Foreign Investment Review Board

Annual Report 2009-10

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Foreign Investment Review Board

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25 January 2011

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 2010. 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 comments on the levels of foreign investment in Australia and Australian investment abroad. The Report also provides an overview of the main provisions of the *Foreign Acquisitions and Takeovers Act 1975.*

The past year has represented a period of renewal at the Board level with long-serving members, the Hon. Chris Miles and Ms Lynn Wood, retiring after many years of outstanding service. In December 2009, you announced that the Board would be expanded from four members to five (including the Executive Member), and that Mr Brian Wilson and Mr Hamish Douglass would be appointed to the Board. The aim was to broaden the expertise and experience of the Board. I consider that objective has been achieved because the new Board is working well and the new members have already made valuable contributions to the workings of the Board. On behalf of the other members of the Board, I would like to take this opportunity to welcome the appointment of Ms Anna Buduls who joined the Board on 15 July 2010.

The Board's key function is to examine the more significant foreign investment applications against the Government's foreign investment policy and advise on potential national interest concerns. The Board examined a range of high profile investment applications throughout the year. In 2009-10, the overwhelming majority of business applications were in the resources sector, continuing a trend from the previous year. Mineral exploration and development applications accounted for around two-thirds of the value of all proposals (excluding real estate) and around 60 per cent of the number received (again excluding real estate applications).

Many of these foreign investment applications involved significant levels of proposed investment. There were 92 applications involving total investment of $100 million or more, including 18 for $1 billion or more (compared with 15 in 2008-09). These 18 proposals accounted for a combined proposed investment of $51.4 billion (64 per cent of the proposed investment in this sector).

The United States was again the largest investor in terms of FIRB approvals, followed by the United Kingdom and China. The combined value of proposals from these three countries accounted for around 60 per cent of all approvals.

In providing advice to the Government on foreign investment applications, the Board was assisted by the Secretariat located in the Treasury. Given the significance of investment in the resources sector, the Board was provided detailed briefings on various industries, including the iron ore, coal and petroleum industries. These briefings provided useful guidance about the size of these specific sectors and their importance to Australia, and I have asked that they become a permanent feature of Board meetings.

The Board continues to foster a better awareness and understanding, both locally and abroad, of Australia’s foreign investment arrangements. This year we released the new easy-to-read version of the Foreign Investment Policy. This was the first update of the Policy for several years and the first time that we have provided detailed guidance on the factors that are considered when determining if an investment is contrary to the national interest. Importantly, given the increase in government investment in recent years, the Policy provides a clear definition of direct investment by foreign governments and a definition of foreign governments and their related entities (which includes entities in which foreign governments hold a 15 per cent stake).

The Board is also involved in ensuring compliance with Australia’s foreign investment arrangements. Following the real estate changes that were announced on 24 April 2010, the Secretariat increased its existing compliance capabilities by recruiting a senior compliance officer who has built upon existing compliance capacity to create a dedicated compliance team. The Board continues to oversee the development of this systemic and structured compliance regime.

Yours sincerely

M.J. Phillips AO
Chairman

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Acronyms and abbreviations

AAT	Administrative Appeals Tribunal
ABS	Australian Bureau of Statistics
AFP	Australian Federal Police
ANCP	Australian National Contact Point
APRA	Australian Prudential Regulation Authority
ATO	Australian Taxation Office
DFAT	Department of Foreign Affairs and Trade
DIAC	Department of Immigration and Citizenship
EU	European Union
FDI	foreign direct investment
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*
FSSA	*Financial Sector (Shareholdings) Act 1998*
NGO	non-government organisation
Privacy Act	*Privacy Act 1988*
Secretariat (/the Division)	the Treasury's Foreign Investment and Trade Policy Division
SWF	sovereign wealth fund
the Policy	Australia's Foreign Investment Policy
Regulations	*Foreign Acquisitions and Takeovers Regulations 1989*
WTO	World Trade Organization

Glossary

Aggregate substantial interest in a corporation	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 hold interests in not less than 40 per cent of the issued shares, of a corporation (section 9 of the FATA).
Applications approved (/approvals)	Comprise all foreign investment proposals approved either with or without conditions.
Applications considered	Comprise all foreign investment proposals finalised (that is, approved, rejected, withdrawn or exempt).
Applications decided	Comprise all foreign investment proposals approved or rejected (that is, excluding proposals withdrawn or determined exempt).
Applications rejected	Comprise all foreign investment proposals that are either rejected under the policy or subject to a Final Order or a Divestiture Order under the FATA.
Australian rural land	Refers to land that is used wholly and exclusively for carrying on a primary production business.
Australian urban land	Refers to all other land in Australia that is not Australian rural land.
Australian urban land corporations and trust estates	A corporation (excluding holding companies) or trust estate where more than half of its assets are in the form of Australian urban land (section 13D of the FATA).
Corporate reorganisations	Corporate reorganisations encompass a wide range of transactions including corporate restructures and transfers of assets or shares within a corporate group.
Divestiture Order	An Order that requires an interest already acquired to be disposed of.
FIMS	The Foreign Investment Management System is the Division's electronic case management system.
Final Order	An Order that prohibits a proposed acquisition.

Foreign Direct Investment / FDI	A direct investment has the objective of establishing a lasting interest in, and a strategic long-term relationship with, the target company. It may include a significant degree of influence by the investor in the management of the target company. It is international practice to define a direct investment as acquiring an interest of 10 per cent or more for statistical purposes. Interests below 10 per cent may also be direct investments if the investor can use those investments to influence or control the company.
Foreign Investment Review Board (FIRB or the Board)	A non-statutory body established in 1976 to advise the Treasurer on foreign investment 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.
Off-the-plan	An acquisition of a dwelling under construction or completed that has not been lived in or previously sold.
Portfolio investment	Passive or non-direct investment.

Proposed investment	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.
Substantial interest in a corporation	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 holds interests in not less than 15 per cent of the issued shares, of a corporation (section 9 of the FATA).
Threshold	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.

Main points

- In 2009-10, 4,401 proposals received foreign investment approval. This compared with 5,352 in 2008-09, representing a decrease of 18 per cent. The real estate sector recorded 3,897 approvals, representing a decline of 19 per cent on the 4,827 approvals in 2008-09. There was an overall decline in approvals in other sectors in 2009-10 compared with 2008-09, from 525 approvals to 504 approvals, representing a decrease of 4 per cent. The decline in number of business approvals reflects the increased threshold of $219 million from 22 September 2009. In 2008-09, there were 83 approvals for companies valued below the new threshold.

- Approvals in 2009-10 involved proposed investment of $139.5 billion. This represented a 23 per cent decrease on the previous year's approvals of $181.4 billion. Approved investment in real estate was $20.0 billion in 2009-10 (compared with $23.4 billion in 2008-09). This reflects the changes in 2009 and 2010 to the screening arrangements for temporary residents purchasing residential real estate. Approved investment in other sectors was $119.5 billion, compared with $158 billion in 2008-09, representing a decrease of 24 per cent. Some of this decline can be explained by several large investments in 2008-09 and some is attributable to the screening threshold change.

- In 2009-10, three proposals were rejected, all related to real estate purchases, the same number as last year. There were two Interim Orders made (three in 2008-09), extending the 30-day statutory decision-making period by up to 90 days.

- The mineral exploration and development sector was the largest destination by value, with approved investment in 2009-10 of $80.9 billion ($90.6 billion in 2008-09). The other major destinations were: real estate, with approved investment of $20.0 billion ($23.4 billion in 2008-09); manufacturing, with approved investment of $16.2 billion ($19.1 billion in 2008-09); and services, with approved investment of $14.0 billion ($31.7 billion in 2008-09).

- The United States of America ($39.1 billion) was the largest source country for foreign investment proposals in 2009-10. The United Kingdom ($28.6 billion), China ($16.3 billion), Japan ($6.0 billion) and Switzerland ($5.9 billion) were the other major source countries of approved investment in 2009-10.

- On 10 December 2009, the Treasurer announced the appointment of Mr Brian Wilson and Mr Hamish Douglass to the Board. On 15 July 2010, the Treasurer announced the appointment of Ms Anna Buduls to the Board, to fill the vacancy created by the retirement of Ms Lynn Wood, after 15 years of service.

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 foreign investment policy and administration. Its 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 foreign investment 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 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 foreign investment policy and related matters.

Information on the operation of 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 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 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 Pro 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.

Ms Anna Buduls was appointed to the Board on 15 July 2010. Through her corporate advisory work and 15 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 since October 2009.

Mr Patrick Colmer 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 20 November 2006. 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 Australian Taxation Office from 1999 to 2002.

Relationship of the Division to the Board

As the Executive Member of the Board and the General Manager of the Division, Mr Colmer 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 FATA and the policy. It also provides a contact point for foreign investors and their representatives/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.

The Executive Member of the Board is also the Australian National Contact Point (the ANCP) for the *OECD Guidelines for Multinational Enterprises*. The ANCP is responsible for implementing the OECD Guidelines, handling inquiries, conducting formal reviews when the adherence of a multinational enterprise to the OECD Guidelines is questioned, facilitating discussions with interested stakeholders, and reporting on its activities to the OECD Investment Committee.

