



AUSTRALIAN GOVERNMENT RESPONSE
TO THE SENATE ECONOMICS REFERENCES COMMITTEE REPORT:
“FOREIGN INVESTMENT BY STATE-OWNED ENTITIES”

JUNE 2011

INTRODUCTION

Foreign investment has been an important component of Australia's growth in the past and will continue to make a positive contribution to Australia's economic growth and prosperity in the future. This is because Australia's domestic savings are not sufficient to meet the demands of domestic business for investment funds. Foreign capital represents the necessary call on overseas resources that fill this gap. It contributes to our capacity to develop and improve living standards.

Foreign investment also brings additional benefits, including:

- creating new job opportunities and supporting existing jobs;
- encouraging innovation and skills development;
- introducing new technologies; and
- promoting healthy competition amongst our industries.

While foreign investment enters Australia in a variety of guises, the last few years have seen an increase in investments being made through sovereign wealth funds and state-owned enterprises (SOEs). This has sparked public and media interest.

The Government has investigated whether significant changes were required to Australia's foreign investment regime to appropriately deal with increasing flows of investments from SOEs and sovereign wealth funds. Our assessment was that Australia's existing regime was already well-placed to deal with any national interest concerns arising from such investments.

Nevertheless, the Government recognised that it has a role in assisting SOEs to better understand our foreign investment regime, as well as helping the Australian public understand the Government's approach to foreign investment from sovereign entities.

That is why in February 2008 the Government first published principles that are used when evaluating the national interest implications of foreign government related investments. These were updated and expanded in June 2010 when, as part of the release of the Government's Foreign Investment Policy, the Government explained the national interest considerations for all investment proposals to buy Australian businesses or companies. For foreign governments and related entities, these considerations emphasise independence and commerciality.

The Government appreciates that more work can be done to improve communication of our foreign investment policies. In that regard, we welcome the Senate Economics References Committee report on 'Foreign Investment by State-Owned Entities'.

The Australian Government has carefully considered the recommendations of the Committee's report and we have provided our response below.

MAJORITY REPORT

Recommendation 1 – The committee recommends that FIRB develop a more effective communication strategy to improve public understanding of the risks and benefits of foreign investment to Australia. This strategy should also provide additional information about how foreign investment decisions are made and provide information about the emergence of sovereign wealth funds and state-owned entities internationally.

The Australian Government agrees with this recommendation.

The Australian Government has asked the Foreign Investment Review Board (FIRB) to review and improve communication of Australia's Foreign Investment Policy. The first task that FIRB undertook was to draft an easy-to-read version of the Foreign Investment Policy for prospective investors. The Government released that new Policy on 30 June 2010.

This new Policy has been made available in other languages including Chinese, Japanese and Bahasa.

The Government has also asked FIRB to engage directly with embassies in Australia – as it has done from time to time – to explain how the Policy is applied. FIRB has also rolled out a new stakeholder awareness program to educate and disseminate information to individuals and organisations affected directly and indirectly by the Government's Foreign Investment Policy.

Recommendation 2 – The committee recommends that the Minister require FIRB to be more assiduous in producing a timely annual report.

The Australian Government agrees with this recommendation and has requested FIRB to prioritise the timely release of its annual report. The Government recognises the importance to the Australian public of releasing information on foreign investment applications and trends.

It has been the usual practice of FIRB to produce its annual report early in the following year. This allows time for all data to be compiled and rigorously checked for accuracy before it is released.

Recommendation 3 – The committee recommends that the government tighten the FATA legislation to deal with complex acquisitions where takeovers of smaller strategic assets may be masked by an application which, in total, does not represent more than 15 per cent, and therefore does not trigger review. The committee would like FIRB to give adequate consideration to the interaction between the various components of an acquisition.

The Government agrees in principle with this recommendation.

Related foreign investors cannot avoid screening by each buying small stakes (below 15 per cent) in an Australian company and using the total investment to wield control. This is because the existing 'associates' provision in the *Foreign Acquisitions and Takeovers Act 1975* (the FATA) is already broad enough to ensure such activities are caught by the regime.

However, the Government was concerned that investors could use complex financial instruments to avoid the intended operation of the FATA. For that reason, the Government introduced the *Foreign Acquisitions and Takeovers Amendment Act 2010* to remedy this matter.

This Act clarifies that convertible notes and similar instruments will be treated in a similar fashion to shareholdings for the purposes of the foreign investment regime. The Act has retrospective effect from 12 February 2009.

MINORITY REPORT

Recommendation 1 – A foreign government shall not use any corporate vehicle which they control to be allowed to purchase any strategic assets within Australia.

