

Senate Standing Committee on Economics
ANSWERS TO QUESTIONS ON NOTICE
Treasury Portfolio
Inquiry into foreign investment proposals

Division: Foreign Investment Division
Topic: Foreign investment assessments/approvals/conditions/compliance undertaken by the Treasury
Reference: Written

Question:

1. When did Treasury agree to the remedial action plan/s with Alinta Energy with regard to the company's compliance with the conditions imposed on its sale to Chow Tai Fook Enterprises?
2. On how many occasions has Treasury agreed to the appointment of an auditor for the purposes of auditing compliance with foreign investment conditions, where the approved auditor is also the company's internal auditor?
3. Is a company, whose compliance with conditions is being audited by a Treasury-approved auditor, able to review and request or negotiate changes to an audit report prior to it being presented to the Treasury?
4. Treasury has an internal review program where it reviews compliance reporting/independent compliance audits/treasury audits, and so on. The committee understands these reviews occur on the basis of available capacity. How many reviews have been completed under this program in each of the following years:
 - a. 2016-17;
 - b. 2017-18;
 - c. 2018-19;
 - d. 2019-20.
5. The committee understands the foreign investment compliance section contains 12 FTE staff. How many staff in the compliance section have:
 - a. audit qualifications;
 - b. previous experience working in a regulatory environment (and for what duration);
 - c. previous experience working in a regulatory environment at management level.
6. Provide the following statistics for each of the following years – 2016-17; 2017-18; 2018-19; 2019-20:
 - a. Number of annual compliance reports received that require only authorisation by a company officer (excluding reports on compliance with tax conditions);
 - b. Number of annual compliance reports received that have been undertaken by a Treasury-approved auditor; and
 - c. Number of annual compliance reports received on compliance with tax conditions.
7. Treasury to provide the legal basis upon which it can impose and enforce conditions on a foreign entity that are not similarly applied to Australian-owned entities, specifically with regard to WTO national treatment obligations, or similar provisions in free trade agreements.

8. What kind of constraints on the ability to screen foreign investment applications have been introduced by the Comprehensive and Progressive Agreement for Trans-Pacific Partnership? Background: In a publicly-released New Zealand Cabinet paper proposing a review of the New Zealand Overseas Investment Act 2005 (second tranche), the following statement was made:

The pace of this first tranche of changes was driven by the timing of Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). After CPTPP enters into force we will be constrained in our ability to screen new types of sensitive land or other assets. Therefore, to date we have concentrated on those changes that must be in place ahead of CPTPP entering into force.

9. In what proportion of applications do investors include commitments or voluntary undertakings?

10. With regard to voluntary undertakings or commitments:

- a. Does Treasury have regard to voluntary undertakings or commitments when assessing whether an investment will not be contrary to the national interest?
- b. If so, how are voluntary undertakings or commitments considered?

11. Of those foreign investment applications that contain voluntary undertakings or commitments, for what proportion are these noted in the foreign investment approval?

12. For how many foreign investments does Treasury track whether the entity has satisfied the voluntary undertakings or commitments?

13. With regard to conditions:

- a. On what basis would Treasury impose a condition that required a 'best endeavours' attempt by the foreign entity to satisfy the condition?
- b. In relation to what type of condition would a 'best endeavours' clause be added?
- c. What proportion of conditions imposed on foreign investments require only that a foreign entity make a 'best endeavours' attempt to meet the condition (rough estimate will be sufficient if no specific numbers available)?
- d. How does Treasury assess compliance with 'best endeavours'?

14. What IT system does Treasury use to track its foreign investment activities?

15. Has Goldwind had any communications about Glennies Creek, the Glenbawn Dam Hydro project, or any other asset acquisition in Australia with:

- a. the Treasury;
- b. the FIRB;
- c. the Treasurer or his staff (about which Treasury is aware); or
- d. the Assistant Treasurer or his staff (about which Treasury is aware)?

If so, please provide for each:

- copies of all correspondence, meeting notes and emails;
- dates of meetings, phone calls, teleconferences or conversations; and
- details of participants and venues in Australia or offshore on each occasion.

16. Has the NSW government or any of its ministers (or members of their staff) or any NSW departmental staff or staff from Water NSW, had any communications about:

- Glennies Creek;
- the Glenbawn Dam Hydro project; or
- any asset acquisition in Australia (on behalf of Goldwind or any other overseas entity)

with:

- a. the FIRB or any of its members;
- b. the Treasury;
- c. the Treasurer or his staff (about which Treasury is aware); or
- d. the Assistant Treasurer or his staff (about which Treasury is aware)?

If so, please provide for each:

- copies of all correspondence, meeting notes and emails;
- dates of meetings, phone calls, teleconferences or conversations; and
- details of participants and venues in Australia or offshore on each occasion.

17. Has Goldwind had any communications about any business or infrastructure asset investment in Australia with:

- a. the FIRB or any of its members;
- b. the Treasury;
- c. the Treasurer or his staff (about which Treasury is aware); or
- d. the Assistant treasurer or his staff (about which Treasury is aware)?

If so, please provide for each:

- copies of all correspondence, meeting notes and emails;
- dates of meetings, phone calls, teleconferences or conversations; and
- details of participants and venues in Australia or offshore on each occasion.