Administration of foreign investment 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/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.

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 to advise the applicant parties of the decision. The statutory period commences upon 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. Around 88 per cent of proposals are decided under this authorisation. The Board maintains oversight of decisions made under this arrangement.

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 additional supporting information, facilitate a timely decision on 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/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. Consideration of such submissions can be an important part of the examination process and the development of advice on the proposals to the Treasurer.

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 Australia's Foreign Investment 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. Additional guidance on aspects of the national interest is provided in the Australian Government's Foreign Investment Policy (see www.firb.gov.au) and includes:

- existing government policy and legislation (for example, applying to telecommunications, broadcasting, the media, aviation, environmental regulation and competition policy);
- national security interests;
- competition;
- impact on the economy and the community; or
- 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 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 Australian Securities Exchange 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 Australian Taxation Office (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 2009-10, the Division received eight applications under the FOI Act (one in 2008-09) 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.

2009-10 outcomes

Cost of the Board's operations

Total Board expenses in 2009-10 were $130,436 ($128,552 in 2008-09). 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 2009-10 were $3.2 million ($3.5 million in 2008-09). These expenses mainly comprised employee salary (including superannuation and accruing leave entitlements) and administrative costs. Over the course of 2009-10, the Division employed an average of 26 staff, two fewer than the average number of staff employed in 2008-09. However, following the introduction of new real estate screening and compliance policy in April 2010, additional staff has been engaged.

Consideration of proposals and enquiries

In 2009-10, a total of 4,703 applications for foreign investment approval were considered, with 4,401 approved, three rejected, 167 withdrawn and 132 exempt as not subject to the policy or the FATA. Of the 4,404 applications decided in 2009-10 (that is, those approved or rejected but not those withdrawn or exempt), 3,895 were decided within the Division under the Treasurer's authorisation and 509 were decided by a Treasury minister.

Additionally, in 2009-10 the Division handled approximately 15,000 telephone enquiries and 5,000 items of correspondence[1] in relation to potential proposals, compliance with conditional approvals, the policy and the FATA.

In 2009-10, two Interim Orders were made and published in the Commonwealth of Australia *Gazette*.[2] No Divestiture Orders or Final Orders were 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 2009-10, 94 per cent of proposals were decided within 30 days, compared with 97 per cent of proposals in 2008-09. 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. Of the real estate cases decided in 2009-10 (which represent the majority of proposals received), 62 per cent were finalised within two weeks, compared with 90 per cent in 2008-09.

Changes to foreign investment screening thresholds

On 4 August 2009, the Treasurer announced that the Government would make several changes to the foreign investment screening thresholds, including:

- replacing the four lowest thresholds for private business investment with a single threshold of $219 million;
- indexing the new unified threshold on 1 January every year to keep pace with inflation; and
- abolishing the requirement that private investors notify the Government when establishing a new business in Australia valued above $10 million.

The threshold changes took effect from 22 September 2009. From 1 January 2011, the monetary threshold is $231 million for all investors excluding US investors, whose

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1 This figure excludes all correspondence in relation to proposals that were yet to be finalised when the correspondence was received.

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.

threshold is $1005 million for investments in sectors that are not prescribed as sensitive sectors.

Changes to foreign investment policy — residential real estate

On 24 April 2010, the former Assistant Treasurer, Senator Nick Sherry, announced a tightening of the foreign investment rules as they relate to residential real estate and a package of new civil penalty, compliance, monitoring and enforcement measures. The announcement includes amendments to each of the FATA, the Regulations and the Policy to ensure that foreign non-residents can only invest in Australian real estate if that investment adds to the housing stock, and that investments by temporary residents in established properties are only for their use whilst they live in Australia.

The Government will continue to monitor the changes. Further details are provided in the section on real estate on page 28.

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.

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 foreign investment 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.

In addition, existing compliance capabilities were increased following the real estate changes announced on 24 April 2010. The Division has recruited a senior compliance officer who has built upon existing compliance capacity to create a dedicated compliance team. The compliance team is moving toward a systemic and structured regime which includes the following measures:

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

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 of, and statistical information on, applications considered in 2009-10.

Features of the FIRB statistics

While this chapter provides a useful source of data on foreign direct investment in Australia, the Board urges particular caution in the use of these statistics, including when making comparisons with earlier years as policy, data capture and reporting methodologies change over time. There are also substantial differences between the FIRB statistics on proposed investments and actual investment flows. The latter is 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. Rather, they provide information on proposed investments that fall within the scope of the *Foreign Acquisitions and Takeovers Act 1975* (the FATA) and Australia's Foreign Investment Policy (the Policy). The monetary value attributed to an approved proposal is the amount advised by the applicants. It represents an estimate of the expected investment in that year and subsequent years that would result if the proposal is in fact implemented. The statistics therefore provide partial coverage of all foreign investments made and may include some transactions that do not actually proceed. Several points should be noted:

- The data does not cover foreign investments below the various monetary and percentage thresholds that apply under the FATA and the Policy. 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.

- 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 externally and therefore 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 funds 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/incorporation is recorded.

- The data does not necessarily reflect a change in foreign ownership as, in some cases, both the target and the purchaser are defined as a foreign person under the FATA.
- Acquisitions of diversified company groups are classified into a single industry sector according to the major activity of the group, for example, 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]

The Board's statistics are also not a reliable indicator of foreign investment inflows because:

- they include proposals that are approved in a given year but which are not actually implemented, or could be implemented in a later year, or over a number of years;
- they include approvals for multiple potential acquirers of the same target company or asset;
- they are inherently irregular and can be skewed due to very large investment proposals;
- major liberalisations of the Policy that have occurred since the mid-1980s have acted to reduce the number 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 thresholds for the calendar year 2005 of $800 million and $50 million (indexed annually) for United States investors from 1 January 2005;

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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 increase 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; and
  - the introduction of changes in 2009 and 2010 to the screening arrangements for temporary residents purchasing residential real estate;

- changes to other government policies and legislation may have had an effect on proposed foreign investment, such as:
  - 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;

- 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. While the data in that report and subsequent reports is consequently more accurate, caution is necessary in making inter-year comparisons involving data from earlier years;

- 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.[4] This has affected the value attributed to proposed investment in the finance and insurance industry; and

- 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.[5]

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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.

The term 'proposed investment' is used widely throughout this report. Proposed investment is the aggregation of the following estimates:

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

Applications considered

This section analyses all investment proposals that were finalised (approved, rejected, withdrawn or exempt) during 2009-10, irrespective of the date they were submitted.[6] Corporate reorganisations are included here (78 in 2009-10), whereas they are excluded from the analysis of approved investment provided later in this chapter.[7]

The number of applications considered during 2009-10 was 4,703, which is 19 per cent lower than the 5,821 in 2008-09. Table 2.1 provides a breakdown of the number of applications considered over the last six years, according to the outcome of proposals.

Of the 4,401 applications **approved** in 2009-10 (18 per cent lower than the 5,352 approvals in 2008-09), 1,729 were approved subject to conditions and 2,672 without conditions being imposed. All but two 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 three proposals were **rejected** in 2009-10 (three in 2008-09), representing less than 0.1 per cent of all proposals considered. All of these rejected proposals were related to real estate acquisitions.

In 2009-10, 167 proposals were **withdrawn** by the applicants, representing a 51 per cent decrease on the 341 withdrawals in 2008-09 and representing less than 4 per cent of the total applications received. In 2009-10, 51 per cent of withdrawals involved real estate proposals. Many of these withdrawals resulted from applicants submitting several concurrent or a series of applications (often for properties that were to be auctioned

6 Since proposals determined exempt were not included prior to 2005-06, the figures shown for prior years have been amended from those previously published to include these proposals.

7 The proposed acquisition costs and development expenditure are not recorded for corporate reorganisations.

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 2009-10, 132 proposals were determined to be **exempt** compared with 125 in 2008-09. 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 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: 2004-05 to 2009-10 (number of proposals)

	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10
Outcome	No.	No.	No.	No.	No.	No.
Approved unconditionally	1,127	1,386	1,520	1,656	2,266	2,672
Approved with conditions	3,233	3,800	4,637	6,185	3,086	1,729
Total approved	**4,360**	**5,186**	**6,157**	**7,841**	**5,352**	**4,401**
Rejected	55	37	39	14	3	3
Total decided	**4,415**	**5,223**	**6,196**	**7,855**	**5,355**	**4,404**
Withdrawn	287	373	629	521	341	167
Exempt	182	185	200	172	125	132
Total considered	**4,884**	**5,781**	**7,025**	**8,548**	**5,821**	**4,703**

Note: Figures include corporate reorganisations (78 in 2009-10).

Applications decided

This section analyses all proposals that were approved (either with or without conditions), or rejected during 2009-10, irrespective of the date they were submitted. Corporate reorganisations are included.

The number of applications decided during 2009-10 was 4,404, 18 per cent fewer than in 2008-09. This reflects to a significant extent the increase in the screening threshold to $219 million in September 2009 and the introduction of changes in 2009 and 2010 to the screening arrangements for temporary residents purchasing residential real estate. The value of decided applications was $139.5 billion in 2009-10, or 23 per cent lower than in 2008-09. Some of this decline can be explained by several large investments in 2008-09 and some is attributable to the screening threshold change. Table 2.2 provides a breakdown of proposed investment according to the outcome of decided applications for the corresponding period provided in Table 2.1.

