS) data, which seeks to reflect more comprehensively investment transactions between residents of Australia and non-residents.

- The statistics contained in this chapter do not measure total foreign investment made in any year, nor do they measure changes in net foreign ownership levels in Australia. They may provide partial coverage of all foreign investment made. They are inherently irregular and can be skewed due to very large investment proposals and multiple proposals for the same target.

- Data capture and reporting methodologies change over time.

- Data presented for earlier years may also have been revised since last published.

- Proposed investment amounts for earlier years are not adjusted for inflation or currency movements.
• The figures are based on the assumption that investment funds will be sourced from overseas. The extent to which approved investment proposals will actually be funded from outside of Australia and result in foreign capital inflows depends not only upon whether they are implemented, but also upon the proportion that is financed from foreign sources. Some (and in some cases all) of the proposed funds to be invested may be contributed by Australians, for example, where they are in partnership with foreign interests, or where the investment is financed from existing Australian operations.

• The source of proposed investment identified in the Board’s statistics does not necessarily imply the country of control. For example, if a company has a single substantial shareholder, the country of that shareholder is recorded, or if a company’s shares are widely held, the country of domicile or incorporation is recorded. The source may also reflect the location of an investment manager who operates independently of interest holders in the acquirer.

• The data does not necessarily reflect a change in foreign ownership as, in some cases, both the target and the purchaser are foreign persons.

• The proposed investment of an approved proposal is the amount advised by the applicants or the best estimate based on the available information. It represents an estimate of the expected proposed investment in the 12 months from the approval unless the approval is granted for a longer period (if the proposal is in fact implemented).
  – Where an approved acquisition is a part of an offshore acquisition, the proposed investment figure is calculated based on the share attributable to the approved acquisition.
  – Where amounts are in a foreign currency, this is converted to Australian dollars based on the exchange rate at the time of the decision.

• The statistics may include some transactions that do not actually proceed. They include:
  – proposals that are approved in a given year but which are not actually implemented in that year;
  – approvals for multiple potential acquirers of the same target; and
  – approvals for shares of units where only a portion of the intended shares or units may be acquired.
• Acquisitions of diversified company groups are classified into a single industry sector according to the major activity of the group, such as, in a diversified mining company with interests in various minerals. Acquisitions of real estate to be used for purposes incidental to the main business activity of the purchaser are classified according to that activity.3

Policy scope and changes

The breadth of the data reflects the requirements of the Policy at the time. The data does not cover foreign investments below the various monetary and percentage thresholds that apply under the Policy and the FATA. Nor does the data cover follow-on investments to expand the capital stock of existing foreign-owned businesses (both in existing areas and into related areas). See the FIRB website, www.firb.gov.au, for the current thresholds.

Furthermore, policy and legislative change can have a considerable impact on the continuity of data. For instance, changes in the Policy that have occurred since the mid-1980s have affected the number of some types of proposals, limiting comparability over time. These changes include:

• the increase in the general asset threshold in 1999 from $5 million to $50 million, and, again, in December 2006 from $50 million to $100 million;
• the increase in the offshore takeovers threshold in December 2006 from the general asset threshold (then at $50 million) to $200 million;
• the introduction of the higher $800 million threshold (indexed on 1 January each year) for United States investors from 1 January 2005;
• the harmonisation in 2009 of the four lowest thresholds for private business investment to a single threshold of $219 million (indexed on 1 January each year);
• the abolition in 2009 of the requirement for private investors to notify when establishing a new business valued above $10 million;
• the introduction of changes in 2009 and 2010 to the screening arrangements for temporary residents purchasing residential real estate;

3 Data has been compiled by reference to the Australian and New Zealand Standard Industrial Classification (ANZSIC 1993), except: newspaper printing and publishing are allocated to the services industry sector (ANZSIC 1993 classifies these under manufacturing); and tourism is recorded as a separate industry sector rather than being included with the other service industries.
• the removal of foreign ownership restrictions in the media sector in April 2007; and

• changes in immigration policies that control the number of temporary resident visa holders, which largely determines the level of foreign investment in developed residential real estate.

**Administrative practices**

Changes in administrative practice (for example, data collection and recording practices) and application requirements have also impacted on data comparability. Examples of this include the following:

• The implementation of a new case management system (known as FIMS) in December 2005 significantly improved data collection accuracy. FIMS allows a more detailed analysis of proposed foreign investment, as reflected in improvements to the statistics presented from the 2005-06 Annual Report onwards.

• Reporting procedures for proposals involving financing arrangements were amended in 2005-06. Although they continue to be included in the statistics (in the number of approvals), the proposed acquisition cost and development expenditure are not recorded in FIMS for proposals such as lending arrangements where there is not expected to be an equity investment flow into Australia. This has affected the value attributed to proposed investment in the finance and insurance industry.

• Prior to 2005-06, proposals involving share acquisitions were recorded as conditionally approved on the basis that the proposed acquisition was to proceed within 12 months. In FIMS, such proposals are no longer recorded as conditionally approved.

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4 This is similar to the existing practice for corporate reorganisations.

5 Applicants are required to re-apply if the transaction has not taken place and they wish to proceed after the 12 month period has passed, unless they were granted approval for an extended period.
Chapter 2: Foreign investment proposals

Applications considered

This section analyses all investment proposals that were finalised (approved, rejected, withdrawn or exempt) during 2010-11, irrespective of the date they were submitted. Corporate reorganisations are included here (80 in 2010-11), whereas they are excluded from the analysis of approved investment provided later in this chapter. Corporate reorganisations occur across a range of sectors, including real estate.

The number of applications considered during 2010-11 was 10,865. Table 2.1 provides a breakdown of the number of applications considered over the past six years, according to the outcome of proposals.

Of the 10,293 applications approved in 2010-11, 5,687 were approved subject to conditions and 4,606 without conditions being imposed. All but four of the conditional approvals were in the real estate sector. Real estate conditions ordinarily imposed at that time include those relating to the period during which development must commence, requiring temporary residents to reside in and then sell established dwellings when they cease to reside in them, and reporting requirements.

A total of 43 proposals were rejected in 2010-11 (three in 2009-10), representing less than 0.4 per cent of all proposals considered. All except one of these rejected proposals were related to proposed real estate purchases.

In 2010-11, 390 proposals were withdrawn by the applicants. Of these, 67 per cent involved real estate proposals. Many of the real estate related withdrawals resulted from applicants submitting concurrent or a series of applications (often for properties that were to be auctioned and for which they intended to bid), and once one property had been purchased, subsequently withdrawing the remaining applications. In other cases, proposals were withdrawn because the investment was deferred or the applicant decided not to proceed for commercial reasons. In some circumstances, business proposals may be withdrawn and re-submitted in order to extend the statutory deadline, particularly if there are concerns about the issuing of an Interim Order, the details of which would be published in the Commonwealth of Australia Gazette.

