Australian Foreign Investment Law and Policy in the Asian Century

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Under Australia’s foreign investment review framework all foreign governments and their related entities should notify the federal government and gain approval before making a direct investment in Australia regardless of the value of that investment. Yet can Australia’s current policy settings be maintained in their current form given developments in global capital markets, in particular the rise of state capitalism. This paper sets out the Australian foreign investment legal and policy framework. It focuses closely on the national interest test and the manner in which it has been applied, with particular reference to the rising importance of China as a major trading partner. Focusing on empirical evidence of government decision-making under the Foreign Acquisitions and Takeover Act 1975 (Cth) and supporting policy documents, this paper makes recommendations for reform in three areas: (1) the national interest test and public opinion; (2) enhancing transparency and consistency; and (3) non-discrimination.

A. Introduction

Under Australia’s foreign investment review framework all foreign governments and their related entities should notify the federal government and gain approval before making a direct investment in Australia regardless of the value of that investment. Yet can Australia’s current policy settings be maintained in their current form given the pace and scale of change since the framework was first established in 1975? The economic and political reality for Australia is that its future economic well-being has become increasingly intertwined with Asia, especially China. The rising significance of investments by Sovereign Wealth Funds (SWFs) and State-Owned Enterprises (SOEs) from that jurisdiction, which together come under the banner of ‘state capital’ pose complex and unresolved questions of the interaction between corporate and political purpose. Moreover, they force reflection on what role government can or should play in limiting foreign investment into domestic capital markets? The purpose of this paper is to enquire whether, in a changing global landscape, the Australian legal and policy framework for deciding foreign investment proposals remains fit for purpose. The use of case study analysis has broader significance given the extent to which China is increasing its scale and range of foreign direct investment around the world. In the lead up to the Global Financial Crisis, Sovereign Wealth Fund investment strategies had become increasingly contentious. Australia went further, linking concern about potential hidden political motives to the investment strategies of SOEs, which further refined the policy environment. The extent to which this refinement reflects the national interest or the elevation of protectionism remains highly contested.

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This paper proceeds as follows. Part B sets out the Australian foreign investment legal and policy framework. It focuses closely on how the federal Treasurer can refuse to allow investments on the basis of a national interest test. Part C provides empirical evidence and analysis of government decision-making under the Foreign Acquisitions and Takeover Act 1975 (Cth) and supporting policy documents, with particular attention to high profile cases on the national interest, and the relevance of China as foreign investor. We make our regulatory recommendations in Part D, focusing on three main areas: (1) the national interest test and public opinion; (2) enhancing transparency and consistency; and (3) non-discrimination.

**B. The Australian Regime**

1. **Regime Overview**

The legal framework under which foreign companies can acquire Australian businesses and invest in Australian property is constituted by the Foreign Acquisitions and Takeover Act 1975 (Cth) (‘FATA’) and the Foreign Acquisitions and Takeovers Regulations 1989. Australia’s Foreign Investment Policy (‘AFIP’)

2 is the key policy document that guides interpretation and application of this legal framework.

The FATA has been in place for over 40 years. It was implemented at a time when “there was a huge backlash against Australia being sold off to the Japanese”, according to Mr Brian Wilson, Chair of the Foreign Investment Review Board (FIRB). Against this historical backdrop, the FATA empowers the federal Treasurer to examine proposals by foreign persons (including corporations and trustees) to acquire: (a) a “substantial interest” or a controlling interest in an Australian corporation over a certain value; or (b) an interest in Australian “urban land”. A substantial interest is defined in the legislation as comprising not less than 15 per cent of the voting power or holding not less than 15 per cent of issued shares in an Australian corporation. The current deal value is above AU$248 million; however, there is a much lower threshold for New Zealand and United States investors of $1078 million. Urban land comprises any land in Australia that is not being used for primary production (regardless of whether it is in fact in an urban area).

Ultimate responsibility for decision-making under FATA lies with the Treasurer. Under the FATA, a foreign person must give prior notification to the Treasurer of a proposal to acquire a substantial interest in an Australian corporation or any interest in Australian rural land. Once a review is triggered, chief consideration is given to whether the proposed acquisition or

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4 FATA, section 9.

5 Unless New Zealand or United States proposed investments are in “prescribed sensitive sectors”, namely: media; telecommunications; transport (including airports, port facilities, rail infrastructure, international and domestic aviation and shipping services provided within, or to and from, Australia); the supply of training or human resources, or the manufacture or supply of military goods or equipment or technology, to the Australian Defence Force or other defence forces; the manufacture or supply of goods, equipment or technology able to be used for a military purpose; the development, manufacture or supply of, or the provision of services relating to, encryption and security technologies and communications systems; and the extraction of (or the holding of rights to extract) uranium or plutonium or the operation of nuclear facilities. See AFIP, supra n 2, 3, 17.

6 FATA section 5, regarding definitions of “Australian rural land” and “Australian urban land”.

7 FATA sections 26 and 26A respectively.
investment will be contrary to the “national interest”. The Treasurer has broad discretion to decline any proposal that he or she considers to be against the national interest. On these grounds the Treasurer may refuse an application outright; approve it subject to conditions considered necessary to remove any national interest concerns; or make orders to divest any interest, assets or shares in urban land on the grounds that the acquisition is contrary to the national interest. Detailed attention to the national interest test is given in the next section.

To assist the assessment process, the Treasurer receives recommendations on specific foreign investment proposals from the Foreign Investment Review Board (‘FIRB’). It is important to emphasise that notwithstanding its responsibilities in administrating the FATA and AFIP, the FIRB’s role is largely uncontroversial. The substantial portion of activity under Australia’s foreign investment regime is conducted by FIRB, which evaluates proposals and makes decisions on those that conform to AFIP and/or lack special sensitivity. For example, over 92 percent of proposals were decided in this way in 2011–2012. A key element in the efficacy of the regime, however, is how cases that become politically salient are decided. In these cases the decision-making is reserved exclusively to the Treasurer, who may or may not agree with or publish the finding of FIRB. It is these cases which determine the transparency and accountability of the regulatory regime and raise questions about Australia’s commitment to ensuring compliance with OECD guidelines aimed at securing parity of treatment between investment classes.