Table 2.2: Applications decided: 2004-05 to 2009-10 (proposed investment)

Outcome	2004-05 $b	2005-06 $b	2006-07 $b	2007-08 $b	2008-09 $b	2009-10 $b
Approved unconditionally	60.4	72.5	140.3	162.6	135.9	125.3
Approved with conditions	59.1	13.3	16.1	29.3	45.5	14.2
Total approved	**119.5**	**85.8**	**156.4**	**191.9**	**181.4**	**139.5**
Rejected	0.0	0.0	0.0	0.2	0.0	0.0
Total decided	**119.5**	**85.8**	**156.4**	**192.0**	**181.4**	**139.5**

Note: Totals may not add due to rounding.
‘0.0’ indicates a figure of less than $50 million.
Including corporate reorganisations (78 in 2009-10).

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 shows a continued decrease in the number of applications decided in the real estate sector in 2009-10. Chart 2.2 shows that the estimated proposed investment in the real estate sector declined in 2009-10 as did the estimated proposed investment in the non-real estate sectors. These declines, particularly in the real estate sector, may represent changes to the administration of the system more so than changes to any underlying foreign investment trends. Further discussion of developments in the real estate sector is provided on pages 28-33.

The decrease in the value of applications decided in the non-real estate sectors in 2009-10, shown in Chart 2.2, may be explained by several large investments in 2008-09 and the screening threshold change. However, it may also be explained by actual decline in investment in particular sectors as a result of the global financial crisis. Sectoral changes are discussed in greater detail in the next section.

Chart 2.1: Applications decided 2004-05 to 2009-10 — number of proposals

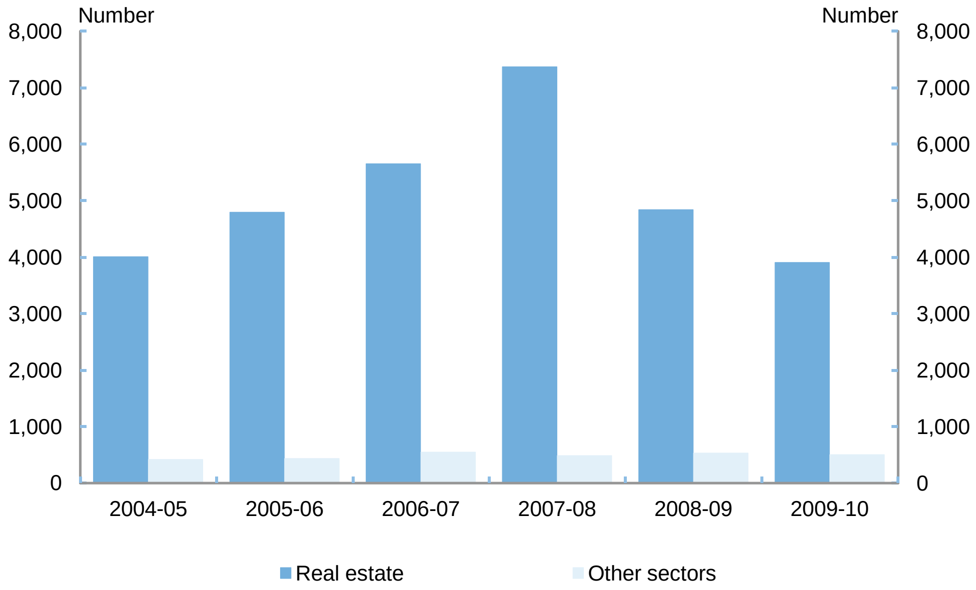
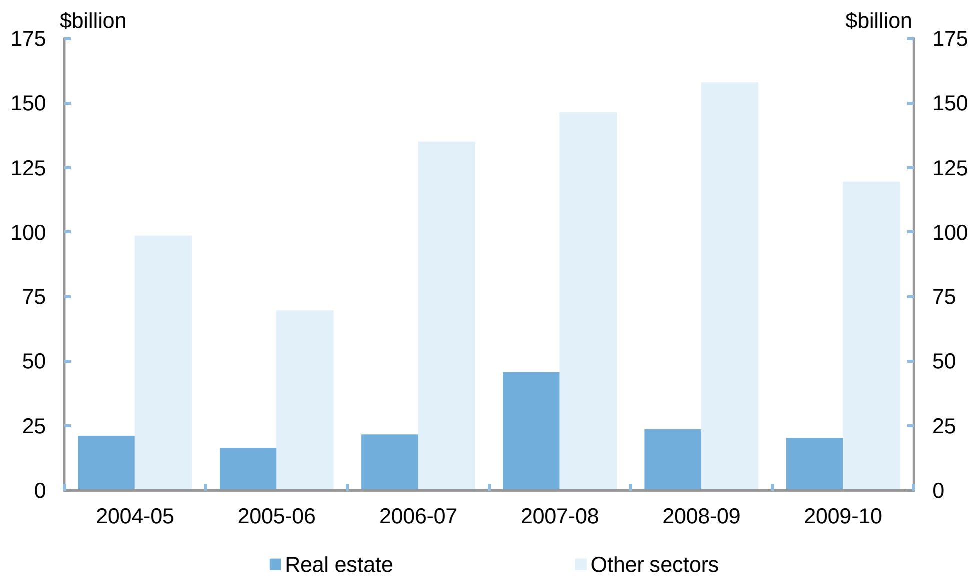


Chart 2.2: Applications decided 2004-05 to 2009-10 — proposed investment



Approvals by value

This section analyses applications approved during 2009-10 (excluding corporate reorganisations). Table 2.3 depicts approvals by the value of proposed investment for 2006-07 to 2009-10. There was a decrease in 2009-10, compared with 2008-09, across all categories except those proposals where the value exceeded $2 billion, but less than $5 billion.

Overall, there were 18 per cent fewer approvals in 2009-10 compared to 2008-09. Table 2.3 shows that this was mainly as a result of the differences in the two categories below $50 million. The overwhelming majority of approvals in these categories relate to real estate (because of the screening thresholds) which supports the view expressed above that the decline in the number of approvals in 2009-10 was largely due to changes to the screening arrangements for temporary residents purchasing residential real estate.

There was also a 23 per cent decrease in the value of proposed investment in 2009-10, compared with 2008-09. Again, there were declines in the value of approvals in the two categories below $50 million, as a result of the real estate changes. In addition, the value of approvals in the category above $5 billion declined considerably, but this may be explained by several large investments in 2008-09 when there were five investment proposals valued in excess of $5 billion (average value of $12.2 billion) while only one investment in 2009-10 (valued at $13.2 billion). By comparison, in 2007-08 there were also five proposals above $5 billion, but their average value was only $7 billion.

Table 2.3: Total approvals by value and number 2006-07 to 2009-10

	2006-07		2007-08		2008-09		2009-10	
Value of proposal	No.	$b	No.	$b	No.	$b	No.	$b
< $1 million	4,598	2.24	5,906	2.99	3,925	1.94	3,402	1.55
≥ $1 million & < $50 million	1,142	8.6	1,463	10.8	1,000	9.0	611	5.2
≥ $50 million & < $100 million	108	7.5	123	8.9	116	8.1	94	6.8
≥ $100 million & < $500 million	158	32.2	195	41.8	172	36.2	154	34.7
≥ $500 million & < $1 billion	43	28.4	53	36.7	36	25.0	35	22.9
≥ $1 billion & < $2 billion	11	16.3	20	25.3	15	20.6	14	18.2
≥ $2 billion & < $5 billion	4	12.2	10	30.2	7	19.5	12	37.0
≥$5 billion	5	49.0	5	35.2	5	60.9	1	13.2
Total	**6,069**	**156.4**	**7,775**	**191.9**	**5,277**	**181.4**	**4,323**	**139.5**

Note: Totals may not add due to rounding.
Excludes corporate reorganisations (78 in 2009-10).

Charts 2.3 and 2.4 depict total approvals by value and number using the data provided in Table 2.3. The decrease in the number of approvals involving proposed investment of less than $1 million can be seen in Chart 2.3, correlating with the decrease in real estate proposals shown in Chart 2.1.