During 2010-11, 139 proposals were determined to be exempt compared with 132 in 2009-10. Some applications received were determined to be outside the scope of the Policy or the scope of the FATA, because they were exempt under the Foreign

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6 The proposed acquisition costs and development expenditure are not recorded for corporate reorganisations.
Acquisitions and Takeovers Regulations 1989. The existence of these particular applications reflects FIRB’s advice that foreign investors submit proposals if they have any doubt as to whether the proposals are notifiable.

Table 2.1: Applications considered: 2005-06 to 2010-11
(number of proposals)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Approved unconditionally</td>
<td>1,386</td>
<td>1,520</td>
<td>1,656</td>
<td>2,266</td>
<td>2,672</td>
<td>4,606</td>
</tr>
<tr>
<td>Approved with conditions</td>
<td>3,800</td>
<td>4,637</td>
<td>6,185</td>
<td>3,086</td>
<td>1,729</td>
<td>5,687</td>
</tr>
<tr>
<td><strong>Total approved</strong></td>
<td><strong>5,186</strong></td>
<td><strong>6,157</strong></td>
<td><strong>7,841</strong></td>
<td><strong>5,352</strong></td>
<td><strong>4,401</strong></td>
<td><strong>10,293</strong></td>
</tr>
<tr>
<td>Rejected</td>
<td>37</td>
<td>39</td>
<td>14</td>
<td>3</td>
<td>3</td>
<td>43</td>
</tr>
<tr>
<td><strong>Total decided</strong></td>
<td><strong>5,223</strong></td>
<td><strong>6,196</strong></td>
<td><strong>7,855</strong></td>
<td><strong>5,355</strong></td>
<td><strong>4,404</strong></td>
<td><strong>10,336</strong></td>
</tr>
<tr>
<td>Withdrawn</td>
<td>373</td>
<td>629</td>
<td>521</td>
<td>341</td>
<td>167</td>
<td>390</td>
</tr>
<tr>
<td>Exempt</td>
<td>185</td>
<td>200</td>
<td>172</td>
<td>125</td>
<td>132</td>
<td>139</td>
</tr>
<tr>
<td><strong>Total considered</strong></td>
<td><strong>5,781</strong></td>
<td><strong>7,025</strong></td>
<td><strong>8,548</strong></td>
<td><strong>5,821</strong></td>
<td><strong>4,703</strong></td>
<td><strong>10,865</strong></td>
</tr>
</tbody>
</table>

Note: Figures include corporate reorganisations (80 in 2010-11). The 2008-09 to 2010-11 figures were impacted by changes to the screening arrangements for residential real estate, as announced in December 2008 and April 2010.

Applications decided

This section analyses all proposals that were approved (either with or without conditions), or rejected during 2010-11, irrespective of the date they were submitted. Corporate reorganisations are included.

The introduction of changes in 2009 and 2010 to the screening arrangements for temporary residents purchasing residential real estate has significantly impacted the comparability of the data across years in this section. Table 2.2 provides a breakdown of proposed investment according to the outcome of applications decided for the corresponding period provided in Table 2.1.

Table 2.2: Applications decided: 2005-06 to 2010-11
(proposed investment)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Approved unconditionally</td>
<td>72.5</td>
<td>140.3</td>
<td>162.6</td>
<td>135.9</td>
<td>125.3</td>
<td>145.7</td>
</tr>
<tr>
<td>Approved with conditions</td>
<td>13.3</td>
<td>16.1</td>
<td>29.3</td>
<td>45.5</td>
<td>14.2</td>
<td>31.0</td>
</tr>
<tr>
<td><strong>Total approved</strong></td>
<td><strong>85.8</strong></td>
<td><strong>156.4</strong></td>
<td><strong>191.9</strong></td>
<td><strong>181.4</strong></td>
<td><strong>139.5</strong></td>
<td><strong>176.7</strong></td>
</tr>
<tr>
<td>Rejected</td>
<td>0.0</td>
<td>0.0</td>
<td>0.2</td>
<td>0.0</td>
<td>0.0</td>
<td>8.8</td>
</tr>
<tr>
<td><strong>Total decided</strong></td>
<td><strong>85.8</strong></td>
<td><strong>156.4</strong></td>
<td><strong>192.0</strong></td>
<td><strong>181.4</strong></td>
<td><strong>139.5</strong></td>
<td><strong>185.5</strong></td>
</tr>
</tbody>
</table>

Note: Totals may not add due to rounding. ‘0.0’ indicates a figure of less than $50 million. Including corporate reorganisations (74 in 2010-11, including 8 in the real estate sector). The 2008-09 to 2010-11 figures were impacted by changes to the screening arrangements for residential real estate, as announced in December 2008 and April 2010.

Charts 2.1 and 2.2 display the figures from Tables 2.1 and 2.2 to show the difference between applications decided within the real estate and non-real estate sectors (other sectors) by number of proposals and value of proposed investment.
Chart 2.1 shows that, by number, most of the applications decided were within the real estate sector. Chart 2.2 shows that, by value, most of the proposed investment occurred in non-real estate sectors.

**Chart 2.1: Applications decided 2005-06 to 2010-11 — number of proposals**

![Chart 2.1: Applications decided 2005-06 to 2010-11 — number of proposals](image)

**Chart 2.2: Applications decided 2005-06 to 2010-11 — proposed investment**

![Chart 2.2: Applications decided 2005-06 to 2010-11 — proposed investment](image)

Note: The 2008-09 to 2010-11 real estate figures were impacted by changes to the screening arrangements for residential real estate, as announced in December 2008 and April 2010.
Approvals by value

This section analyses applications approved during 2010-11 (excluding corporate reorganisations). Table 2.3 shows approvals by the value of proposed investment for 2007-08 to 2010-11.

The overwhelming majority of approvals in the categories below $50 million relate to real estate (because of the screening thresholds). The significant differences in recent years in these numbers were largely due to changes to the screening arrangements for temporary residents purchasing residential real estate in 2009 and 2010.