2. The ‘National Interest’

Despite the importance of knowing what the national interest is and hence what may be contrary to it, that phrase is not legislatively defined. Instead, policy guidance is provided by AFIP. If a proposal does not meet the requirements of AFIP then it will be, prima facie, contrary to the national interest and subject to rejection. Thus, even though AFIP is not a legal document as such, it is a critical component of Australia’s foreign investment regulatory regime. AFIP provides that proposals are decided on an individual case-by-case basis in the context of the following issues: national security; competition; impact on the economy and community; Australian government policies such as tax; and the character of the investor. The relative importance of these factors will vary with the nature of the target enterprise (large or small; unique or sensitive) and the impact of the investment. For example, a proposed investment that “enhances economic activity – such as by developing additional productive capacity or new technology – is less likely to be contrary to the national interest.” However, many other factors will also inform the ‘national interest’ including the priorities of the government of the day, scale and types of foreign direct investment (FDI), the prevailing economic climate especially the national fiscal budgetary position, macro political-economic influences and changes, and even “community concerns about foreign ownership of certain Australian assets”.

Ultimately, the decision rests with the Treasurer to determine the definition and breadth of national interest, and thereby, whether a proposal should be refused. Importantly, the judiciary has upheld the Treasurer’s right to exercise this broad discretion on what is or is not in the

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8 FATA section 21A(2) regarding an interest in Australian urban land; sections 18 and 19 regarding a substantial interest in shares or assets, respectively, of an Australian corporation.
9 FATA section 25.
10 See www.firb.gov.au/content/default.asp
12 AFIP, supra n 2, 7-8.
13 Ibid 7.
14 Ibid 1.
national interest. Courts will certainly consider questions of procedural fairness and natural justice on administrative law grounds;\textsuperscript{15} however, as Justice Besanko stated in \textit{Wight v Honourable Chris Pearce MP, Parliamentary Secretary to the Treasurer}, the ultimate determination about the ‘national interest’ rests with the appropriate Minister and a “court will be slow to interfere” with that decision.\textsuperscript{16} Investing in Australia, therefore, requires capacity to read shifting political currents. It is as much an art form as a science. Nowhere is this more apparent than in the increasing investment by Chinese SOEs in the resources sector and, even more controversially but not as statistically significant, acquisitions in the agricultural sector. Both sectors are critical to Australia’s economy and susceptible to acute political contestation. Land, the manner in which it is exploited and who ultimately controls it strikes a divisive chord in the nation’s psyche. The legal and regulatory model was put in place in an attempt to increase flexibility, as acknowledged by the FIRB chairman, quoted above. The policy problem for Australia is that the primary (but not sole) source of concern is not coming from corporations domiciled in liberal democratic states but state-controlled entities in authoritarian China, which is becoming a strategically important trading partner.

2. \textbf{Regulatory restrictions for foreign state-owned enterprises (SOEs)}

\textbf{The Nature of SOEs}

SOEs are widely deemed to be state-owned operating companies rather than investment mechanisms like SWFs. SOEs can be defined as a commercial enterprise in which the state has control through total, majority or significant minority ownership.\textsuperscript{17} Instead of making portfolio or indirect investments, SOEs tend to make commercially strategic direct investments, such as through mergers and acquisitions (‘M&A’) of already listed corporations in international markets to enhance capacity and knowledge transfer. In so doing they are following, if not rigidly, national developmental agendas. Accordingly, SOEs have tended to invest in areas of their home-state priority, being natural resources, utilities, telecommunication services, and defence.\textsuperscript{18} What animates this purpose is one of the most controversial aspects of SOE investment. Unlike private corporations, SOEs are administratively and financially controlled by a government entity. So, in a state capital jurisdiction such as China, central or local government will be a controlling shareholder of an SOE, whereas in a liberal capital jurisdiction such as Australia or the United States, that controlling entity would more likely be a private institutional investor. This has created some concern by recipient countries about the political (rather than commercial) motives of government-directed FDI.\textsuperscript{19} Specifically, there is concern, albeit unproven, that, through the

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{15} As noted by V Bath, “Foreign Investment, the National Interest and National Security – Foreign Direct Investment in Australia and China” (2012) 34(5) Sydney Law Review 5, 13.
\item\textsuperscript{17} Organisation for Economic Co-operation and Development, \textit{Guidelines On The Corporate Governance Of State Owned Enterprises} (OECD, 2005), Preamble, \url{http://www.oecd.org/corporate/ca/corporategovernanceofstate-ownedenterprises/34803211.pdf}
\item\textsuperscript{18} J Lee, “The Re-emergence of China: Economic and Strategic Implications for Australia” (2012) 45(4) The Australian Economic Review 484, 484. The OECD also notes that SOEs are often prevalent in utilities and infrastructure industries whose performance is of great importance to broad segments of the population: \textit{ibid}, Preamble.
\end{enumerate}
\end{footnotesize}
investments of government-controlled entities such as SOEs and SWFs, foreign governments may obtain access to sensitive information or technology that jeopardise a recipient country’s national interests or security.20 Domestic policy and legal restrictions are put in place to provide public assurance that the economic, political and social risks are minimised. What remains unclear is whether these restrictions reflect latent xenophobic tendencies that contribute to a weakening of the coherence and legitimacy of the investment regime rather than strengthening it.

