

15 May 2020

Mr Mark Fitt
Committee Secretary
The Senate
Economics References Committee
By email: Economics.Sen@aph.gov.au

Dear Sir,

**THE SENATE: ECONOMICS REFERENCES COMMITTEE
INQUIRY INTO FOREIGN INVESTMENT PROPOSALS**

I declare that I am a member of the Advisory Board of FIA Australia, which is a business that provides advice about foreign investment matters.

I am also former Chairman of the Australian Competition and Consumer Commission.

The views expressed in this submission, however, are my own and no different from anything I have said in recent years about the Foreign Investment Review Board (FIRB).

OVERVIEW

My submission is solely about the FIRB as an organisation.

FIRB differs in some key organisational features from the major regulators such as the ACCC, ASIC and others. I briefly identify some of the differences below.

I then raise but do not answer the question as to whether it should come into line with the way most regulators are organised.

I use the ACCC as my main example of a regulatory body.

THE ACCC

1. FINAL DECISION MAKING POWER

In general the ACCC cannot affect the legal rights of any person whether an individual or a business without having received the sanction of a court.

It must apply to court for injunctions e.g. to stop mergers, fines, damages and other penalties etc.

The ACCC has some powers to make final decisions such as decisions to investigate (subject to some rights to challenge under provisions of the Australian Competition and Consumer Act 2010) and to 'prosecute' matters in court. But the exercise of those powers does not have a major effect on rights.

It is true that it makes many decisions which are, in effect, final decisions but technically they are not final decisions. Thus when the Commission decides to oppose something e.g. a merger, that most often ends the matter although there is always the opportunity for the business being opposed to take the matter to court and this does happen from time to time and sometimes business wins.

There are a few substantive matters where it has final power to decide but even then its decisions can mainly be appealed to a court of law or to a tribunal e.g. authorisations.

2. INDEPENDENCE

The ACCC is a statutory body independent of government. Its Chair, Commissioners and staff are independent of the government.

Its operations are entirely at arms length from the Minister, advisors, and the department.

Incidentally critics often say that ACCC and other regulators are unelected and therefore lack legitimacy. Their response is usually that Parliament has conferred on them certain powers and sets criteria they must stick to and legislation sets safeguards e.g. court overview.

3. ACCOUNTABILITY

The ACCC is 'accountable' to the courts.

The ACCC is also accountable to parliament and is frequently questioned by parliamentary committees. It also does an annual report and some other reports during the year.

4. TRANSPARENCY

Decisions of the ACCC are generally transparent. First, it must give reasons supporting its wish to obtain a court or tribunal verdict. Second, it announces the reasons for its decisions in a great majority of cases.

5. SANCTIONS AND ENFORCEMENT POWERS

The Australian Competition and Consumer Act has a range of instruments such as sanctions, powers to investigate, powers to enforce undertakings etc. In particular the instrument of 'court enforceable undertakings' is an invaluable weapon. This means that if a business makes a promise to the ACCC and it does not keep that promise then the ACCC can go to court and get that promise enforced by court action without the court evaluating the merits of or otherwise of the undertaking. As I note below, if FIRB does not have this power it would be useful to have it. Its main power is to withdraw approval of an acquisition. This is a blunt instrument. It is not explicitly allowed under the Act.

FIRB

FIRB differs in most of these dimensions.

FINAL DECISIONS

FIRB is an advisory Board only. It does not have final decision-making power. That power resides with the Treasurer.

INDEPENDENCE

Whilst the members of the advisory board are independent, the staff, however, are members of Treasury. Indeed it is the case that having being involved in a FIRB decision they then may become involved as Treasury officials in dealing with it and following it through.

There may be less than the arms length distancing from Minister and political advisors and department than would occur with the ACCC or regulatory bodies where they keep out of influencing decisions. FIRB may have a closer day-to-day relationship. I do not know. If so, I am not critical. The task is different. It probably involves some pre-decision negotiations as a prelude to the Treasurer making a final decision.

ACCOUNTABILITY

Decisions and recommendations of FIRB are not subject to any judicial oversight. There is typically little or no accountability to the courts. The courts have no oversight role. The only accountability is a political one on the part of the Treasurer to the Parliament.

TRANSPARENCY

FIRB is not very transparent. There is typically no published analysis of applications, and little or no explanation of decisions.

SANCTIONS

There appear to be few or no court enforceable undertakings powers. If there is non-compliance with conditions, FIRB could reverse its decision but this is a blunt instrument and possibly of dubious legality.

OVERALL

FIRB does not meet the standard practices and criteria that characterise normal best practice regulation i.e. independence, final decision making powers, accountability, transparency.

At one level it could be argued that public confidence decision-making could be enhanced with independence and transparency.

There are arguments, however, that the FIRB role and decisions are different and of a special kind. The judgments involve political decision-making and arguably differ from the more technical decisions of regulators. Unlike competition law there is not a well-established set of guiding principles, practices, procedures and methods of analysis that mean that matters can be handled by an independent body in accordance with well established principles.

There may well be some defences of its relative lack of transparency and accountability for the above reasons. Dealing with foreign investment could mark it out as different from other areas of economic policy.

FIRB appears to play a role in providing confidential advice to applicants about their prospects for success. It also tends to negotiate conditions that are necessary for approval. This again differentiates its role from that of the ACCC.

Should it be brought into line? I do not have a firm view on this matter.

It would be useful to hear from FIRB and Treasury defences of the present approach and some analysis of the pros and cons of bringing FIRB more into line with practices of regulatory bodies.

If it is assumed that it is right that the Treasurer makes final decisions on FIRB decisions, there remains the question as to whether other changes at FIRB, and the framework in which it operates, should occur. This includes:

- Making it more independent. This would involve staff working for it and not being part of the Treasury department.
- Making it more arms length. As noted above, there could be good reasons for it not being as arms length as the ACCC.
- Making its reports/recommendations to Treasurer public before/after approval.
- Making its decisions challengeable in court or at least challengeable to the AAT.
- Making it more answerable to such institutions as Parliament.

I believe there could be some value in looking into these questions. The role and operations of FIRB may need review having regard to the wider and bigger scope of its activities now and also to changing public attitudes to foreign investment.

Yours sincerely



PROFESSOR ALLAN FELS AO