Table 2.3: Total approvals by value and number 2007-08 to 2010-11

<table>
<thead>
<tr>
<th>Value of proposal</th>
<th>2007-08</th>
<th></th>
<th>2008-09</th>
<th></th>
<th>2009-10</th>
<th></th>
<th>2010-11</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No.</td>
<td>$b</td>
<td>No.</td>
<td>$b</td>
<td>No.</td>
<td>$b</td>
<td>No.</td>
</tr>
<tr>
<td>&lt; $1 million</td>
<td>5,906</td>
<td>2.99</td>
<td>3,925</td>
<td>1.94</td>
<td>3,402</td>
<td>1.55</td>
<td>8,417</td>
</tr>
<tr>
<td>≥ $1 million &amp; &lt; $50 million</td>
<td>1,463</td>
<td>10.8</td>
<td>1,000</td>
<td>9.0</td>
<td>611</td>
<td>5.2</td>
<td>1,400</td>
</tr>
<tr>
<td>≥ $50 million &amp; &lt; $100 million</td>
<td>123</td>
<td>8.9</td>
<td>116</td>
<td>8.1</td>
<td>94</td>
<td>6.8</td>
<td>108</td>
</tr>
<tr>
<td>≥ $100 million &amp; &lt; $500 million</td>
<td>195</td>
<td>41.8</td>
<td>172</td>
<td>36.2</td>
<td>154</td>
<td>34.7</td>
<td>218</td>
</tr>
<tr>
<td>≥ $500 million &amp; &lt; $1 billion</td>
<td>53</td>
<td>36.7</td>
<td>36</td>
<td>25.0</td>
<td>35</td>
<td>22.9</td>
<td>36</td>
</tr>
<tr>
<td>≥ $1 billion &amp; &lt; $2 billion</td>
<td>20</td>
<td>25.3</td>
<td>15</td>
<td>20.6</td>
<td>14</td>
<td>18.2</td>
<td>24</td>
</tr>
<tr>
<td>≥ $2 billion &amp; &lt; $5 billion</td>
<td>10</td>
<td>30.2</td>
<td>7</td>
<td>19.5</td>
<td>12</td>
<td>37.0</td>
<td>14</td>
</tr>
<tr>
<td>≥ $5 billion</td>
<td>5</td>
<td>35.2</td>
<td>5</td>
<td>60.9</td>
<td>1</td>
<td>13.2</td>
<td>2</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>7,775</td>
<td>191.9</td>
<td>5,276</td>
<td>181.4</td>
<td>4,323</td>
<td>139.5</td>
<td>10,219</td>
</tr>
</tbody>
</table>

Note: Totals may not add due to rounding.
Excludes corporate reorganisations (74 in 2010-11).
The 2008-09 to 2010-11 figures were impacted by changes to the screening arrangements for residential real estate, as announced in December 2008 and April 2010.
Excludes corporate reorganisations

Approvals by sector

Table 2.4 lists applications approved in 2010-11 by industry sector. Chart 2.5 shows the sectoral distribution of approved proposed investment in 2010-11. Corporate reorganisations are excluded (74 in 2010-11). Most of the proposed investment is attributable to acquisition cost.

The skewing of the foreign investment data towards acquisition costs reflects the fact that the FATA applies to acquisitions of interests in, and not to the expansion of, existing businesses.

The real estate sector’s development figures predominantly reflect the estimated expenditure on construction of vacant land (however, in recent years development expenditure has not always been collected for vacant land proposals, primarily due to a simplification of the residential real estate application forms). Bearing in mind the limitations of the data, the figures show that, during 2010-11:

- There was an increase in the value of investment in 2010-11 when compared to 2009-10 in finance and insurance, real estate, resource processing and services.
Chapter 2: Foreign investment proposals

- Sectors where there was a decrease in the value of investment in 2010-11 when compared to 2009-10 were agriculture, forestry and fishing, manufacturing, mineral exploration and development, and tourism sectors.

- The mineral exploration and development sector remains the largest industry sector by value of approvals, although proposed investment has decreased from 2009-10.

### Table 2.4: Total approvals by industry sector in 2010-11

<table>
<thead>
<tr>
<th>Industry</th>
<th>Number of approvals</th>
<th>Acquisition cost $b</th>
<th>Development expenditure $b</th>
<th>Proposed investment $b</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agriculture, forestry &amp; fishing</td>
<td>17</td>
<td>1.38</td>
<td>-</td>
<td>1.38</td>
</tr>
<tr>
<td>Finance &amp; insurance</td>
<td>32</td>
<td>13.74</td>
<td>-</td>
<td>13.74</td>
</tr>
<tr>
<td>Manufacturing</td>
<td>50</td>
<td>14.90</td>
<td>0.01</td>
<td>14.91</td>
</tr>
<tr>
<td>Mineral exploration &amp; development</td>
<td>222</td>
<td>54.86</td>
<td>0.04</td>
<td>54.90</td>
</tr>
<tr>
<td>Resource processing</td>
<td>7</td>
<td>2.59</td>
<td>-</td>
<td>2.59</td>
</tr>
<tr>
<td>Services</td>
<td>117</td>
<td>47.50</td>
<td>-</td>
<td>47.50</td>
</tr>
<tr>
<td>Tourism</td>
<td>3</td>
<td>0.14</td>
<td>-</td>
<td>0.14</td>
</tr>
<tr>
<td>Real estate(a)</td>
<td>9,771</td>
<td>34.59</td>
<td>6.92</td>
<td>41.51</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>10,219</strong></td>
<td><strong>169.70</strong></td>
<td><strong>6.97</strong></td>
<td><strong>176.67</strong></td>
</tr>
</tbody>
</table>

(a) The number of approvals and proposed investment in the real estate sector in 2010-11 were impacted by changes to the screening arrangements for residential real estate, as announced in April 2010. Proposed investment includes off-the-plan approvals provided to real estate developers and approvals for annual programs. Further details are provided in the section on real estate starting on page 29.

**Note:** Totals may not add due to rounding.

'-' indicates a figure of zero.

Excludes corporate reorganisations (74 in 2010-11).

### Chart 2.3: Total approvals by value by industry sector in 2010-11—proposed investment

- Mineral exploration & development: 31%
- Resource processing: 1.47%
- Services: 27%
- Manufacturing: 8%
- Finance & insurance: 8%
- Agriculture, forestry & fishing: 0.79%
- Real estate: 23%
- Tourism: 0.08%

**Note:** Totals may not add due to rounding.

The real estate sector was impacted by changes to the screening arrangements for residential real estate announced in April 2010.
Agriculture, forestry and fishing

Proposed investment in the agriculture, forestry and fishing sector decreased by value from $2.3 billion in 2009-10 to $1.4 billion in 2010-11, even though the number of proposals stayed constant, at seventeen.

Finance and insurance

During 2010-11, 32 proposals were approved in the finance and insurance sector. This is one less than the 33 proposals approved in this sector in 2009-10. However, proposed investment increased, from $4.2 billion to $13.7 billion.

Manufacturing

The manufacturing sector saw an increase in the number, but a decrease in the value, of proposals approved in 2010-11. There were 50 proposals (46 proposals in 2009-10) and proposed investment of $14.9 billion ($16.3 billion in 2009-10).