**Australian Regulatory Restrictions**

To this end, the Australian regulatory regime makes special provision for investment proposals by a state-owned entity. Indeed, the Economics References Committee of the Commonwealth Senate stated in 2009 that: “the best way for Australia to regulate the conduct of foreign investors (be they SWF, SOE or private commercial operator) is through developing robust domestic legislation.”21 The AFIP expressly states that “Australia’s foreign investment regime is concerned with investments that provide the investor with potential influence or control over the [Australian] target”.22 While neither FATA nor AFIP use or define the term ‘state-owned enterprise’, they instead focus on “foreign government investors”, which are treated separately and differently to private investors. “Foreign government investor” is defined by section 17F of the FATA as an entity that is a foreign body politic or controlled by one. AFIP further specifies that an entity is considered to be a “foreign government investor” if a foreign government has a 15 per cent or more interest in it.23

Unlike “foreign persons”, who need only notify the Government if they seek to acquire a controlling interest in an Australian corporation over a certain value, a “foreign government investor” must seek approval for any proposed investment activity that comprises a “direct investment” regardless of its value.24 “Direct investment” comprises an investment of an interest of 10 per cent or more; however, AFIP was amended on 4 March 2013 such that a direct investment may now be less than 10 per cent where the “acquiring foreign government investor is building a strategic stake in the target, or can use that investment to influence or control the target”.25 Moreover, the government will have regard to six factors in addition to the national interest matters above when assessing an investment proposal by an SOE or SWF. These factors, according to the 2008 *Guidelines for Foreign Government Investment Proposals*26 (the Guidelines) are:

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21 The Senate, Economics References Committee, Foreign Investment by State-Owned Entities (Commonwealth of Australia, 2009) 47.
22 Ibid n 14.
23 Ibid 2.
24 Ibid 15.
- the degree to which a state actor is independent from their government sponsor and is observing common standards of business behaviour; and

- the degree to which an investment may impede competition in the relevant industry/sector, impact on revenue or other policies, impact on the Australian economy, broader community, and/or national security.\(^{27}\)

At the time of their promulgation, the Guidelines purported to “enhance the transparency of Australia’s foreign investment screening regime”.\(^{28}\) However, no further guidance was given by the government regarding how these six factors might impact upon consideration of the national interest, or the extent to which the Treasurer needs to be satisfied about each of them in order to approve an investment proposal. Such lack of guidance has confounded aspirations of increased regime transparency. The extent to which this is a problem for Australia becomes acutely apparent through an evaluation of the empirical data, particularly with regard to the critical trading relationship with China.

### C. Operation and Application of the Regime: Empirical Analysis

#### 1. Foreign investment decision-making: empirical evidence

FIRB data provide a useful means of tracking government agency decision-making on foreign investment. Specifically, FIRB Annual Reports provide breakdowns of investment applications considered and decided by value, sector, and investor country per fiscal year. Note however that these reports track only approved proposed investment; proposals may not necessarily proceed to completion. At the time of writing, the 2012/2013 FIRB Annual Report has not yet been published. However, data are available for previous years from which we can readily gauge patterns of proposed investment and governmental decision-making under the FATA and AFIP.

Table 1 gives a statistical snapshot of foreign investment decision-making for the six year period 2006/2007 to 2011/2012. It is clear that the vast majority of applications considered by the Treasurer are approved (either with or without conditions). Indeed, the use of legal process to deny resource investment pursuant to the *Foreign Acquisitions and Takeovers Act 1975* (Cth) has been relatively infrequent. For example, just over 0.1% of all proposals considered were refused in 2011/12, equating to 13 rejected out of a total 11,420 applications.\(^{29}\) The real estate sector (both residential and commercial proposals) comprised all 13 rejections.\(^{30}\)

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<tr>
<td>Total considered</td>
<td>7025</td>
<td>8548</td>
<td>5821</td>
<td>4703</td>
<td>10865</td>
<td>11420</td>
</tr>
<tr>
<td>Total approved</td>
<td>6157</td>
<td>7841</td>
<td>5352</td>
<td>4401</td>
<td>10293</td>
<td>10703</td>
</tr>
<tr>
<td>Approved unconditionally</td>
<td>1520</td>
<td>1656</td>
<td>2266</td>
<td>2672</td>
<td>4606</td>
<td>4900</td>
</tr>
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\(^{27}\) Ibid.
\(^{28}\) Ibid.
\(^{29}\) Commonwealth of Australia, *supra* n 11, 19.
\(^{30}\) Ibid 19-20. More specifically, 4,900 proposals were approved outright; 5,803 proposals were approved subject to conditions; 534 proposals were withdrawn; and 170 were deemed exempt.
\(^{31}\) Ibid. Figures include corporate reorganisations (81 in 2011/12). The 2008/09 and 2009/10 figures were impacted by changes to the screening arrangements for residential real estate, which were announced in December 2008 and April 2010 respectively.
Tables 2 and 3 below depict the proposed sectors of investment and Australia’s top approved investors. Taking the year 2011/12 as a recent benchmark, the highest sector of approved investment was real estate with AUD59.1 billion in 2011/12 (compared with AUD41.5 billion in 2010/11). In other words, real estate comprised 94.5 percent of the approvals in 2011/12. For the same fiscal year, Table 3 shows that the United States is by far our top approved proposed investor at AUD36.6 billion. This is followed by the UK (AUD20.3 billion) and then China in third place (AUD16.2 billion). However, China has been prolific in the volume of proposed investment deals in Australia, with over 17 times more approved proposals than the United States.

Table 2

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<th>Industry</th>
<th>Number of approvals</th>
<th>Proposed investment value (AUD bn)</th>
</tr>
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<tbody>
<tr>
<td>Agriculture, forestry and fishing</td>
<td>49</td>
<td>3.60</td>
</tr>
<tr>
<td>Finance &amp; insurance</td>
<td>25</td>
<td>4.56</td>
</tr>
<tr>
<td>Manufacturing</td>
<td>70</td>
<td>29.52</td>
</tr>
<tr>
<td>Mineral exploration &amp; development</td>
<td>241</td>
<td>51.65</td>
</tr>
<tr>
<td>Resource processing</td>
<td>6</td>
<td>0.30</td>
</tr>
<tr>
<td>Services</td>
<td>109</td>
<td>21.02</td>
</tr>
<tr>
<td>Tourism</td>
<td>4</td>
<td>0.94</td>
</tr>
<tr>
<td>Real estate</td>
<td>10118</td>
<td>59.12</td>
</tr>
<tr>
<td>TOTAL</td>
<td>10622</td>
<td>170.12</td>
</tr>
</tbody>
</table>

Table 3

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<tr>
<th>Top 5 countries by proposed investment value</th>
<th>Deal Value</th>
<th>Number of Contracts</th>
</tr>
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<tbody>
<tr>
<td>TOTAL</td>
<td>170.71</td>
<td>10,703</td>
</tr>
<tr>
<td>U.S.A</td>
<td>36.613</td>
<td>268</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>20.343</td>
<td>1,018</td>
</tr>
<tr>
<td>China</td>
<td>16.190</td>
<td>4,752</td>
</tr>
<tr>
<td>Japan</td>
<td>13.920</td>
<td>324</td>
</tr>
<tr>
<td>Canada</td>
<td>8.871</td>
<td>131</td>
</tr>
</tbody>
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33 Ibid.
3. High-profile Cases and the ‘National Interest’

While rejections are not statistically relevant, high-profile cases can provide useful insights into how the ‘national interest’ in foreign direct investment has been interpreted by different Australian governments at different times.