Chart 2.3: Total approvals by value 2006-07 to 2009-10 — number of proposals

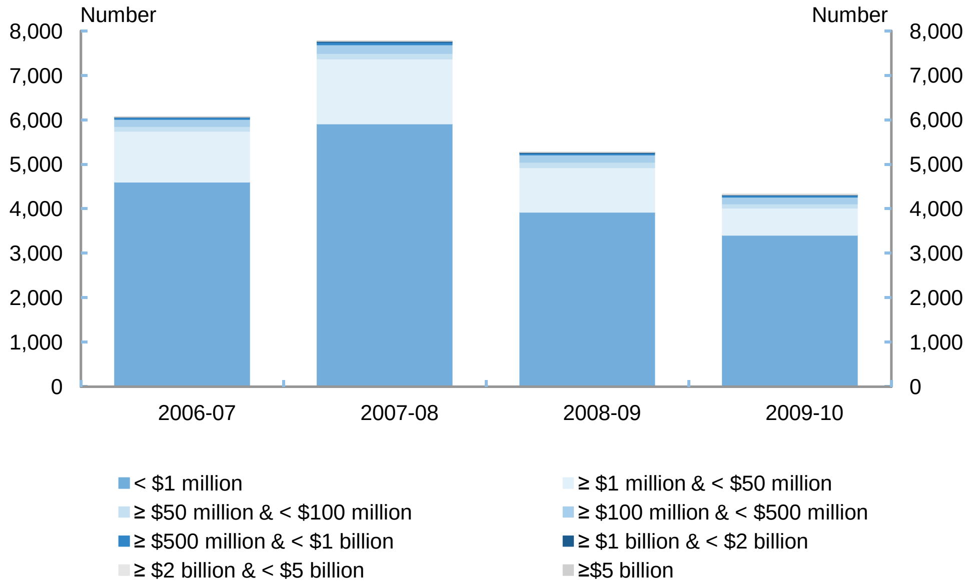
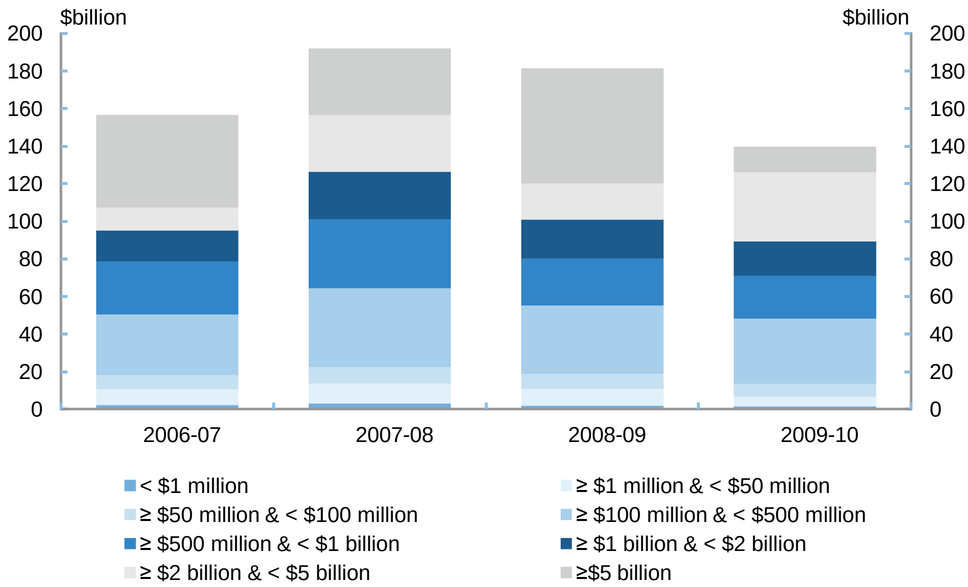


Chart 2.4: Total approvals by value 2006-07 to 2009-10 — proposed investment



Approvals by sector

Table 2.4 lists applications approved in 2009-10 by industry sector. Chart 2.5 depicts the sectoral distribution of approved proposed investment in 2009-10. Corporate reorganisations are excluded. 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 on vacant land. Bearing in mind the limitations of the Board's data, the figures show that, during 2009-10:

- There was a decrease in the value of investment in all sectors in 2009-10 when compared to 2008-09. Most sectors saw a decrease in both the number of investment proposals and the total value of investment, which is to be expected given the raising of the screening threshold and changes to the real estate policy;

- Mineral exploration and development was the largest industry sector by value of approvals, with approvals totalling $80.9 billion ($90.6 billion in 2008-09). While the value of investments in this sector decreased by 11 per cent from the previous year, the total number of investment proposals increased from 164 to 248. Therefore, there was a higher volume of lower value investments in this sector this year compared to 2008-09; and

- Other significant sectors by value of proposed investment were: real estate, with approved investment of $20.0 billion ($23.4 billion in 2008-09); manufacturing, with approved investment of $16.2 billion ($19.1 billion in 2008-09); and services, with approved investment of $14.0 billion ($31.7 billion in 2008 09).

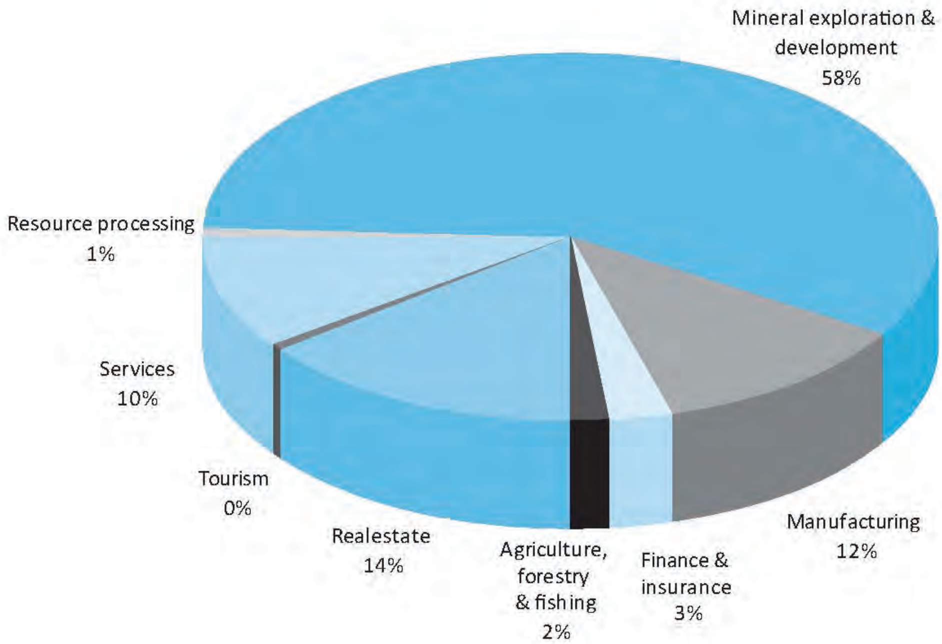
Table 2.4: Total approvals by industry sector in 2009-10

Industry	Number of approvals	Acquisition cost $b	Development expenditure $b	Proposed investment $b
Agriculture, forestry & fishing	17	2.33	-	2.33
Finance & insurance	33	4.20	-	4.20
Manufacturing	46	16.25	-	16.25
Mineral exploration & development	248	80.92	-	80.92
Resource processing	5	0.33	0.75	1.08
Services	69	13.99	0.00	14.00
Tourism	8	0.71	-	0.71
Real estate(a)	3,897	18.67	1.34	20.01
Total	**4,323**	**137.41**	**2.09**	**139.50**

(a) Proposed investment in the real estate sector 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 on page 28.

Note: Totals may not add due to rounding.
'-' indicates a figure of zero.
Excludes corporate reorganisations (78 in 2009-10).

Chart 2.5: Total approvals by value by industry sector in 2009-10 — proposed investment



Note: Totals may not add due to rounding.

Agriculture, forestry and fishing

Proposed investment in the agriculture, forestry and fishing sector decreased by value in 2009-10, while the number of proposals increased. Seventeen proposals were approved with a total value of $2.3 billion, compared with twelve approvals in 2008-09 with a total value of $2.8 billion. Of these approvals, eight involved total investment of $100 million or more.

Finance and insurance

During 2009-10, 33 proposals were approved in the finance and insurance sector with proposed investment of $4.2 billion, compared with 60 proposals and $10.9 billion in 2008-09. There were 11 proposals approved which involved investment of $100 million or more (23 in 2008-09), of which one involved proposed investment of $1 billion or more. The decrease in the number and value of proposals in the finance and insurance sector can be partly attributed to a higher than trend number of transactions during the global financial crisis in 2008-09 where banks and insurance companies globally sought to recapitalise.

As discussed on page 17, the proposed acquisition costs and development expenditure (and therefore the total investment value) are not recorded in the FIRB data base (FIMS) for proposals such as financing arrangements where there is not expected to be an investment flow into Australia.

Manufacturing

The manufacturing sector saw a decrease in the number and value of proposals approved in 2009-10. There were 46 proposals (12 per cent less than the 52 proposals in 2008-09) and proposed investment of $16.2 billion (15 per cent less than the $19.1 billion in 2008-09). Eighteen proposals involved total investment of $100 million or more in 2009-10. Four proposals involved total investment of $1 billion or more.

Table 2.5: Manufacturing sector approvals in 2009-10

Industry	Number of approvals	Acquisition cost $b	Development expenditure $b	Proposed investment $b
Chemical, petroleum & coal products	2	2.88	-	2.88
Electricity & gas	17	2.55	-	2.55
Food, beverages & tobacco	8	2.82	-	2.82
Water sewerage and drainage	5	5.13	-	5.13
Transport equipment	7	0.21	-	0.21
Machinery & equipment	2	0.55	-	0.55
Other(a)	5	2.12	-	2.12
Total	**46**	**16.25**	**-**	**16.25**

(a) Comprises: miscellaneous manufacturing; water, sewerage and drainage; paper and paper products; and textiles.