Table 2.5: Manufacturing sector approvals in 2010-11

<table>
<thead>
<tr>
<th>Industry</th>
<th>Number of approvals</th>
<th>Acquisition cost $b</th>
<th>Development expenditure $b</th>
<th>Proposed investment $b</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chemical, petroleum &amp; coal products</td>
<td>3</td>
<td>1.32</td>
<td>-</td>
<td>1.32</td>
</tr>
<tr>
<td>Electricity &amp; gas</td>
<td>31</td>
<td>9.89</td>
<td>0.01</td>
<td>9.90</td>
</tr>
<tr>
<td>Food, beverages &amp; tobacco</td>
<td>7</td>
<td>2.39</td>
<td>-</td>
<td>2.39</td>
</tr>
<tr>
<td>Water sewerage and drainage</td>
<td>1</td>
<td>0.00</td>
<td>-</td>
<td>0.00</td>
</tr>
<tr>
<td>Transport equipment</td>
<td>2</td>
<td>0.01</td>
<td>-</td>
<td>0.01</td>
</tr>
<tr>
<td>Machinery &amp; equipment</td>
<td>4</td>
<td>0.53</td>
<td>-</td>
<td>0.53</td>
</tr>
<tr>
<td>Other(a)</td>
<td>2</td>
<td>0.76</td>
<td>-</td>
<td>0.76</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>50</strong></td>
<td><strong>14.90</strong></td>
<td><strong>0.01</strong></td>
<td><strong>14.91</strong></td>
</tr>
</tbody>
</table>

(a) Comprises: non-metallic mineral products; and paper and paper products.

Note: Totals may not add due to rounding. 

-" indicates a figure of zero.

Mineral exploration and development

Proposed investment in the mineral exploration and development sector decreased from $80.9 billion in 2009-10 to $54.9 billion in 2010-11. However, the number of approved proposals only fell slightly, from 248 proposals to 222 proposals.
Table 2.6: Mineral exploration and development sector approvals: 2007-08 to 2010-11

<table>
<thead>
<tr>
<th>Industry</th>
<th>2007-08</th>
<th>2008-09</th>
<th>2009-10</th>
<th>2010-11</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No.</td>
<td>$b</td>
<td>No.</td>
<td>$b</td>
</tr>
<tr>
<td>Metallic minerals</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Bauxite</td>
<td>3</td>
<td>12.38</td>
<td>4</td>
<td>0.60</td>
</tr>
<tr>
<td>- Copper-gold</td>
<td>24</td>
<td>11.26</td>
<td>25</td>
<td>8.05</td>
</tr>
<tr>
<td>- Iron ore</td>
<td>25</td>
<td>8.89</td>
<td>30</td>
<td>27.19</td>
</tr>
<tr>
<td>- Nickel</td>
<td>10</td>
<td>3.05</td>
<td>9</td>
<td>0.40</td>
</tr>
<tr>
<td>- Uranium</td>
<td>8</td>
<td>1.26</td>
<td>15</td>
<td>1.68</td>
</tr>
<tr>
<td>- Zinc-lead-silver</td>
<td>6</td>
<td>5.56</td>
<td>5</td>
<td>0.19</td>
</tr>
<tr>
<td>- Other</td>
<td>12</td>
<td>3.45</td>
<td>12</td>
<td>0.38</td>
</tr>
<tr>
<td>Coal</td>
<td>39</td>
<td>11.47</td>
<td>33</td>
<td>15.69</td>
</tr>
<tr>
<td>Oil &amp; gas</td>
<td>31</td>
<td>4.52</td>
<td>23</td>
<td>35.08</td>
</tr>
<tr>
<td>Other(a)</td>
<td>15</td>
<td>2.45</td>
<td>8</td>
<td>1.36</td>
</tr>
<tr>
<td>Total</td>
<td>173</td>
<td>64.27</td>
<td>164</td>
<td>90.62</td>
</tr>
</tbody>
</table>

(a) Comprises: services to mining and exploration; and other non-metallic minerals.

Note: Totals may not add due to rounding.

Resource processing

Proposed foreign investment in the resource processing sector more than doubled from the proposed investment of $1.1 billion in 2009-10 to $2.6 billion in 2010-11, while the number of approvals increased from five to seven.

Services

Proposed investment by number of proposals and value in the services sector increased from 2009-10. The number of approved proposals increased from 69 to 117 in 2010-11 and proposed investment increased from $14.0 billion to $47.5 billion in 2010-11.

---

7 The sector includes activities that through processing value add to natural resources. For example, cotton ginning, flour and sugar milling, smelting and refining of mineral resources, abattoirs and wood chipping.
Table 2.7: Services (excluding Tourism) sector approvals: 2007-08 to 2010-11

<table>
<thead>
<tr>
<th>Industry</th>
<th>2007-08</th>
<th></th>
<th>2008-09</th>
<th></th>
<th>2009-10</th>
<th></th>
<th>2010-11</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No. $b</td>
<td></td>
<td>No. $b</td>
<td></td>
<td>No. $b</td>
<td></td>
<td>No. $b</td>
<td></td>
</tr>
<tr>
<td>Construction</td>
<td>13</td>
<td>12.53</td>
<td>14</td>
<td>1.67</td>
<td>12</td>
<td>1.67</td>
<td>12</td>
<td>18.94</td>
</tr>
<tr>
<td>Communications</td>
<td>24</td>
<td>5.43</td>
<td>25</td>
<td>9.45</td>
<td>12</td>
<td>2.91</td>
<td>26</td>
<td>3.51</td>
</tr>
<tr>
<td>Health</td>
<td>14</td>
<td>6.14</td>
<td>11</td>
<td>1.47</td>
<td>4</td>
<td>0.65</td>
<td>17</td>
<td>6.79</td>
</tr>
<tr>
<td>Property &amp; business services</td>
<td>13</td>
<td>2.92</td>
<td>20</td>
<td>2.67</td>
<td>5</td>
<td>0.52</td>
<td>10</td>
<td>1.65</td>
</tr>
<tr>
<td>Trade(a)</td>
<td>16</td>
<td>2.35</td>
<td>9</td>
<td>0.44</td>
<td>5</td>
<td>0.92</td>
<td>6</td>
<td>2.29</td>
</tr>
<tr>
<td>Transport(b)</td>
<td>15</td>
<td>5.14</td>
<td>43</td>
<td>14.64</td>
<td>23</td>
<td>5.08</td>
<td>30</td>
<td>11.68</td>
</tr>
<tr>
<td>Other(c)</td>
<td>14</td>
<td>1.22</td>
<td>10</td>
<td>1.33</td>
<td>8</td>
<td>2.25</td>
<td>16</td>
<td>2.65</td>
</tr>
<tr>
<td>Total</td>
<td>109</td>
<td>35.72</td>
<td>132</td>
<td>31.67</td>
<td>69</td>
<td>14.00</td>
<td>117</td>
<td>47.50</td>
</tr>
</tbody>
</table>

(a) Comprises retail and wholesale trade.
(b) Comprises: air transport; rail transport; road transport; water transport; and services to transport.
(c) Comprises: entertainment and recreation services; other community services; and restaurants and clubs.
Note: Totals may not add due to rounding.