**Woodside Petroleum & Royal Dutch Shell (2001)**

The first major high profile rejection by an Australian Treasurer of a substantial inward foreign investment bid under the FATA regime was made on 23 April 2001 by then Treasurer Mr Peter Costello. Mr Costello stated that: ‘After long and careful deliberations I have today made orders under the Foreign Acquisition & Takeovers Act 1975 ("the Act") prohibiting Shell acquiring a substantial shareholding in Woodside which would result in a change of control of Woodside… I have decided that the Shell proposal is contrary to the national interest. I have taken into account that Woodside is a joint venturer with Shell in the North West Shelf (“NWS”) project, Australia’s largest developed energy resource.’

Mr Costello certainly had been thinking long and carefully about his decision, ten months according to contemporary media coverage which also reported that the FIRB had not been able to reach a firm decision and had suggested two options: outright rejection of the bid by Shell or acceptance with a series of conditions. In his post-announcement press conference Mr Costello stated that there could be no guarantees that Shell would prioritise liquefied natural gas (LNG) from the North West Shelf on international markets over LNG produced from its projects in other jurisdictions such as Brunei, Malaysia, Oman or Russia. Therefore: ‘The concern I had was that the exports from the North West Shelf of Australia be promoted in all circumstances in preference to all competing supplies. I thought that was in our national interest and that was one of the considerations that weighed on me very heavily.’

So, the Shell Woodside decision set the pattern for subsequent high profile national interest decisions under the FATA discussed below: a pattern in which although domestic concerns may legitimately shape decisions by the Australian Treasurer, little information is released about how such decisions are constructed. Whether this approach is an appropriate modus operandi that facilitates optimum application of the AFIP and the FATA regimes remains an issue of concern in 2014 just as it was in 2001.

**Singapore Exchange Limited (SGX) and Australian Stock Exchange (ASX) (2011)**

Following the Shell Woodside decision there was a long hiatus between high profile controversial rejections under the FATA, ten years in fact. Then on 8 April 2011 then Australian Treasurer Mr Wayne Swan made the announcement that: ‘After long and careful deliberations, I

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have today made an order under the *Foreign Acquisitions and Takeovers Act 1975* (the Act) prohibiting the acquisition of ASX Limited (ASX) by Singapore Exchange Limited (SGX). The proposed acquisition has been subject to an ongoing examination by the Foreign Investment Review Board (FIRB), the Government's independent advisory body, since it was announced on 25 October 2010 and has been under formal consideration since the application was lodged on 11 March 2011. The FIRB members also considered a further response provided by the SGX on 7 April and have advised that this material does not cause them to change their advice.\(^{37}\) Mr Swan went on to add that: 'My decision was based on unambiguous and unanimous advice from FIRB that the proposed transaction was contrary to the national interest.'\(^{38}\) Mr Swan went on to stress his fears that the SGX/ASX merger would diminish not only Australia's standing as a global financial services centre in Asia, but also its economic and regulatory sovereignty, and that it should be emphasised that the SGX was smaller in size and nature than the ASX.\(^{39}\) What was surprising in this decision, however, was the manner in which Mr Swan justified the decision on the finding of FIRB, whose role is advisory and to that point its determination had not been made public. While this provided cover for the Treasurer, it raised the question of whether in the future a blockage that ran counter to the advice of FIRB would be published.

As with the Archer Daniels Midland GrainCorp decision discussed below, the SGX/ASX merger had earlier been cleared by the ACCC: ‘After extensive inquiries with a range of market participants, the ACCC concluded that the proposed acquisition was unlikely to result in a substantial lessening of competition.’\(^{40}\) So it would seem that the proposed SGX/ASX merger did not contravene on competition grounds, but as discussed earlier competition is but one facet of the national interest test mosaic under the FATA/AFIP infrastructure. Uncertainty persists about how the various tiles that form this mosaic are weighted and until more detailed information is released on this topic uncertainty, ambiguity and as a result diplomatic tension are likely to persist around decision-making in this space.

ADM and GrainCorp (2013)

The most recent high-profile rejection by an Australian Treasurer of a major proposed investment in Australia occurred in November 2013 and related to U.S. firm Archer Daniels Midland (ADM) and its attempted $3 billion takeover of Australia's GrainCorp Limited (GrainCorp). For the purposes of this paper it is worth discussing in detail reaction to this decision by current Australian Treasurer Mr Joe Hockey because it highlights the intensely political and sometimes partisan contexts that permeate the discourse surrounding foreign direct investment into Australia.

In June 2013, the ACCC approved ADM's bid on the basis that the takeover was not anti-competitive because local competitors would still hold over 50% of the market share. GrainCorp's Board and shareholders also supported the proposal. As ACCC Chairman, Mr Rod Sims, said at the time, ‘Our concern is competition, to make sure there's sufficient competition in the market, so it doesn't really matter who owns these assets or what nationality the owner is,


\(^{38}\) Ibid.

\(^{39}\) Ibid.

it’s all about competition from our point of view.” Any concern about foreign ownership invokes the role of the FIRB.