Further, for a non-state-owned entity, a related entity test will be applied so that different corporate entities with the same ultimate majority controlling influence represented by equity, debt or other mechanisms will be deemed as the one entity for assessment as to whether it will result in more than 10 per cent of control of any strategic asset market in Australia.

The Australian Government does not support this recommendation.

The Government is committed to a case-by-case examination of all foreign investment proposals. This approach ensures that Australia can maximise investment flows while protecting Australia's national interest.

The Government recognises that sovereign wealth funds and SOEs are increasingly a part of the global financial system. The Government notes that Australia has its own sovereign wealth fund. Reflecting this trend, the Government supports the efforts of the International Monetary Fund and the International Forum of Sovereign Wealth Funds to develop a set of voluntary, best-practice principles to maintain the free flow of cross border investment.

The Government applies a rigorous national interest test to all SOE investments. This is designed to examine whether SOE investments are transparent and commercial in manner and that investment and sales decisions are driven by market forces. Blanket bans on certain types of investment could risk unnecessary job losses and provoke retaliation against Australian investors overseas.

As outlined above, the 'associates' provision in the FATA prevents related foreign investors from avoiding screening by each buying stakes below 15 per cent in an Australian company and using the total investment to wield control.

Recommendation 2 – The Foreign Investment Board will be required to, as a point of consideration in its decision, assess whether Australia has reciprocal rights of investment in the proposer's country.

The Government notes this recommendation.

The Australian Government does not consider it appropriate to penalise foreign investors for the investment policies of their home country government. This would be inconsistent with Australia's international obligations, including with the Organisation for Economic Co-operation and Development (OECD), the World Trade Organization (WTO) and Australia's free trade agreement (FTA) commitments.

The role of the FATA is to provide for screening of incoming investment, it has no role in outwards investment. Assessment of the national interest could include such considerations but in general, reciprocity is not a useful guide to Australia's national interest.

However, the Australian Government will continue to advocate for foreign governments that have restrictive investment policies to liberalise their regimes for the benefit of Australian investors. We do this in a variety of ways, including through FTA negotiations, as FTAs cover a variety of issues including the investment regimes of each negotiating party.

Recommendation 3 – The Government must look to enact effective laws to prevent creeping acquisitions of Australian businesses and assets owned by state-owned entities.

The Government notes this recommendation.

The Australian Government already has laws in place to monitor ‘creeping acquisitions’ of Australian companies and businesses by foreign investors.

The FATA allows the Government to review any increase in ownership beyond 15 per cent of an Australian company or business valued above \$231 million.

For investments by SOEs and other entities with links to foreign governments, the Foreign Investment Policy allows the Government to review any direct investments in Australian companies or businesses regardless of the value of the company or business. This includes investments that increase an existing stake.

Recommendation 4 – The Foreign Investment Review Board needs to provide clear criteria of what the ‘national interest’ test is and that abbreviated versions of FIRB advice to the Minister be tabled in both houses of Parliament.

Further, that the Government defines what it means by ‘community interest’ and ‘common standards of business behaviour’ and subject major investment proposals to rigorous public scrutiny to ensure that they meet genuine common standards of business behaviour.

The Government notes this recommendation.

In June 2010, the Australian Government published its Foreign Investment Policy, which explains the factors we consider when evaluating the national interest.

Specifically, the Government considers national security concerns, competition issues, the impact of the investment on Australia’s revenue base and other policies, the impact of the investment on the Australian company, our economy and the broader community and the character of the investor. For foreign governments and their related entities, the Government also looks for evidence of a commercial basis for the investment.

The Government takes seriously the commercial-in-confidence nature of the investment proposals that it receives. It is not appropriate for the Government to release potentially market sensitive information on behalf of investors. This would undermine investor confidence and risk Australia’s standing as a desirable investment destination.

The Government will continue, however, to release a statement whenever it determines that a foreign investment proposal raises national interest concerns.

Recommendation 5 – That the human rights records of the country of state-owned entity seeking to invest in Australia be a key factor during consideration by the Foreign Investment Review Board. Similarly, that all foreign non-state-owned entities be subject to consideration of their other investment activities and whether these conflict with Australia’s ethical positions.

The Government notes this recommendation.

The Australian Government does not consider it appropriate to hold investors accountable for actions taken by its home country government, except in limited circumstances where Australia maintains formal sanctions against that country.

However, if there is evidence that the investor itself has breached human rights or undertaken other unethical behaviour, such actions will be considered when determining if the investment would be contrary to Australia's national interest. This has always been the case.