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 by 11 per cent, from $90.6 billion in 2008-09 to $80.9 billion in 2009-10. However, a total of 248 proposals were approved compared with 164 in 2008-09, representing an increase of 51 per cent. There were 92 proposals involving total investment of $100 million or more, including 18 for $1 billion or more (compared with 15 for $1 billion or more in 2008-09). These 18 proposals accounted for a combined proposed investment of $51.4 billion (64 per cent of the proposed investment in this sector).

Table 2.6: Mineral exploration and development sector approvals: 2006-07 to 2009-10

	2006-07		2007-08		2008-09		2009-10	
Industry	No.	$b	No.	$b	No.	$b	No.	$b
Metallic minerals								
- Bauxite	-	-	3	12.38	4	0.60	4	2.92
- Copper-gold	37	2.84	24	11.26	25	8.05	51	23.21
- Iron ore	13	1.17	25	8.89	30	27.19	42	23.02
- Nickel	5	5.27	10	3.05	9	0.40	13	1.72
- Uranium	12	1.75	8	1.26	15	1.68	18	4.93
- Zinc-lead-silver	3	0.19	6	5.56	5	0.19	9	0.17
- Other	9	1.19	12	3.45	12	0.38	10	0.38
Coal	35	5.67	39	11.47	33	15.69	60	17.14
Oil & gas	15	13.24	31	4.52	23	35.08	29	6.76
Other(a)	12	0.96	15	2.45	8	1.36	12	0.68
Total	**141**	**32.28**	**173**	**64.27**	**164**	**90.62**	**248**	**80.92**

(a) Comprises: services to mining and exploration; and non-metallic minerals.
Note: Totals may not add due to rounding.
'-' indicates a figure of zero.

Resource processing

There was a decrease in proposed foreign investment in the resource processing sector, with five approvals in 2009-10, compared to ten in 2008-09. Total proposed investment was $1.1 billion ($1.8 billion in 2008-09).

Services

Proposed investment by number of proposals and value in the services sector decreased in 2009-10. The number of proposed investments declined by 48 per cent, from 132 in 2008-09 to 69 in 2009-10. Similarly, the value of the proposed investments in services declined by 56 percent, from $31.7 billion in 2008-09 to $14 billion in 2009-10. There were 31 proposals involving proposed investment of $100 million or more, including three of $1 billion or more.

Table 2.7: Services (excluding Tourism) sector approvals: 2006-07 to 2009-10

	2006-07		2007-08		2008-09		2009-10	
Industry	No.	$b	No.	$b	No.	$b	No.	$b
Construction	12	2.30	13	12.53	14	1.67	12	1.67
Communications	27	9.19	24	5.43	25	9.45	12	2.91
Health	15	6.55	14	6.14	11	1.47	4	0.65
Property & business services	16	1.83	13	2.92	20	2.67	5	0.52
Trade(a)	13	1.74	16	2.35	9	0.44	5	0.92
Transport(b)	23	6.31	15	5.14	43	14.64	23	5.08
Other(c)	10	1.01	14	1.22	10	1.33	8	2.25
Total	**116**	**28.93**	**109**	**35.72**	**132**	**31.67**	**69**	**14.00**

(a) Comprises retail and wholesale trade.
(b) Comprises: air transport; rail transport; road transport; water transport; and services to transport.
(c) Comprises: education, museum and library services; storage; entertainment and recreational services; defence; personal services; and other community services.
Note: Totals may not add due to rounding.
'-' indicates a figure of zero.

Tourism

Total proposed foreign investment in the tourism sector declined by 33 per cent in 2009-10, to $0.71 billion, from $1.06 billion in 2008-09. Three proposals involved proposed investment of $100 million or more (five in 2008-09).

Real estate

Changes to foreign investment policy — residential real estate

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

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 seeking to purchase an existing property in Australia have been brought within the FIRB notification, screening and approval process. Temporary residents are also required to sell established properties when they depart Australia and foreign non-residents are required to develop vacant land within 24 months of purchase.

8 Press release from the former Assistant Treasurer, the Senator Nick Sherry, 24 April 2010.

The implementation of these changes to the administration of residential real estate screening means that comparisons of data from 2010 for this category with data for previous years are affected by these policy changes.

Further information relating to these changes can be found on the FIRB website at www.firb.gov.au.

Proposals in real estate in 2009-10

The total number of approvals in the real estate sector decreased from 4,827 in 2008-09 to 4,323 in 2009-10, or by 10 per cent. Total proposed investment in real estate decreased from $23.4 billion in 2008-09 to $20.0 billion in 2009-10.

Changes in reported proposals were affected by changes to the administrative arrangements for residential property and do not give a comparable view of investment activity in this sector. Acquisitions of residential real estate decreased from $14.9 billion in 2008-09 to $8.8 billion in 2009-10. The number of residential real estate approvals decreased from 4,715 to 3,723 in 2009-10. The value of acquisitions of commercial real estate increased from $8.5 billion in 2008-09 to $11.2 billion in 2009-10. (This category is not affected by the change in policy on 24 April 2010). Of the increase in commercial real estate proposals, $2.0 billion was for existing commercial property, which increased from $5.2 billion in 2008-09 to $7.1 billion in 2009-10. There was also an increase in the value of approvals for annual program acquisitions from $1.6 billion in 2008-09 to $3.3 billion in 2009-10.

Residential real estate

Developed

During 2009-10, 654 proposals were approved for the acquisition of **developed residential** real estate, a 73 per cent reduction from the 2,457 that were approved in 2008-09. This was due to the changes in administration of residential real estate screening in April 2009 and April 2010. For the initial three quarters of 2009-10 there was no requirement for FIRB notification for temporary residents who intended to acquire residential real estate. However, the requirement for notification was reintroduced in April 2010.

The category of developed residential real estate consists primarily of temporary residents in Australia acquiring existing residential property as their principal place of residence.[9] Proposed investment approved totalled $1.4 billion, a 45 per cent decline from the $2.5 billion in 2008-09. Much of this decline in value can be attributed to

9 Also includes a small number of approvals relating to foreign companies acquiring existing residential property for company employees to reside in.

changes in notification requirements for temporary residents, with the value of proposed investment decreasing from $1.8 billion in 2008-09 to $0.8 billion in 2009-10. Therefore, temporary residents account for 90 per cent of the decline in value in this category.

Table 2.8: Investment in residential real estate by type of expenditure and number of proposals approved from 2006-07 to 2009-10

	2006-07		2007-08		2008-09		2009-10	
	No.	$b	No.	$b	No.	$b	No.	$b
Residential								
Developed								
- existing residential property	2,986	2.21	4,015	2.97	2,450	1.81	647	0.81
- annual programs	5	0.13	13	0.44	7	0.68	7	0.56
Sub-total 'Developed'	*2,991*	*2.34*	*4,028*	*3.41*	*2,457*	*2.49*	*654*	*1.38*
For development								
- vacant land	1,378	2.87	1,667	3.93	988	2.72	1,010	1.44
- new dwellings								
- individual purchases	838	0.48	1,043	0.66	954	0.60	1,937	1.20
- developer 'off-the-plan'	238	5.81	324	9.49	235	5.48	22	2.30
Sub-total 'new dwellings'	*1,076*	*6.29*	*1,367*	*10.15*	*1,189*	*6.08*	*1,959*	*3.50*
- redevelopment	59	0.37	103	1.61	73	1.06	92	0.34
- annual programs	10	1.63	6	1.34	8	2.58	8	2.11
Sub-total 'For development	*2,523*	*11.15*	*3,143*	*17.02*	*2,258*	*12.43*	*3,069*	*7.39*
Total residential	**5,514**	**13.49**	**7,171**	**20.43**	**4,715**	**14.92**	**3,723**	**8.77**

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

For development

In 2009-10, 3,069 proposals were approved for acquisitions of **residential real estate for development** (including eligible redevelopment), which represented a 36 per cent increase on the 2,258 approvals in 2008-09.[10] However, the value of proposed investment in this category decreased by 41 per cent to $7.4 billion ($12.4 billion in 2008-09). This was due to changes in developer advance 'off-the-plan' approvals for new dwellings as developments containing less than 100 properties were no longer eligible. There was a corresponding increase over the same period in the number of individual new dwelling applications.

The *vacant land* category consists primarily of individual blocks of land purchased for single dwelling construction. It also includes broadacre land for residential subdivision and multiple-dwelling residential developments (such as townhouses and units). In

10 The acquisitions of house and land packages, where construction has not commenced, are treated as vacant land for development rather than falling within the new dwellings category.

2009-10, 1,010 vacant land proposals were approved (a 2 per cent increase on the 988 proposals in 2008-09).

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. If a developer is given approval, individuals need not apply for approval. There are no restrictions on the number of off-the-plan dwellings in a new development which may be sold to foreign persons, provided that the developer markets the dwellings locally as well as overseas (that is, the dwellings cannot be marketed exclusively overseas).

With advance off-the-plan approvals for developers, the Board's 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.