However, on 29 November 2013 Australian Treasurer Mr Joe Hockey announced that he was making: ‘..an order under the Foreign Acquisitions and Takeovers Act 1975 (the Act) prohibiting the proposed acquisition by Archer Daniels Midland Company (ADM) of 100 per cent of the shareholding in GrainCorp Limited (GrainCorp).’ Mr Hockey stressed a number of factors to support his decision, emphasising: that GrainCorp owns 280 up-country storage sites, seven of the ten grain port terminals in New South Wales and Queensland and so handles approximately 85 per cent of eastern Australia’s bulk grain exports; that many industry participants, particularly growers in eastern Australia had expressed concerns about the ADM bid; and that the FIRB could not agree on a consensus recommendation regarding the ADM bid. So, taking all these factors into account in Mr Hockey’s view the ADM bid: ‘..could risk undermining public support for the foreign investment regime and ongoing foreign investment more generally. This would not be in our national interest’. Mr Hockey was at pains to emphasise that of: ‘..131 significant foreign investment applications we have dealt with, this is the only application we have prohibited.’ Mr Hockey went on to offer comfort to ADM that he is: ‘..inclined, based on current circumstances, to approve any proposals from ADM to increase its shareholding in GrainCorp up to an interest of 24.9 per cent.’

Both ADM and GrainCorp were restrained in their response. ADM’s official statement expressed ‘disappointment’ at Mr Hockey’s decision, asserted that throughout the process it had: ‘..worked constructively to create an arrangement that would be in Australia’s best interests and made substantial commitments to address issues that were important to stakeholders..’ and as: ‘..owner of 19.85 percent of GrainCorp, we will look to work with them to maximize returns on our investment and create value for both companies.’ GrainCorp’s chairman Mr Don Taylor said that: ‘..it was extremely disappointing that the transaction would not be proceeding as planned.’

Predictably, Opposition Shadow Treasurer Mr Chris Bowen was not as restrained. He claimed that Mr Hockey’s decision was not only ‘weak’ and ‘pathetic’, but also in the National Party interest rather than the national interest, (referring to the vehement opposition to the ADM bid by the junior partner in the Coalition Government the National Party), and that as a result of this single decision: ‘The claims by this government that they would lure back investment into Australia lie in tatters.’ There is undoubtedly some political hyperbole in Mr Bowen’s remarks, but there is also little doubt that the National Party was hostile to the ADM bid. For example, the criticism of ADM by Deputy Prime Minister and leader of the National Party Mr Warren Truss the night before Mr Hockey’s announcement: ‘They haven’t been offering anything to Australian growers other than higher charges and potentially even an environment which would

43 Ibid.
44 Ibid.
make agriculture in this country the captive of overseas boardroom. There is some political hyperbole evident in Mr Truss’s comments too and it should be noted that prior to Mr Hocke

The ‘creeping cumulative acquisition of agricultural land may be inconsistent with both the national interest and the interests of local communities, even though foreign acquisitions of discrete land holdings will generally not of themselves be a matter of concern for the FIRB.’ That White Paper also called for the creation of a national register to track foreign ownership and suggests that accountability and public confidence could only be assured by having representatives of the agricultural sector on the FIRB.

As discussed in detail in section B it is the Government of the day which decides and expresses the AFIP and which provides guidance on national interest in relation to foreign acquisitions through that Policy. Thus, Australian inward foreign investment and politics, and on occasion unfortunately, populism, can be linked. The issue of foreign investment in Australia, and decisions about such investment, have always carried the potential for controversy, confusion, obfuscation and political manipulation. Given on-going rising global demand for food, as both the global population and food consumption levels inevitably rise, it seems likely that such controversy may be become even more pronounced when foreign actors seek to invest in Australian agriculture and agri-business. The National Party was the prime mover when the Liberal/National Coalition, (then in opposition), released its own White Paper, advocating placing additional restrictions on farm sales. For example: ‘The ‘creeping cumulative acquisition of agricultural land may be inconsistent with both the national interest and the interests of local communities, even though foreign acquisitions of discrete land holdings will generally not of themselves be a matter of concern for the FIRB.’ That White Paper also called for the creation of a national register to track foreign ownership and suggests that accountability and public confidence could only be assured by having representatives of the agricultural sector on the FIRB. Rural-based Coalition Senators went further, calling for a more substantive definition of the national interest test under the AFIP.

Now that the Coalition actually is the Australian Government it is unclear how much of that White Paper will become formal national policy in Australia under the AFIP. Similarly, it is unclear whether expanding the pool of experts within the FIRB would provide greater accountability and clarity, or whether it is indeed possible to codify the parameters of what constitutes the national interest with the aim of increasing public confidence. It is within this context that the ADM decision announced by Mr Hocke should be evaluated even if it may be difficult for some to understand or accept. Reading the political runes of how an Australian treasurer will react to specific significant foreign investments in Australia has not been made any

clearer by Mr Hockey’s 11 December 2013 decision regarding Chinese SOE Yanzhou Coal Mining Company and its permitted level of ownership in Yancoal Australia Limited.\(^{53}\)

**Yanzhou and Yancoal (2009; 2013)**

On October 23 2009 then Australian Assistant Treasurer Mr Nick Sherry announced that he had ‘…approved the application by Yanzhou Coal Mining Company Limited (Yanzhou) to acquire full ownership of Felix Resources Limited (Felix), conditional upon it complying with legally enforceable undertakings provided by Yanzhou.’\(^{54}\) Significant amongst those undertakings agreed to by Yanzhou were that it would reduce its ownership in its subsidiary vehicle Yancoal Australia Limited from 100 per cent to less than 70 per cent by end-2013 whilst similarly reducing its economic interest in Felix Resources coal mining assets and Syntech Resources and Premier Coal mines by end-2014. As several of the mines operated by Felix Resources were joint ventures with third parties the undertaking was that that: ‘…Yanzhou’s economic ownership of the underlying mining assets must stand at no more than 50 percent.’\(^{55}\)