18. Between 2015 and 2020, where the Chair of the FIRB has convened a meeting at his request or at the request of the FIRB, the Treasury or the Treasurer, or where the Chair of the FIRB has been invited by a foreign entity in Australia or overseas following a request by:

- a. Chinese owned entities who have successfully received board approval for investment in Australia – with conditions and without conditions;
- b. US owned entities who have successfully received board approval for investment in Australia – with conditions and without conditions;
- c. British owned entities who have successfully received board approval for investment in Australia – with conditions and without conditions; or
- d. Japanese owned entities who have successfully received board approval for investment in Australia – with conditions and without conditions;

and where such meetings have been facilitated by, or disclosed or reported on to the FIRB, the Treasury, the Treasurer (or his staff) or Assistant Treasurer (or his staff):

Please provide for each:

- details of places where meetings were held;
- attendees and their role description;
- costs associated; and
- notes taken.

And the same for all other member of the FIRB board.

Answer:

1. 21 October 2019
2. Treasury does not routinely collect the identity of the internal auditor of either an applicant or target entity. Independent audit requirements imposed on investors under conditions will generally require that the Treasury approve the scope of the audit and the identity of the audit firm or auditors that will undertake the audit. Guidance Note 52 (available on the FIRB website) describes the factors that Treasury will consider in doing so, and refers to the Framework for Assurance Engagements published by the Auditing

and Assurance Standards Board, which sets out expectations in relation to ethical standards and quality control.

3. Audit standards do not prohibit an auditor from presenting a draft report to the auditee, in order to enable any errors or misunderstandings in the draft to be remedied prior to finalisation of the report.
4. a. - d. In relation to Treasury-led audits, please see the answer provided to IQ20-000050.

Year on year data for reviews of compliance reporting is not available, but as an indicator, Treasury has reviewed over 90 compliance reports from July 2019 to July 2020.

Additionally, in the course of 2019-20, Treasury has conducted a compliance review of over 150 cases.

5. The number of staff in the compliance section is currently 13.5 FTE.

a: Two staff are chartered accountants (CA) (the CA qualification includes an audit and assurance component); one additional staff member has 15 years' experience with the Australian National Audit Office;

b:

Prior regulator experience	0 years	1-5 years	5-10 years	10+ years
No. staff	2	5	3	5

c: Five

6. Data to respond to these questions is not readily available. Obtaining such data would be a highly manual process and significant diversion of resources.
7. Please see the answer provided to IQ20-000048.
8. Please see the answer provided to IQ20-000048.
9. The current system used by Treasury does not allow us to efficiently quantify this. Obtaining such data would be a highly manual process and significant diversion of resources.
10. a. and b. The Government reviews foreign investment proposals against a national interest test which assesses whether a particular proposal is contrary to the national interest. While voluntary undertakings can be offered, they are not suggested or encouraged, nor are they relied upon in making this assessment. Furthermore, if those undertakings or commitments are not met, this may be considered as part of the character of the investor in future applications. The Government's reform package announced in June provides for enforceable undertakings, which will provide an enforceable framework for voluntary undertakings where they are offered by Applicants.
11. Typically no objection notifications issued under the *Foreign Acquisitions and Takeovers Act 1975* (FATA) refer only to conditions imposed under section 74 of the FATA. The current system used by Treasury does not allow us to easily quantify or identify cases

where voluntary undertakings may have been considered. Obtaining such data would be a highly manual process and significant diversion of resources.

12. Voluntary undertakings and commitments are not legally binding in the same way that conditions imposed under section 74 of the FATA are and as such, are not subject to the standard compliance monitoring mechanisms that conditions are. However, such commitments can be taken into account in any future applications by an investor and this would be done on a case-by-case basis.
13. a. Treasury may recommend a condition that requires a foreign investor “must use its best endeavours to ensure, and within its powers must ensure” that certain things are done. This reflects the fact that the legal powers and technical and commercial capability of the investor with respect to the target entity may not extend to full control of all aspects of the business (for example, if the investor is not taking a majority interest). “Best endeavours” is an established legal standard based on case law.
- b. A recommended condition is likely to include a “best endeavours” element in instances where there may be elements or entities that determine the desired outcome in addition to the applicant
- c. The current system used by Treasury does not allow us to easily quantify this. Based on our knowledge of cases, this wording is used in a minority of conditions.
- d. “Best endeavours” is only relevant when the outcome sought by the condition has not been achieved. Treasury would seek evidence from the investor of its actions to try to achieve the required outcome, and would from there assess whether the endeavours were adequate, applying the legal standard of “best endeavours”.
14. Treasury’s system, known as FIMS3, is built on Microsoft Dynamics 365.
15. a. – d. As is common practice for prospective applicants, Goldwind and its legal advisers briefed Treasury on the potential development of projects at Glennies Creek and Glenbawn Dam.
16. a. – d. The NSW Government has not had any communications with Treasury on the potential projects at Glennies Creek or Glenbawn Dam.
17. a. – d. Goldwind has been a frequent applicant over many years. It would be an unreasonable diversion of resources to search for and provide records relating to all of Goldwind’s past communications on any of its investment proposals in Australia.
18. a. – d. It would be an unreasonable diversion of resources to search for and provide records relating to all of these meetings.