In 2009-10, 1,937 new dwelling proposals from individuals were approved, involving acquisition costs of $1.2 billion (compared with 954 proposals and $0.6 billion in 2008-09). There were 22 advance off-the-plan approvals to developers covering sales in new multi-unit residential developments (compared with 235 in 2008-09). This corresponded to a reduction in approval value of 58 per cent, down from $5.5 billion in 2008-09 to $2.3 billion in 2009-10.

Developed property for *redevelopment* involves the acquisition of existing property for the purpose of demolition and construction of new residential dwellings. The number of redevelopment proposals increased by 26 per cent with 92 approvals in 2009-10 (compared with 73 in 2008-09). The proposed investment associated with these approvals was $0.3 billion in 2009-10 ($1.1 billion in 2008-09).

Commercial real estate

Developed

In 2009-10, there were 113 approvals to purchase **developed commercial** real estate (for example, shopping centres, office buildings and warehouses), an increase from the 71 approvals in 2008-09. The associated proposed investment was $8.6 billion which is an increase from the $5.8 billion proposed investment in 2008-09. This data reports only part of the total foreign investment that would have occurred in commercial real estate as some acquisitions, including of non-vacant, non-heritage listed commercial property valued below $50 million are exempt.

For development

During 2009-10, there were 61 approvals to purchase **commercial land for development**, compared with 42 approvals in 2008-09. These approvals involved proposed investment of $2.6 billion, which represented a 5 per cent reduction on the $2.8 billion total proposed investment reported for 2008-09.

There were no rejections of proposed acquisitions of developed commercial property or commercial real estate for development by foreign persons in 2009-10 (none in 2008-09).

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.

In 2009-10, a total of 31 annual programs were approved with proposed investment of $6.0 billion, compared with 19 annual programs and proposed investment of $4.9 billion in 2008-09. The increase of $1.1 billion on the 2008-09 proposed investment was accountable by: an increase of $0.9 billion for developed commercial property, an increase of $0.8 billion for commercial land for development and a decrease in the value of annual programs in the residential sector of $0.6 billion.

During 2009-10, seven annual program approvals involved acquisitions of developed residential real estate with proposed investment of $0.6 billion (seven approvals to the value of $0.7 billion in 2008-09). Such approvals generally involve foreign mining companies acquiring housing for employees in rural areas. Eight approvals were made for the purchase of vacant residential real estate for development (eight in 2008-09) involving proposed total investment of $2.1 billion, representing a decrease from the $2.6 billion in 2008-09.

Table 2.9: Investment in commercial real estate by type of expenditure and number of proposals approved from 2006-07 to 2009-10

	2006-0		2007-08		2008-09		2009-10	
	No.	$b	No.	$b	No.	$b	No.	$b
Developed								
- existing commercial property	46	3.35	85	13.78	70	5.2	107	7.11
- annual programs	4	1.23	5	2.73	1	0.60	6	1.51
Sub-total 'Developed'	50	4.58	90	16.51	71	5.75	113	8.62
For development								
- vacant commercial property	39	2.58	86	6.71	39	1.73	51	0.79
- annual programs	9	0.74	7	1.85	3	1.02	10	1.83
Sub-total 'For development'	48	3.32	93	8.56	42	2.75	61	2.62
Total commercial	98	7.90	183	25.07	113	8.50	174	11.24

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 investment. During 2009-10, New South Wales was the main location of proposed real estate investment with 28 per cent of the total amount approved (compared with 17 per cent in 2008-09), followed by Victoria and Queensland which accounted for approximately 14 per cent and 9 per cent respectively (compared with 15 per cent and 24 per cent in 2008-09).

Table 2.10: State distribution of proposed investment in real estate in 2009-10

		Residential		Commercial		
	Number of	Developed	For development	Developed	For development	Total
Location	approvals	$b	$b	$b	$b	$b
Various(a)	69	0.52	2.02	3.82	1.83	8.19
NSW	910	0.21	1.74	3.35	0.33	5.63
VIC	1,801	0.24	2.19	0.18	0.12	2.73
QLD	548	0.21	0.96	0.29	0.30	1.76
WA	368	0.15	0.43	0.59	0.04	1.21
ACT	31	0.01	0.01	0.31	-	0.32
SA	139	0.03	0.03	0.09	-	0.15
TAS	21	-	0.01	-	-	0.01
NT	10	-	-	-	-	0.01
Total	**3,897**	**1.38**	**7.39**	**8.62**	**2.62**	**20.01**

(a) Comprises approved proposals where the 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 to less than $5 million.

Approvals by country of investor

Proposed investment in 2009-10 by selected country, disaggregated by sector, is shown in Table 2.11. The US was again the largest source of proposed foreign investment in Australia. The other major sources of foreign investment were the United Kingdom (UK), China, Japan, and Switzerland.

Approved investment from the US fell by 1 per cent from $39.6 billion in 2008-09 to $39.1 billion in 2009-10. Proposed investment was primarily in the mineral exploration and development sector, accounting for 64 per cent of total US investment. The US was also the leading nationality for foreign investment in the services sector, accounting for 48 per cent of investment in that sector.

The UK was Australia's second largest investor in 2009-10 with $28.6 billion. Investment in the mineral exploration and development sector accounted for $22.2 billion, representing 77 per cent of total UK investment in Australia.

China was the third largest investor in 2009-10 with total proposed investment of $16.3 billion. The majority of this proposed investment was in the mineral exploration and development sector, accounting for $12.2 billion and representing 75 per cent of that country's proposed investment.

Japan was the fourth largest investor in 2009-10, with $6.0 billion. Of this proposed investment, $2.0 billion or 33 per cent was in the mineral exploration and development sector. Japan was the leading source of foreign investment in manufacturing in 2009-10, with proposed investment accounting for 19 per cent of total proposed investment from all sources in this sector and 52 per cent of Japan's total proposed investment.

Table 2.11: Approvals by country of investor in 2009-10 — industry sector

Country (a)	Number of approvals(f)	Agriculture forestry & fishing $m	Finance & insurance $m	Manufacturing $m	Mineral exploration & development $m	Real estate $m	Resource processing $m	Services $m	Tourism $m	Total $m
US	142	659	732	2,350	24,985	3,369	218	6,753	11	39,077
UK	410	322	650	574	22,172	2,264	105	2,358	200	28,644
China(b)	1,766	-	-	198	12,186	2,421	760	717	-	16,282
Japan	72	150	350	3,149	2,011	368	-	-	-	6,028
Switzerland	37	-	1,288	2,020	1,115	497	-	966	-	5,885
NZ	24	95	-	380	5,073	45	-	238	-	5,831
Canada	52	-	-	-	4,453	375	-	941	-	5,769
Netherlands	37	1	-	183	2,598	936	-	55	-	3,772
Germany	74	1	307	1,619	75	1,247	-	491	-	3,739
Singapore	320	228	330	19	193	2,113	-	169	440	3,491
Sth Korea	49	-	-	-	1,730	1,165	-	-	-	2,896
Hong Kong	47	35	-	500	718	404	-	110	-	1,768
India	86	-	-	-	1,443	53	-	-	63	1,559
Malaysia	524	499	-	168	-	612	-	79	-	1,358
Brazil	8	-	-	-	1,264	3	-	-	-	1,267
Other(c)	234	292	82	80	35	287	-	-	-	776
South Africa	149	-	-	-	39	497	-	161	-	697
France	54	-	149	-	242	34	-	30	-	456
Other ASEAN	222	-	-	29	298	123	-	-	-	449
Sweden	9	-	-	-	-	397	-	-	-	397
Other EU	69	-	-	36	178	49	-	6	-	270
United Arab Emirates	6	45	-	-	-	11	-	205	-	261
Not allocated(d)	22	-	-	-	-	2,300	-	-	-	2,300
Sub-total	*4,413*	*2,326*	*3,888*	*11,305*	*80,808*	*19,571*	*1,083*	*13,277*	*714*	*132,971*
Australia(e)	78	-	315	4,942	115	439	-	720	-	6,532
Total	**4,491**	**2,326**	**4,203**	**16,247**	**80,922**	**20,011**	**1,083**	**13,998**	**714**	**139,503**

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 excluding Australia.

(d) The investment identified as unallocated includes investments in commercial real estate by property trusts which have a range of foreign investors including pension funds, superannuation funds, and equity funds.

(e) Comprises proposals where the investment is from more than one country, such as in joint venture arrangements.

(f) 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.

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 December 2010. The FATA and the *Foreign Acquisitions and Takeovers Regulations 1989* (the Regulations) provide legislative support for the Government's foreign investment policy. A copy of the FATA, the Regulations and a summary of the policy 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;[12] or

- acquire an interest in Australian urban land.[13]

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.

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 The thresholds were increased in September 2009 following a review of all thresholds. US investors are subject to different thresholds. The thresholds are indexed annually.

13 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 Government's foreign investment policy statements set out guidelines on national interest matters in relation to foreign acquisitions. Ordinarily a proposal that does not meet the requirements set out in 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).

2010 legislative amendments

The FATA was amended in 2010 to ensure that the Treasurer has the capacity to examine all substantial investment proposals that involve complex financing arrangements that could potentially raise national interest concerns. The amendments received Royal Assent on 12 February 2010.