Yanzhou has been largely compliant with its undertakings and indeed by December 2013 had reduced its stake in Yancoal to 78 per cent. However, Yanzhou has been lobbying both the current Australian Government and its Labor predecessor that there should be a variance in the obligations of the undertakings it had given in October 2009. For example, in July 2013 Yanzhou is reported to have proposed to the FIRB that Yanzhou should be allowed to privatise Yancoal because it: ‘…has a lower cost of capital at a time when it is hard to attract capital to coal projects.’\(^{56}\) So, Mr Hockey’s December 2013 decision was not a total surprise when he announced that he was removing certain foreign investment conditions on Yanzhou that had been imposed by Mr Sherry’s 2009 decision. New conditions imposed on the mining company require it to hold at least 51% of shares in Yancoal and extend existing loans to Yancoal if required. Mr Hockey said that this decision was due to “slowing demand, declining coal prices and a number of mine closures”. Moreover, the government has said that it is “open to any… proposals from Yanzhou in the future” that seek 100% ownership of Yancoal.\(^{57}\) The changed conditions allowed by Mr Hockey saw an immediate increase in Yanzhou’s FDI into Australia of US$250 million.\(^{58}\) So, how does one reconcile the apparent asymmetry regarding the rejection of ADM and the favourable decision for Yanzhou? Some possible factors might include:

(i) unlike ADM, Yancoal is not operating in the agribusiness space that is so core to the political *raison d’etre* of the National Party (the junior partner in the current federal government);

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\(^{55}\) Ibid.


\(^{57}\) For details see: The Hon Joe Hockey MP (11 December 2013) &lt;http://jbh.ministers.treasury.gov.au/media-release/033-2013/&gt;

(ii) Yancoal Australia plays a significant role as a major regional employer at a time when there is substantial unemployment pressures in regional Australia and a relatively gloomy outlook on that front;

(iii) Australia has a deteriorating foreign investment position with the Commonwealth Government’s Bureau of Resources and Energy Economics (BREE) forecasting that the value of committed and potential projects in Australia’s energy and resources sector is expected to fall to from $350 billion in 2013 to $25 billion in 2018;  

(iv) the reality of China’s importance as Australia’s most important trading partner with 19.9% of Australia’s total two-way trade;  

(v) the expectation that a free trade agreement can be reached with China in 2014. Indeed, Foreign Minister Ms Julie Bishop made this clear less than a week before Mr Hockey’s announcement on Yanzhou and Yancoal. 

All of these factors (and more) will play roles in framing the changing nature of what constitutes the ‘national interest’ and how AFIP is operationalised.

4. China As Foreign Direct Investor

As noted above, China is Australia’s most important two-way trading partner and its third most valuable proposed investor. For this reason it is imperative to understand the nature of that relationship in empirical terms.

<table>
<thead>
<tr>
<th>Table 4</th>
<th>FIRB Approved Proposed Investment for China by Value (AUD bns): 2006/07 - 2011/12</th>
</tr>
</thead>
<tbody>
<tr>
<td>Approved proposed investment values</td>
<td>06/07</td>
</tr>
<tr>
<td>TOTAL approval value</td>
<td>156.39</td>
</tr>
<tr>
<td>China’s investment approval value</td>
<td>2.64</td>
</tr>
<tr>
<td>China’s investment in Australia as a percentage of total approval value</td>
<td>1.7%</td>
</tr>
<tr>
<td>China’s country rank by investment value</td>
<td>11</td>
</tr>
</tbody>
</table>

62 Commonwealth of Australia, supra n 11.
Table 5  FIRM Approved Proposed Investment for China by sector in AUD millions: 2006/07 – 2011/12

<table>
<thead>
<tr>
<th>SECTOR</th>
<th>06/07</th>
<th>07/08</th>
<th>08/09</th>
<th>09/10</th>
<th>10/11</th>
<th>11/12</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agriculture, forestry &amp; fishing</td>
<td>15</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>4</td>
<td>27</td>
<td></td>
</tr>
<tr>
<td>Finance &amp; Insurance</td>
<td>-</td>
<td>420</td>
<td>43</td>
<td>-</td>
<td>558</td>
<td>60</td>
<td></td>
</tr>
<tr>
<td>Manufacturing</td>
<td>700</td>
<td>-</td>
<td>82</td>
<td>198</td>
<td>416</td>
<td>538</td>
<td></td>
</tr>
<tr>
<td>Mineral Exploitation &amp; development</td>
<td>1,203</td>
<td>5,311</td>
<td>26,254</td>
<td>12,186</td>
<td>9,758</td>
<td>10,505</td>
<td></td>
</tr>
<tr>
<td>Real Estate</td>
<td>712</td>
<td>1,491</td>
<td>-</td>
<td>2,421</td>
<td>4,093</td>
<td>4,187</td>
<td></td>
</tr>
<tr>
<td>Resource Processing</td>
<td>-</td>
<td>137</td>
<td>162</td>
<td>760</td>
<td>132</td>
<td>240</td>
<td></td>
</tr>
<tr>
<td>Services</td>
<td>10</td>
<td>101</td>
<td>54</td>
<td>717</td>
<td>16</td>
<td>634</td>
<td></td>
</tr>
<tr>
<td>Tourism</td>
<td>1</td>
<td>20</td>
<td>5</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td><strong>TOTALS</strong></td>
<td>2,640</td>
<td>7,479</td>
<td>26,599</td>
<td>16,282</td>
<td>14,976</td>
<td>16,190</td>
<td>91,425</td>
</tr>
</tbody>
</table>

Table 6  Chinese proposed sector investment breakdown (% of value): 2006/07 – 2011/12