Tourism

Proposed investment in the tourism sector in 2010-11 was $0.14 billion, down from $0.71 billion in 2009-10. The number of approved proposals dropped from eight to three.

Real estate

Changes to the Policy — residential real estate

As of 24 April 2010, temporary residents residing in Australia are no longer exempted from notification of proposed acquisitions of established residential real estate for their own residence, established residential real estate for the purposes of redevelopment, new residential real estate and vacant residential land. Temporary residents were previously exempt from April 2009 under the changes announced in December 2008.

The changes were introduced to ensure ‘investment in Australian real estate by temporary residents and foreign non-residents, is within the law, meets community expectations and doesn't place pressure on housing availability for Australians’.8

The changes mean that all temporary residents and foreign non-residents seeking to invest in Australian real estate have been brought within the notification, screening and approval process. Temporary residents may seek approval to acquire

one established dwelling only to be used as their residence. No objections are raised subject to the condition that they sell the property when it ceases to be their residence. Temporary and foreign non-residents are required to commence development on vacant land within 24 months of the date of approval.

Guidance Notes released by the FIRB provide further information relating to real estate and the eligibility criteria. These are available on the FIRB website, www.firb.gov.au.

Proposals in real estate in 2010-11
Approved investment in real estate was $41.5 billion in 2010-11 (compared with $20.0 billion in 2009-10). These figures were affected by changes to the Policy and administrative arrangements for residential property and in no regard do they provide a comparable view of investment activity in this sector.

Residential real estate
Developed
The category of developed residential real estate consists primarily of temporary residents in Australia acquiring one existing residential property for use as their residence in Australia.9

For development
Acquisitions of residential real estate for development include a number of categories.

The vacant land category consists primarily of individual blocks of land purchased for single dwelling construction. These are normally approved subject to conditions (such as, that construction begins within 24 months). It also includes broadacre land for residential subdivision and multiple-dwelling residential developments (such as townhouses and units).

The new dwellings and off-the-plan category consists of applications by individuals to acquire newly constructed dwellings directly from developers and applications by developers to sell up to 100 per cent of new residences to foreign interests (this

9 Also includes a small number of approvals relating to foreign companies acquiring existing residential property for company employees to reside in.
previously only permitted developers to sell up to half the new residences to foreign interests). Applications from individuals are normally approved without conditions. If a developer is given approval, individuals need not apply for approval. Provided that the developer markets the dwellings locally as well as overseas (that is, the dwellings cannot be marketed exclusively overseas), the developer may sell up to all the off-the-plan dwellings in their new development to foreign persons.

With off-the-plan approvals for developers, the figures for annual program approval values overstate the likely extent of actual foreign purchases. The value of investment reported against annual program approvals represents the maximum amount foreign persons may acquire under the program.

Developed property for re development involves the acquisition of existing property for the purpose of demolition and construction of new residential dwellings. These are normally approved as long as the redevelopment increases Australia’s housing stock (at least two dwellings built for the one demolished) or where it can be shown that the existing dwelling is derelict or uninhabitable. Approvals are usually subject to conditions (such as, that construction begins within 24 months).

Table 2.8: Investment in residential real estate by type of expenditure and number of proposals approved from 2007-08 to 2010-11

<table>
<thead>
<tr>
<th></th>
<th>2007-08</th>
<th>2008-09</th>
<th>2009-10</th>
<th>2010-11</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No.</td>
<td>$b</td>
<td>No.</td>
<td>$b</td>
</tr>
<tr>
<td>Residential</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Developed</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- existing residential property</td>
<td>4,015</td>
<td>2.97</td>
<td>2,450</td>
<td>1.81</td>
</tr>
<tr>
<td>- annual programs</td>
<td>13</td>
<td>0.44</td>
<td>7</td>
<td>0.68</td>
</tr>
<tr>
<td>Sub-total 'Developed'</td>
<td>4,028</td>
<td>3.41</td>
<td>2,457</td>
<td>2.49</td>
</tr>
<tr>
<td>For development</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- vacant land</td>
<td>1,667</td>
<td>3.93</td>
<td>988</td>
<td>2.72</td>
</tr>
<tr>
<td>- new dwellings</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- individual purchases</td>
<td>1,043</td>
<td>0.66</td>
<td>954</td>
<td>0.60</td>
</tr>
<tr>
<td>- developer 'off-the-plan'</td>
<td>324</td>
<td>9.49</td>
<td>235</td>
<td>5.48</td>
</tr>
<tr>
<td>Sub-total 'new dwellings'</td>
<td>3,187</td>
<td>10.15</td>
<td>1,189</td>
<td>6.08</td>
</tr>
<tr>
<td>- redevelopment</td>
<td>103</td>
<td>1.61</td>
<td>73</td>
<td>1.06</td>
</tr>
<tr>
<td>- annual programs</td>
<td>6</td>
<td>1.34</td>
<td>8</td>
<td>2.58</td>
</tr>
<tr>
<td>Sub-total 'For development'</td>
<td>3,143</td>
<td>17.02</td>
<td>2,258</td>
<td>12.43</td>
</tr>
<tr>
<td>Total residential</td>
<td>7,171</td>
<td>20.43</td>
<td>4,715</td>
<td>14.92</td>
</tr>
</tbody>
</table>

Note: Totals may not add due to rounding.

The 2008-09 to 2010-11 figures were impacted by changes to the screening arrangements for residential real estate, as announced in December 2008 and April 2010.

Commercial real estate

Developed

Foreign persons acquiring an interest in developed commercial real estate (for example, shopping centres, office buildings and warehouses) that is valued at more
than the applicable monetary threshold are required to notify and get prior approval before purchasing.

**For development**

Foreign persons need to apply to buy or take an interest in *commercial land for development*, regardless of the value of the land. Such proposed investment is normally approved subject to development conditions, such as the land must be developed within five years of the acquisition and the equivalent of at least 50 per cent of the purchase cost must be spent on the development.

**Annual programs**

The ‘annual program’ arrangements allow foreign persons to apply for an annual approval for real estate acquisitions up to a specified global monetary limit. Such an approval relieves them of the requirement to seek separate approvals for individual real estate acquisitions within the approved value and the approval year. Approvals are subject to the condition that applicants subsequently report on the actual acquisitions completed and any associated development. Applicants are also required to comply with the standard requirements that would apply under the Policy for the type of property that is to be purchased. For example, vacant land must be developed within the required timeframe.