The use of innovative and increasingly complex financing arrangements has been a growing feature of investment activity over recent years. While these types of investment arrangements may have a solid commercial basis, they can have the effect of delivering influence or control over Australian companies through a variety of ways that were not envisaged when the FATA was formulated.

The Amendments clarify the operation of the FATA by requiring foreign investors explicitly to notify the Treasurer where there is a possibility that the type of arrangement being used will deliver influence or control over an Australian company, either currently or at some time in the future. The Amendments clarify the definition of substantial interest by expanding the definition of voting power so that it covers the number of votes that could be cast if it is assumed that a future right is exercised, and by clarifying the section of the Act dealing with interests in shares.

The Regulations were also amended to coincide with the amendments to the FATA. The Regulations ensure that Australian companies are not inadvertently treated as foreign companies under the FATA by virtue of the expanded definition of substantial interest.

The changes to the Act and the Regulations applied retrospectively from 12 February 2009. This is the date that the Treasurer announced the Amendments.

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 or the policy, but which are not subject to compulsory notification under the FATA. These include offshore acquisition of interests, acquisitions of business assets, acquisitions of shares in prescribed Australian corporations that are less than a substantial shareholding, and investments by a sovereign government or a government-related entity.

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. 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*.

Other aspects of foreign investment policy

Foreign investment in Australian residential real estate

It is the Government's policy that foreign investment in residential real estate should increase Australia's housing stock. All applications are considered in light of this overarching principle.

Residential real estate means all land and housing that is not commercial property or rural land. In that regard, vacant land that can be used for residential purposes, 'hobby farms' and 'rural residential' blocks are residential real estate.

Temporary Residents

Established (second-hand) dwellings

Temporary residents need to apply if they wish to buy an established dwelling. Only one established dwelling may be purchased by a temporary resident and it must be used as their residence in Australia. Such proposals are normally approved subject to conditions (such as, that the temporary resident sells the property when it ceases to be their residence).

Temporary residents cannot buy established dwellings as investment properties.

New dwellings

Temporary residents need to apply to buy new dwellings in Australia. Such proposals are normally approved without conditions.

Vacant land

Temporary residents need to apply to buy vacant land for residential development. These are normally approved subject to conditions (such as, that construction begins within 24 months).

All Other Foreign Persons

Established (second-hand) dwellings

Non-resident foreign persons cannot buy established dwellings as investment properties or as homes, except as below.

Companies that are foreign persons need to apply to buy established dwellings to house their Australian-based staff. Such proposals are normally approved subject to the company undertaking to sell or rent the property if it is expected to remain vacant for six months or more.

Non-resident foreign persons need to apply to buy established dwellings for redevelopment (that is, to demolish the existing dwelling and build new dwellings). Proposals for redevelopment 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.

New dwellings

Non-resident foreign persons need to apply to buy new dwellings in Australia. Such proposals are normally approved without conditions.

Vacant land

Non-resident foreign persons need to apply to buy vacant land for residential development. These are normally approved subject to conditions (such as, that construction begins within 24 months).

Chapter 4

Australia’s international investment position

Australia's international investment position

Introduction

One of the Government's principal policy objectives is to generate and capture benefits for the Australian community through international trade and investment liberalisation. This is pursued through a multifaceted policy involving complementary multilateral, regional and bilateral engagement.

The Treasury's Foreign Investment and Trade Policy Division (the Division) is responsible for ensuring effective representation of Australia's Foreign Investment Policy (the policy) and negotiating positions on international investment issues. This work includes: multilateral forums, such as the Organisation for Economic Co-operation and Development (OECD) and the World Trade Organization (WTO); regional forums, such as Asia-Pacific Economic Cooperation (APEC); and bilateral mechanisms, such as free trade agreements (FTAs) and investment protection and promotion agreements (IPPAs).

The Division also supports the Executive Member of the Board in his role as the Australian National Contact Point (the ANCP) for the *OECD Guidelines for Multinational Enterprises* (the OECD Guidelines) and related corporate social responsibility issues. The role of the ANCP is to ensure the effective promotion and implementation of the OECD Guidelines in Australia.

Over the past two decades, growth in worldwide flows of foreign direct investment (FDI) has been particularly strong. This growth in FDI largely reflects the worldwide relaxation of trade and investment controls, together with advancements in information technologies, communications and transport, and the emergence of global production chains. The global financial crisis has impacted adversely on global capital flows. According to OECD data, member countries' outflows of FDI fell by 25 per cent while inflows fell by 26 per cent in 2009-10. This OECD data shows that FDI inflows into Australia fell by 27 per cent while outflows from Australia fell by 40 per cent in 2009-10.

Australia has traditionally relied on inward FDI to meet the shortfall between domestic saving and the level of domestic investment. Foreign investment supplements local savings, thereby supporting higher rates of economic growth and employment levels which in turn improve the wellbeing of the Australian people. Inward FDI also continues to play a significant role in making Australian industry internationally competitive, and thereby contributing to export growth, facilitating access to new technologies, financing new and often risky innovations, and providing opportunities for global integration and networking.

Outward FDI enables Australian firms to expand their business beyond the potential constraints imposed by the limited size of the domestic market. By extending their market presence and access to resources, expertise and technology in other markets, Australian firms are able to become more efficient and competitive in global markets. Outward FDI also has a multiplier effect through stimulating the demand for goods and services provided by component and other input suppliers.

Australia's international investment position

This section summarises trends in foreign investment in Australia and Australian investment abroad using Australian Bureau of Statistics (ABS) data.[14] Foreign investment in Australia refers to the stock of financial assets in Australia owned by non-residents and financial transactions that increase or decrease this stock. Conversely, Australian investment abroad refers to the stock of foreign financial assets owned by Australian residents and financial transactions that increase or decrease that stock.

ABS data on Australia's international investment position is compiled in accordance with the relevant international statistical standards promulgated by the OECD and the International Monetary Fund. This data is a measure of the actual cross-border transactions and the level of foreign investment held at a particular time. By contrast, FIRB statistics relate to proposals submitted for approval, regardless of the source of finance or whether proposals were actually implemented. These differences are explained in Chapter 2.

Foreign investment levels[15]

According to ABS statistics[16], the stock of foreign investment in Australia at the end of June 2010 was $1,960.8 billion. This represents an increase of $168.4 billion over the level at the end of June 2009.

At the same time, the stock of Australian investment abroad was $1,193.7 billion. This represents an increase of $105.0 billion over the stock at the end of June 2009.

Foreign direct investment levels by country

Chart 4.1 depicts recent trends in FDI levels between Australia and five of its most important FDI partners: the US, the United Kingdom (UK), Japan, New Zealand and the European Union (EU) (other than the UK). The latest ABS data on foreign direct investment levels by country is for 2009.

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14 As ABS data is subject to periodic revision, data included in the current report may differ from that published for the same period in previous reports.

15 Prior to 2005-06, foreign investment levels were reported on a calendar year basis.

16 Source: ABS cat. no. 5302.0 Balance of Payments and International Investment Position, Australia, June Quarter 2010.

The US is Australia's single largest source of inward FDI and the most important destination for Australian FDI abroad. At the end of 2009, $99 billion or approximately 23 per cent of the level of FDI in Australia originated from the US. The level of Australian direct investment in the US was $100 billion at the end of 2009 or 29 per cent of the level of Australian outward direct investment. However, direct investment to the US had fallen significantly from the level at the end of 2008 ($136 billion).

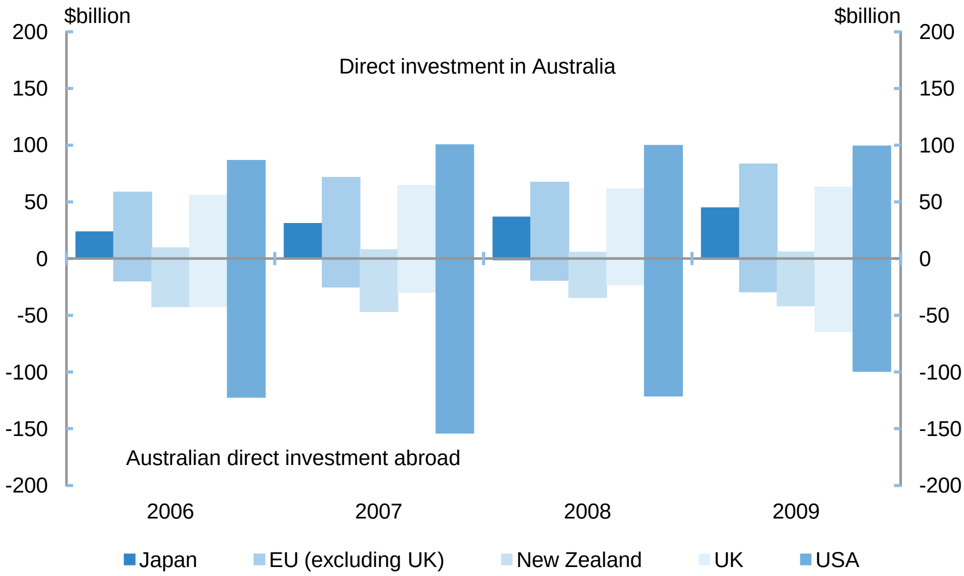
The UK has traditionally been Australia's other major source of FDI. At the end of 2009, $63 billion, or approximately 14 per cent, of the level of FDI in Australia originated from the UK. The level of Australian direct investment in the UK was $64 billion at the end of 2009, a significant increase on the $25 billion at the end of 2008.