<table>
<thead>
<tr>
<th>SECTOR</th>
<th>06/07</th>
<th>07/08</th>
<th>08/09</th>
<th>09/10</th>
<th>10/11</th>
<th>11/12</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agriculture, forestry &amp; fishing</td>
<td>0.57%</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>0.03%</td>
<td>0.17%</td>
</tr>
<tr>
<td>Finance and Insurance</td>
<td>-</td>
<td>5.62%</td>
<td>0.16%</td>
<td>-</td>
<td>3.73%</td>
<td>0.37%</td>
</tr>
<tr>
<td>Manufacturing</td>
<td>26.5%</td>
<td>-</td>
<td>0.31%</td>
<td>1.22%</td>
<td>2.78%</td>
<td>3.32%</td>
</tr>
<tr>
<td>Mineral exploitation &amp; development</td>
<td>45.57%</td>
<td>71%</td>
<td>98.70%</td>
<td>78.84%</td>
<td>65.16%</td>
<td>64.90%</td>
</tr>
<tr>
<td>Real Estate</td>
<td>26.97%</td>
<td>19.94%</td>
<td>-</td>
<td>14.87%</td>
<td>27.44%</td>
<td>25.86%</td>
</tr>
<tr>
<td>Resource Processing</td>
<td>-</td>
<td>1.83%</td>
<td>0.61%</td>
<td>4.67%</td>
<td>0.88%</td>
<td>1.48%</td>
</tr>
<tr>
<td>Services</td>
<td>0.38%</td>
<td>1.35%</td>
<td>0.20%</td>
<td>4.40%</td>
<td>0.11%</td>
<td>3.92%</td>
</tr>
<tr>
<td>Tourism</td>
<td>0.04%</td>
<td>0.27%</td>
<td>0.02%</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

Importantly, SOE-led investments dominate the Sino-Australian investment landscape. FIRM Annual Reports do not differentiate between SOE and non-SOE foreign investments in Australia. As such, we need to consider data on completed (not proposed) deals. Regarding total actual Chinese SOE-led FDI in Australia, KMPG reports that investments valued US$5million and above for the period September 2006 to June 2012 comprised 116 deals by volume of which nearly 80% were made by 45 SOEs; and over 95% of deal value involved SOEs (Table 7

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63 Ibid.
Those percentages are notably higher than average Chinese SOE-led investment deal value figures for the United States (65%) and Europe (72%). Similarly high numbers are present in the mining and energy sectors specifically. Clayton Utz, an Australian law firm, reports that for the period January 2005 to December 2012, Chinese SOEs accounted for 76% of deal volume, 100% of all deals greater than AU$250 million, and 97% of the accumulated value of actual investments in those sectors.

Table 7 Chinese Investment into Australia: September 2006-December 2012 vs. 2012

<table>
<thead>
<tr>
<th></th>
<th>2006-2012</th>
<th>2012</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>By volume</td>
<td>By deal value</td>
</tr>
<tr>
<td>SOE share of capital invested</td>
<td>80%</td>
<td>94%</td>
</tr>
<tr>
<td>Private (non-state) investment</td>
<td>20%</td>
<td>6%</td>
</tr>
</tbody>
</table>

Indeed, the ten largest Chinese corporate investors in Australia are all SOEs. These ten SOEs accounted for US$39,000 million out of a total accumulated direct investment of US$51,020 million for 1 January 2005 to December 2012, which equates to 76% of accumulated Chinese direct investment into Australia over the past seven years. However, there are important implications for state-led FDI into Australia given the ‘post-boom’ economy and increasing global competition for FDI. Accordingly, the next section examines legal and public policy concerns within the Australian foreign investment regime, particularly in relation to the ‘national interest’ test generally and Chinese SOEs specifically.

64 KPMG and the University of Sydney, *Demystifying Chinese Investment* (KPMG, 2012) (hereafter ‘KPMG and the University of Sydney 2012’), 9. In 2012 alone, SOEs completed 74% of all deals (valued US$5mn and above) by volume and 87% by deal value of the total Chinese inward investment into Australia: KPMG and the University of Sydney, *Demystifying Chinese Investment In Australia: Update March 2013* (KPMG, 2013) (hereafter ‘KPMG and the University of Sydney 2013’), 1. These reports do not reveal original sources of their SOE figures.


67 KPMG and the University of Sydney 2013, supra n 64, 1, 15.

68 In descending order of accumulated value from 1 January 2005-31 December 2012 (US$ millions): Chinalco (14,300), Yanzhou (6,590), Sinopec (3,070), CITIC (3,020), Minmetals (2,960), Taurus (2,280), CNOOC (2,200), China Datang (2,030), Sinosteel (1,460), China Metallurgical (1,090). We compiled these statistics from a variety of sources: KPMG and the University of Sydney 2012, supra n 64, 14; KPMG and the University of Sydney 2013, supra n 64, 23; individual company websites.

D. Practical Concerns and Potential Reform

1. Legal concerns: the ‘national interest’ test

As described in Part A, the regulatory framework surrounding FDI in Australia allows the Treasurer to maintain broad discretion to determine whether or not a proposed investment decision is in the national interest. While the FIRB reviews investment proposals to advise the Treasurer if the investment will be contrary to the national interest, the Treasurer is not bound by the decision. Moreover, the Treasurer is not obliged to publish the decision. As such, both the FIRB and the Treasurer can have different understandings of what is in the ‘national interest’. The challenge is that, without the requirement for the FIRB reasons to be published, the process is opaque and uncertain for foreign investors.

To this end, the Senate Rural and Regional and Transport Committee in its 2013 Final Report on foreign investment into Australian agriculture recommended that the federal government instigate “an independent and wide-ranging review of Australia’s foreign investment regulatory framework” (Recommendation 4). In delivering its report, the Committee noted evidence of rising concerns about foreign investment in Australian agribusiness, stemming from: increasing global food security issues (“the growing global food task”); a lack of transparency about the FIRB national interest test; and empirical information gaps regarding levels and types of foreign investment in Australia.

A fundamental step in addressing these concerns is for government to “increase the transparency and public awareness of the national interest test” to provide “precise and unambiguous instructions to prospective foreign investors about their obligations to FIRB and the Treasurer, and how the national interest test is conducted” (Recommendation 18). More recently, in response to the ADM/GrainCorp decision, the Shadow Minister for Agriculture, Mr Joel Fitzgibbon, has claimed that potential investors will not bother trying to navigate investment applications without rules in place that clarify the process.

2. Public policy concerns: China and SOEs

Australian politics and populism can interact and inform responses to foreign investment. While sensitivities around foreign acquisition in Australia are not solely directed at one country or one modality of investment, heightened concern-both community and regulatory-has seemed to focus on Chinese investment via SOE acquisition in recent years. This is not surprising and follows similar concern in both the United States and Canada.