**Table 2.9: Investment in commercial real estate by type of expenditure and number of proposals approved from 2007-08 to 2010-11**

<table>
<thead>
<tr>
<th></th>
<th>No.</th>
<th>$b</th>
<th>No.</th>
<th>$b</th>
<th>No.</th>
<th>$b</th>
<th>No.</th>
<th>$b</th>
</tr>
</thead>
<tbody>
<tr>
<td>Developed</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- existing commercial property</td>
<td>85</td>
<td>13.78</td>
<td>70</td>
<td>5.2</td>
<td>107</td>
<td>7.11</td>
<td>114</td>
<td>9.65</td>
</tr>
<tr>
<td>- annual programs</td>
<td>5</td>
<td>2.73</td>
<td>1</td>
<td>0.60</td>
<td>6</td>
<td>1.51</td>
<td>8</td>
<td>3.50</td>
</tr>
<tr>
<td>Sub-total ‘Developed’</td>
<td>90</td>
<td>16.51</td>
<td>71</td>
<td>5.75</td>
<td>113</td>
<td>8.62</td>
<td>122</td>
<td>13.15</td>
</tr>
<tr>
<td>For development</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- vacant commercial property</td>
<td>86</td>
<td>6.71</td>
<td>39</td>
<td>1.73</td>
<td>51</td>
<td>0.79</td>
<td>79</td>
<td>2.09</td>
</tr>
<tr>
<td>- annual programs</td>
<td>7</td>
<td>1.85</td>
<td>3</td>
<td>1.02</td>
<td>10</td>
<td>1.83</td>
<td>14</td>
<td>5.35</td>
</tr>
<tr>
<td>Sub-total ‘For development’</td>
<td>93</td>
<td>8.56</td>
<td>42</td>
<td>2.75</td>
<td>61</td>
<td>2.62</td>
<td>93</td>
<td>7.44</td>
</tr>
<tr>
<td><strong>Total commercial</strong></td>
<td>183</td>
<td>25.07</td>
<td>113</td>
<td>8.50</td>
<td>174</td>
<td>11.24</td>
<td>215</td>
<td>20.59</td>
</tr>
</tbody>
</table>

Note: Totals may not add due to rounding.

**Real estate by location of investment**

Table 2.10 provides details of proposed investment in the real estate sector, according to the state and territory location of the proposed investment.
Table 2.10: State and Territory distribution of proposed investment in real estate in 2010-11

<table>
<thead>
<tr>
<th>Location</th>
<th>Number of approvals</th>
<th>Residential Developed $b</th>
<th>Residential For development $b</th>
<th>Commercial Developed $b</th>
<th>Commercial For development $b</th>
<th>Total $b</th>
</tr>
</thead>
<tbody>
<tr>
<td>Various(a)</td>
<td>69</td>
<td>0.83</td>
<td>1.60</td>
<td>7.11</td>
<td>5.22</td>
<td>14.75</td>
</tr>
<tr>
<td>VIC</td>
<td>4,398</td>
<td>1.32</td>
<td>7.98</td>
<td>1.79</td>
<td>0.14</td>
<td>11.23</td>
</tr>
<tr>
<td>NSW</td>
<td>2,598</td>
<td>0.83</td>
<td>4.24</td>
<td>1.52</td>
<td>1.02</td>
<td>7.61</td>
</tr>
<tr>
<td>QLD</td>
<td>1,273</td>
<td>0.30</td>
<td>2.18</td>
<td>0.97</td>
<td>0.52</td>
<td>3.97</td>
</tr>
<tr>
<td>WA</td>
<td>812</td>
<td>0.28</td>
<td>0.92</td>
<td>0.58</td>
<td>0.27</td>
<td>2.05</td>
</tr>
<tr>
<td>ACT</td>
<td>129</td>
<td>0.03</td>
<td>0.09</td>
<td>0.92</td>
<td>0.25</td>
<td>1.28</td>
</tr>
<tr>
<td>SA</td>
<td>432</td>
<td>0.16</td>
<td>0.13</td>
<td>0.10</td>
<td>0.03</td>
<td>0.42</td>
</tr>
<tr>
<td>TAS</td>
<td>44</td>
<td>0.01</td>
<td>0.01</td>
<td>0.16</td>
<td>-</td>
<td>0.18</td>
</tr>
<tr>
<td>NT</td>
<td>16</td>
<td>0.01</td>
<td>0.00</td>
<td>-</td>
<td>0.00</td>
<td>0.01</td>
</tr>
<tr>
<td>Total</td>
<td>9,771</td>
<td>3.76</td>
<td>17.15</td>
<td>13.14</td>
<td>7.45</td>
<td>41.51</td>
</tr>
</tbody>
</table>

(a) Comprises approved proposals where the proposed investment is to be undertaken in more than one state or territory.

Note: Totals may not add due to rounding. 
- indicates a figure of zero.

The number of approvals and proposed investment in the real estate sector in 2010-11 were impacted by changes to the screening arrangements for residential real estate, as announced in April 2010.

Approvals by country of investor

Proposed investment in 2010-11 by selected country, disaggregated by sector, is shown in Table 2.11. The United States was again the largest source of proposed foreign investment in Australia. The other major sources of proposed investment were the United Kingdom, China, Canada and India. Canada and India replaced Japan and Switzerland in the top five sources of proposed investment.
Table 2.11: Approvals by country of investor in 2010-11 — industry sector