The level of Japanese FDI in Australia at the end of 2009 was $45 billion, up from $37 billion at the end of 2008. However, Australian FDI in Japan remains at a very low level.

The level of Australian direct investment in New Zealand at the end of 2009 was $42 billion. New Zealand direct investment in Australia was $6 billion at the end of 2009.

The level of EU (excluding the UK) direct investment in the Australian economy grew to $83 billion by the end of 2009. Australian direct investment in the EU (excluding the UK) was $29 billion at the end of 2009.

Chart 4.1: Level of foreign direct investment by country



Source: ABS cat. no. 5352.0 International Investment Position, Australia: Supplementary Statistics, Calendar year 2009.

Foreign investment flows

Foreign investment transactions involve changes in the levels of Australian foreign assets and liabilities (including the creation or extinction of foreign assets and liabilities). A current account deficit is balanced by a surplus on the capital and financial account, after allowing for errors and omissions. The balance on the financial account represents net financial transactions with the rest of the world, that is, the inflow of foreign investment into Australia, minus the outflow of Australian investment abroad.

International investment flows and stocks are divided into direct, portfolio, financial derivatives, other investment, and reserve assets. Under the international standards used to compile ABS foreign investment statistics, direct investment represents capital invested in an enterprise by an investor in another country which gives the investor a 'significant influence' (either potentially or actually exercised) over the key policies of the enterprise. Ownership of 10 per cent or more of the ordinary shares or voting stock of an enterprise is considered, under the ABS framework, to indicate significant influence by an investor. Portfolio investment is cross-border investment in equity and debt securities other than direct investment. Financial derivatives are linked to a specific financial instrument or indicator, or to a particular commodity. Other investment is a residual group that comprises many different kinds of investment. Reserve assets are those external financial assets available to, and controlled by, the Reserve Bank of Australia or the Treasury for use in financing payment imbalances or intervention in foreign exchange markets.

Table 4.1 provides a breakdown of the flow of foreign investment over the past five years measured by ABS statistics. In 2009-10, the inflow of foreign investment into Australia was $141.9 billion. The outflow of Australian investment abroad was $87.4 billion.

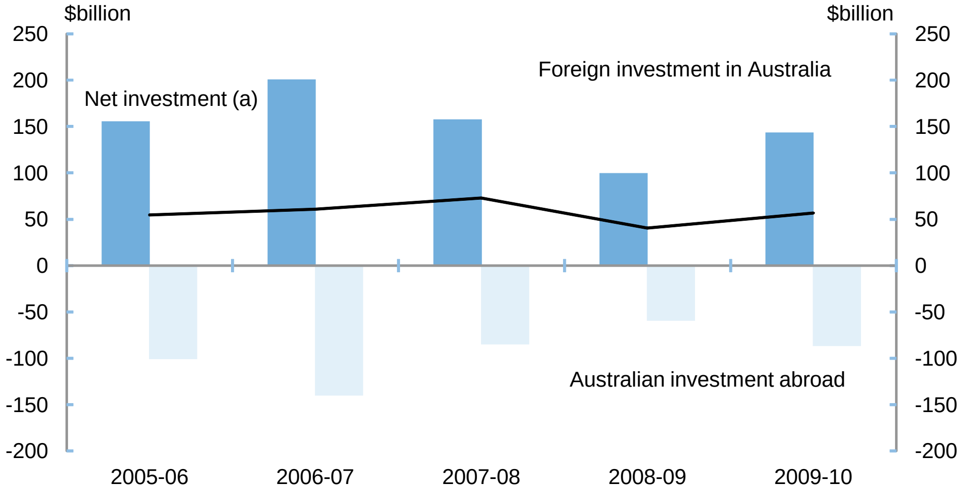
Table 4.1: Foreign investment flows 2005-06 to 2009-10

	2005-06	2006-07	2007-08	2008-09	2009-10
	$b	$b	$b	$b	$b
Australian investment abroad(a)					
Direct investment					
Equity and reinvested earnings	-27.4	-19.6	-20.9	-21.7	-10.8
Other capital	-2.3	-14.8	-6.4	-8.8	-6.1
Portfolio investment					
Equity	-26.5	-37.6	-41.3	4.2	-45.5
Debt	-33.5	-39.0	-24.1	-0.1	-47.2
Derivatives	13.0	12.7	-4.4	30.7	37.7
Other investment(b)	-18.2	-21.1	-31.8	-51.4	-21.5
Reserve assets	-5.6	-20.1	44.3	-11.9	5.9
Total Australian investment abroad	*-100.5*	*-139.6*	*-84.6*	*-59.1*	*-87.4*
Foreign investment in Australia(a)					
Direct investment					
Equity and reinvested earnings	16.8	24.4	35.7	39.6	33.7
Other capital	7.3	21.5	20.7	8.5	0.6
Portfolio investment					
Equity	18.4	32.8	3.6	45.6	13.4
Debt	106.6	110.2	57.8	-0.4	145.7
Derivatives	-16.5	-10.7	-2.7	-34.4	-43.6
Other investment(b)	22.7	22.2	42.3	40.6	-7.9
Total foreign investment in Australia	*155.1*	*200.4*	*157.4*	*99.6*	*141.9*
Net foreign investment	**54.6**	**60.9**	**72.8**	**40.5**	**54.5**

(a) In keeping with balance of payment conventions, credit entries are shown without sign and debit items are shown as negative entries. Thus, investment flows going from Australia to offshore destinations are shown as a negative.
(b) Other investment includes all other investment.
Note: Figures may not add due to rounding.
Source: ABS cat. no. 5302.0 Balance of Payments and International Investment Position, Australia, June Quarter 2010.

Chart 4.2 summarises major trends in foreign investment flows using the data in Table 4.1. It indicates that Australia remains a net importer of capital.

Chart 4.2: Foreign investment flows 2005-06 to 2009-10



(a) The net foreign investment figure has been derived from determining the difference between foreign investment in Australia and Australian investment abroad.

Source: ABS cat. no. 5302.0 Balance of Payments and International Investment Position, Australia, June Quarter 2010.

Appendix A

Media releases and speeches

Media releases and speeches

1. Statement by the Deputy Prime Minister and Treasurer, the Hon Wayne Swan MP — Foreign Investment Decision — Minmetals Resources Limited acquisition of Album Resources Private Limited — 19 December 2010.

2. Speech by the Assistant Treasurer and Minister for Financial Services and Superannuation, the Hon Bill Shorten MP — Oceania China Future Forum, Sydney — 7 December 2010.

3. Statement by the Deputy Prime Minister and Treasurer, the Hon Wayne Swan MP — Foreign Investment Decision — Wilmar International Limited acquisition of Sucrogen Limited from CSR Limited — 8 November 2010.

4. Statement by the Deputy Prime Minister and Treasurer, the Hon Wayne Swan MP — Government Welcomes Multi Billion Dollar Coal Seam Gas Investment — 31 October 2010.

5. Statement by the Deputy Prime Minister and Treasurer, the Hon Wayne Swan MP — Foreign Investment Review Board Appointment — 15 July 2010.

6. Statement by the Deputy Prime Minister and Treasurer, the Hon Wayne Swan MP — Foreign Investment Decision — Taifeng Yuanchuang International Development Co Ltd acquisition of up to 19.9 per cent of IMX Resources Limited and 49 per cent of Outback Iron Pty Ltd — 9 July 2010.

7. Speech by the former Assistant Treasurer, Senator the Hon Nick Sherry — International Forum of Sovereign Wealth Funds, Sydney — 6 May 2010.

8. Speech by the former Assistant Treasurer, Senator the Hon Nick Sherry — Australia, Qatar and the Future of Islamic Finance — Qatar Chamber of Commerce and Industry, Qatar — 27 April 2010.

9. Statement by the former Assistant Treasurer, Senator the Hon Nick Sherry — Government Tightens Foreign Investment Rules for Residential Housing — 24 April 2010.

10. Speech by the former Assistant Treasurer, Senator the Hon Nick Sherry — Asian Venture Capital Journal Private Equity and Venture Forum, Sydney — 4 March 2010.

11. Speech by the Treasurer, the Hon Wayne Swan MP — The Global Foundation, Brisbane — 10 December 2009.

12. Statement by the former Assistant Treasurer, Senator the Hon Nick Sherry — Foreign Investment Proposal — Yanzhou Coal Mining Company Limited acquisition of Felix Resources Limited — 23 October 2009.

13. Statement by the Treasurer, the Hon Wayne Swan MP — Foreign Investment Proposal — James Hardie Industries N.V. Corporate Restructure — 18 September 2009.

14. Speech by the Treasurer, the Hon Wayne Swan MP — Foreign Investment and the Long Road to Recovery — Thomson Reuters Newsmaker Series, Sydney — 4 August 2009.

15. Statement by the Treasurer, the Hon Wayne Swan MP — Reforming Australia's Foreign Investment Framework — 4 August 2009.