<table>
<thead>
<tr>
<th>Country(a)</th>
<th>Agriculture &amp; forestry &amp; fishing</th>
<th>Finance &amp; insurance</th>
<th>Mineral exploration &amp; development</th>
<th>Real estate(f)</th>
<th>Resource processing</th>
<th>Services</th>
<th>Tourism</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>US</td>
<td>189</td>
<td>38</td>
<td>1,017</td>
<td>4,337</td>
<td>1,808</td>
<td>3,404</td>
<td>-</td>
<td>16,985</td>
</tr>
<tr>
<td>UK</td>
<td>1,004</td>
<td>189</td>
<td>1,679</td>
<td>595</td>
<td>5,551</td>
<td>4,610</td>
<td>25</td>
<td>2,734</td>
</tr>
<tr>
<td>China(b)</td>
<td>5,033</td>
<td>4</td>
<td>558</td>
<td>416</td>
<td>9,758</td>
<td>4,093</td>
<td>132</td>
<td>16</td>
</tr>
<tr>
<td>Canada</td>
<td>112</td>
<td>104</td>
<td>-</td>
<td>-</td>
<td>9,317</td>
<td>807</td>
<td>-</td>
<td>4,666</td>
</tr>
<tr>
<td>India</td>
<td>320</td>
<td>-</td>
<td>2,000</td>
<td>8,929</td>
<td>163</td>
<td>-</td>
<td>168</td>
<td>-</td>
</tr>
<tr>
<td>Singapore</td>
<td>536</td>
<td>1</td>
<td>3,606</td>
<td>1,639</td>
<td>668</td>
<td>1,487</td>
<td>1,750</td>
<td>59</td>
</tr>
<tr>
<td>Spain</td>
<td>18</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>2,344</td>
<td>407</td>
<td>600</td>
<td>4,398</td>
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<tr>
<td>Switzerlnd</td>
<td>52</td>
<td>150</td>
<td>-</td>
<td>-</td>
<td>711</td>
<td>455</td>
<td>-</td>
<td>6,089</td>
</tr>
<tr>
<td>Japan</td>
<td>120</td>
<td>-</td>
<td>1,335</td>
<td>1,202</td>
<td>2,913</td>
<td>598</td>
<td>-</td>
<td>590</td>
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<td>Germany</td>
<td>126</td>
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<td>376</td>
<td>1,865</td>
<td>232</td>
<td>1,128</td>
<td>-</td>
<td>1,048</td>
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<td>France</td>
<td>82</td>
<td>-</td>
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<td>911</td>
<td>45</td>
<td>-</td>
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<td>Thailand</td>
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<td>-</td>
<td>250</td>
<td>2,566</td>
<td>13</td>
<td>82</td>
<td>-</td>
<td>63</td>
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<tr>
<td>Russia</td>
<td>65</td>
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<td>-</td>
<td>-</td>
<td>2,561</td>
<td>245</td>
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<td>-</td>
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<tr>
<td>Malaysia</td>
<td>896</td>
<td>-</td>
<td>355</td>
<td>461</td>
<td>1,863</td>
<td>2</td>
<td>103</td>
<td>-</td>
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<tr>
<td>Sth Korea</td>
<td>90</td>
<td>-</td>
<td>420</td>
<td>-</td>
<td>1,445</td>
<td>497</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Netherlands</td>
<td>62</td>
<td>-</td>
<td>27</td>
<td>-</td>
<td>1,691</td>
<td>-</td>
<td>571</td>
<td>-</td>
</tr>
<tr>
<td>New Zealand</td>
<td>32</td>
<td>-</td>
<td>757</td>
<td>1,110</td>
<td>64</td>
<td>-</td>
<td>163</td>
<td>6</td>
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<tr>
<td>Hong Kong</td>
<td>97</td>
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<td>-</td>
<td>-</td>
<td>1,383</td>
<td>404</td>
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<td>-</td>
</tr>
<tr>
<td>United Arab Emirate</td>
<td>10</td>
<td>-</td>
<td>-</td>
<td>1,089</td>
<td>-</td>
<td>407</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>South Africa</td>
<td>347</td>
<td>-</td>
<td>-</td>
<td>372</td>
<td>826</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Other(c)</td>
<td>1,341</td>
<td>123</td>
<td>285</td>
<td>1</td>
<td>1,425</td>
<td>11,873</td>
<td>0</td>
<td>1,622</td>
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</tbody>
</table>

Sub-total 10,565 | 623 | 9,304 | 14,685 | 54,485 | 35,763 | 2,591 | 40,769 | 145 | 158,364|

Australia(d) 176 | 758 | 4,435 | 230 | 419 | 5,750 | - | 6,732 | - | 18,325|

Total 10,741 | 1,381 | 13,739 | 14,915 | 54,904 | 41,513 | 2,591 | 47,501 | 145 | 176,689|

Note: Totals may not add due to rounding. '-' indicates a figure of zero.
Notes applying to Table 2.11

(a) Includes overseas territories.

(b) China excludes Special Administrative Regions and Taiwan.

(c) Other comprises all other countries not in the largest 20 countries based on total proposed investment approved, as well as proposed investment approved which cannot be attributed to a country, including developers granted approval for off-the-plan developments.

(d) Comprises proposals where an Australian controlled investment manager acting on behalf of an investor operates independently of the interest holders in the investor, or an Australian investor(s) jointly intends to make a proposed investment with a foreign investor, or jointly establish a new business with a foreign government related entity or entities.

(e) These figures indicate the total number of proposals in which investors from the particular country have an interest. Those involving investment originating from more than one country count as one proposal for each of the countries concerned.

(f) The number of approvals and proposed investment in the real estate sector in 2010-11 were impacted by changes to the screening arrangements for residential real estate, as announced in April 2010.
CHAPTER 3

OVERVIEW OF THE FOREIGN ACQUISITIONS AND TAKEOVERS ACT 1975
Overview of the *Foreign Acquisitions and Takeovers Act 1975*

Introduction

This chapter provides an overview of the main provisions of the *Foreign Acquisitions and Takeovers Act 1975* (the FATA) as at February 2012. The FATA and the *Foreign Acquisitions and Takeovers Regulations 1989* (the Regulations) provide legislative support for Australia’s Foreign Investment Policy (the Policy). A copy of the Policy, FATA and the Regulations are available on the FIRB website at www.firb.gov.au.

The FATA empowers the Treasurer to examine proposals by foreign persons to:

- acquire, or to increase, a substantial interest\(^{11}\) in, or acquire a controlling interest in the assets of, a prescribed Australian corporation valued above the relevant thresholds; or

- acquire an interest in Australian urban land.\(^{12}\)

The FATA does not provide the Treasurer with a power to ‘approve’ investment proposals. Rather, it empowers the Treasurer to prohibit a proposal that he decides would be contrary to the national interest (sections 18, 19, 20, 21 and 21A), or to raise no objections subject to conditions considered necessary to remove national interest concerns (section 25). It also permits the Treasurer to make orders for foreign persons to divest shares, assets or interests in urban land where the acquisition is decided to be contrary to the national interest.

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\(^{11}\) A substantial interest is defined by the FATA as where a person, alone or together with any associate(s), is in a position to control not less than 15 per cent of the voting power or potential voting power, or holds interests in not less than 15 per cent of the issued shares or rights to issued shares, of a corporation.

An aggregate substantial interest is where two or more persons together with any associate(s), are in a position to control not less than 40 per cent of the voting power or potential voting power, or hold interests in not less than 40 per cent of the issued shares or rights to issued shares, of a corporation.

\(^{12}\) Australian urban land is defined as any land within Australia on which a primary production business is not being conducted. Consequently, this definition encompasses all land in Australia that is not being used for primary production, regardless of whether it is in an urban area.
The national interest, and hence what might be contrary to it, is not defined in the FATA. The FATA confers upon the Treasurer the power to decide in each case whether a particular proposal would be contrary to the national interest. The Policy provides guidance on national interest matters in relation to foreign acquisitions. Ordinarily a proposal that does not meet the requirements of the Policy would be regarded as being, prima facie, contrary to the national interest and hence subject to rejection.

The FATA requires the prior notification of certain proposals, namely where a foreign person proposes to acquire a substantial shareholding in a prescribed Australian corporation (section 26) or certain interests in Australian urban land (section 26A).

**Notification**

**Section 26** makes it compulsory for a foreign person to notify the Treasurer of a proposal to acquire or increase a substantial shareholding in a prescribed Australian corporation where the total assets exceed, or the transaction values it above, the thresholds set under the Regulations.

**Section 26A** makes it compulsory for a foreign person to notify the Treasurer of a proposal to acquire or increase an interest in Australian urban land, unless the acquisition is exempt under the Regulations.

Substantial penalties apply for non-compliance with the notification provisions of sections 26 and 26A. On conviction, a natural person may be subject to a fine not exceeding 500 penalty units (currently $110 per unit) or imprisonment for a period not exceeding two years, or both. A corporation may be subject to a fine not exceeding 500 penalty units.

**Section 25** applies where the Treasurer has received a notice from a person, including those notices that are required under sections 26 and 26A. It also provides an avenue for the notification of proposals falling within the scope of the FATA, but which are not subject to compulsory notification under the FATA. These include offshore acquisition of interests and acquisitions of business assets.

Formal notification of a proposal under sections 25, 26 or 26A must be made in accordance with the forms prescribed in the *Foreign Acquisitions and Takeovers (Notices) Regulations 1975* (forms available at www.firb.gov.au). Receipt of a valid notice activates the commencement of the 30-day statutory examination period from the day after receipt. If the Treasurer does not take action (under sections 18, 19, 20, 21A, 22 or 25) within this period, the power to prohibit the proposal or to impose conditions expires. A further period of 10 days is available to publish any order in the Commonwealth of Australia *Gazette* and to notify the parties. The 30-day examination period may be extended by up to a further 90 days by the issue of an Interim Order (section 22 and subsection 25(3)) which prohibits the proposal for that period.
The Treasurer’s powers

The powers available to the Treasurer under the FATA in relation to foreign investment proposals are primarily contained in sections 18, 19, 20, 21, 21A and 25.

Section 18 deals with proposals involving the acquisition of shares in prescribed corporations which carry on an Australian business (unless the transaction values it, or its total assets are, below the thresholds). Where an acquisition would result in a foreign person acquiring a controlling interest, and the Treasurer concludes that this would be contrary to the national interest, it may be prohibited by the issue of an order (known as a Final Order). The Treasurer’s powers under the section apply irrespective of whether the controlling interest is being acquired by a foreign person, or by an additional or different, foreign person(s).

Sections 19, 20 and 21 confer upon the Treasurer powers similar to section 18 but in respect of other types of acquisitions and arrangements. Section 19 deals with acquisitions of business assets, section 20 with arrangements relating to the corporation’s governance and operation such as board representation or alterations to constituent documents such as the articles of association, and section 21 with the leasing or hiring of assets, management agreements or profit sharing arrangements.

Section 21A deals with proposals to acquire interests in Australian urban land. It empowers the Treasurer to examine proposed acquisitions of interests in Australian urban land and make an order prohibiting those that he considers would be contrary to the national interest.

The FATA applies to acquisitions, or proposed acquisitions, of interests in ‘Australian urban land’ (see section 12A). Consequently, section 21A applies not only to direct purchases of Australian urban land, but also to interests in such land, for example mortgage, or certain leasehold interests. It also applies to the purchase of shares in companies and units in trusts (Australian urban land corporations and trust estates), where more than half of its assets are in the form of Australian urban land, and participation in profit sharing agreements in relation to land.

The Treasurer’s powers in section 21A to take action against acquisitions of interests in Australian urban land are not limited to acquisitions of what the Treasurer considers to be a controlling interest as is the case in sections 18 to 21. Failure to notify an acquisition of an interest in Australian urban land is an offence under section 26A of the FATA, unless exempt under the Regulations.

Sections 18, 19, 20, 21 and 21A give the Treasurer the power to order the divestment or unwinding of an investment where the acquisition is subsequently found to have been contrary to the national interest.
Section 25 allows conditions to be applied which are considered necessary to remove national interest concerns that would otherwise arise. This power is available where the Treasurer can make an order under sections 18, 19, 20, 21 and 21A.

Foreign-to-foreign transactions
Transactions involving acquisitions by foreign persons of Australian businesses or assets that are already foreign-owned or controlled (referred to as 'foreign-to-foreign' transactions), are subject to the FATA. Such transactions are of two broad types: indirect acquisitions where a foreign company acquires another, or part of it, and in so doing also acquires an interest in its Australian business or assets (referred to as an 'offshore acquisition'); and direct acquisitions by a foreign person of an already foreign owned or controlled Australian business or assets.

For the FATA to apply to a foreign-to-foreign transaction, the Australian business or assets of the target company must be valued above the applicable thresholds set under the Regulations. These transactions are assessed against the policy applicable to the relevant sector of the economy. Such proposals normally do not raise issues that might make the transaction contrary to the national interest.

Prior approval for contractual arrangements
The FATA makes it an offence to acquire, or increase, a substantial shareholding or certain interests in Australian urban land without providing prior notification to the Treasurer (sections 26 and 26A). Consequently, parties proposing to enter into such transactions should ensure that the relevant agreements are conditional on foreign investment approval, or alternatively ensure they seek prior approval. This applies to situations where the acquirer intends to make an offer, tender or bid for shares or real estate. Entering an agreement that is not conditional may result in the acquisition of an interest that is in breach of the notification provisions of the FATA and also may expose the acquirer to possible prosecution and divestment action.

Foreign control
Under the FATA, a substantial interest in an Australian corporation is deemed to be a controlling interest unless the Treasurer is satisfied that the acquirer is not in a position to determine the policy of the corporation (see section 9). A variety of factors and considerations other than simply a person’s share ownership may be relevant to the Treasurer’s consideration of where ultimate control of a corporation lies. These factors are also relevant to sections 19, 20 and 21 which relate to control of business assets and arrangements relating to the directorate and governance of corporations. These factors and considerations include:

- voting rights attached to the various shareholdings and the rights of shareholders, including in relation to representation on the Board or controlling body;

- the distribution and composition of share holdings;
that all rights over future shares and potential voting power are treated as having been exercised at the time the agreement is entered into, such as the issuing of convertible notes; and

arrangements or agreements between shareholders and a corporation or controlling body that would enable a shareholder to exercise a measure of control, including through the provision of finance, technology, materials, markets and marketing or management expertise.

The extent to which each of these or other factors is relevant would depend on the particular circumstances of each case. The determination of control is undertaken on a case-by-case basis as contemplated by the relevant provisions of the FATA.

**Enforcement provisions**

If the Treasurer raises no objections to a proposal subject to conditions and the parties do not comply with the conditions, they may commit an offence under subsection 25(1C) of the FATA. Failure to comply with an order made by the Treasurer constitutes an offence under section 30. The FATA empowers the Treasurer to make orders to prohibit schemes entered into for the purpose of avoiding its provisions (section 38A). In addition, the provision of false or misleading information can constitute an offence under the *Crimes Act 1914* and Chapter 7 of the *Criminal Code Act 1995*. 