The intrinsic nature of an SOE, as described above, captures public concern. According to a 2008 Lowy Institute survey of public opinion and foreign policy over time, more Australians have been opposed to foreign ownership of major Australian companies than are opposed to the death penalty, the Iraq war, or even ‘illegal immigration’. Importantly, 85% of respondents felt that companies controlled by foreign governments should be more strictly regulated than foreign

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70 Senate Standing Committees on Rural and Regional Affairs and Transport, Foreign Investment and the National Interest (Commonwealth of Australia, 2013).
71 Ibid para 1.3.
73 Bath also makes this point, citing the vociferous public debate around and eventual government rejection of the 2011 proposal by Singapore Exchange Limited (SGX) to merge with ASX Limited on the basis that it was contrary to the national interest: Bath, supra n 15, 18.
private investors, with the most opposition directed at companies controlled by China (78% opposed). Such concerns are also reflected in (and perhaps exacerbated by) media sensationalism on the topic of investment in Australia by foreign government entities. For example, recent Australian media headlines have included ‘China’s state-owned enterprises obtain FIRB approval by stealth’ (2013),75 and ‘Don’t mix politics and deals: FIRB in warning to state-owned investors’ (2012).76 Political decisions are not immune from the influence of populism, with the government’s decision to place conditions upon Yanzhou investment ownership in 2009 and then to lift those conditions in 2013 being a prime example. In such circumstances, it is unsurprising that adverse populist sentiment combined with shifting Australian policy toward Chinese state capital inflows has prompted uneasiness among some Chinese investors.

E. Policy Recommendations

As seen in Part D, the FATA has been used extremely infrequently to block proposed corporate acquisitions, and only relatively infrequently to deny proposed foreign interests in urban land. Nonetheless, the FATA is now over 40 years old and has been substantively amended only three times since its commencement, first in 1976 pursuant to the Foreign Takeovers Amendment Act 1976 (Cth), then in 1989 pursuant to the Foreign Takeovers Amendment Act 1989 (Cth), and most recently in 2010 pursuant to the Foreign Acquisitions and Takeovers Amendment Act 2010 (Cth).

In a changing global landscape, is the FATA and supporting policy on the ‘national interest’ still adequate to assist consideration of foreign investment applications? This is especially relevant in the context of agribusiness where the traditional roles of developed nations as ‘importers’ and emerging economies as ‘exporters’ are becoming blurred. To this end, the Chair of FIRB, Mr Brian Wilson, was asked at a Committee hearing on 9 May 2013 whether FATA can deal with current foreign investment scenarios. His response? “I will simply say that the Foreign Acquisitions and Takeovers Act was put in place in 1975 and, as I recall, was last modified in 1989 and it is now 2013 so you could draw your own conclusions about how up to date it might be.” So the question is whether the FATA, as currently constituted, can sufficiently adapt to current times. In other words, is it still fit for purpose? In short, we think the FATA should – and undoubtedly will – remain unchanged. However, the policy surrounding the implementation of that law needs reform. Our recommendations focus on three areas: (1) the national interest test and public opinion; (2) enhancing transparency and consistency; and (3) non-discrimination.

1. The national interest test and public opinion

Part D showed that the acquisition of Australian natural resources assets by state capital actors, particularly from China, has seen politics and populism assume a higher profile in the discourse on Australian foreign investment. Is this appropriate? From a democratic point of view, public pressure surrounding foreign acquisitions may well be a relevant factor in Ministerial definition of the national interest in any given case.77 Indeed, AFIP expressly states that “The Government also recognises community concerns about foreign ownership of certain Australian assets. The review system allows the Government to consider these concerns when assessing

77 Bath, supra n 15, 14.
Australia’s national interest.” So we can add “community concern” to the mutable list of factors that the Treasurer considers when evaluating the national interest test. However, the Treasurer is still obliged to weigh it up in light of many other factors. We contend that one of those factors must be relevant empirical evidence. This would not only reduce contestation but also enhance the legitimacy and accountability of the regime.

For example, there has been media and community concern in recent years that Chinese investors are “buying up the farm,” whereby investment is heavily skewed toward real estate and agriculture. However, evidence indicates that natural resources and mining sector investments dominate Chinese investment in Australia with some diversification towards energy (gas and renewables). 2013 data from KPMG show that mining comprised 73% of total Chinese FDI for the period 2006-2012 and 48% for 2012 alone; and gas investments comprised 18% of total Chinese FDI for the period 2006-2012 and 42% for 2012 alone. Importantly, agriculture has been the area of least interest for Chinese investment in the past seven years, commanding only around 2% of Chinese FDI volume since 2006.

Similarly, statistics show that Chinese investors rely heavily on local talent to manage Australian companies in which the investor gains a controlling interest. For example, Clayton Utz lawyers demonstrate that during the period 1 January 2005 to 31 December 2012, Chinese nationals were appointed as Chief Executive Officer only in 32% of acquisitions in the energy and resources sectors, and Chief Operating Officer in only 10% of same. The evidence begs a serious questioning of media sensationalism and public concern about Chinese foreign investment. Accordingly, these sorts of empirics need to be regarded when weighing up factors, including public opinion. Notwithstanding the rising scale and scope of Chinese investment, Australia is far from being in a position of surrendering its sovereignty to an acquisitive hegemon to the North.

2. Enhancing Transparency and Consistency in Government Decision-making

As we know, statistically the FIRB approves the vast majority of proposed deals that it reviews. However, perception is almost as important as evidence. As special counsel at law firm King & Wood Mallesons, Mr Malcolm Brennan, has stated: “We need to be careful about the message we are sending…There are so many myths out there and we are in competition with others for deals.” One way of dealing with those myths is to reduce the ambiguity inherent in trying to divine governmental interpretation of loosely-defined guidelines. To this end, the Senate Rural and Regional and Transport Committee’s recommendation is right on point that precise and unambiguous instructions ought to be given to prospective foreign investors about their obligations to FIRB and the Treasurer, and about how the national interest test is conducted. Moreover, it is unclear how many intended deals do not even make it to an initial request for approval. The absence of full disclosure, allied with the pragmatic realities of prevailing standards of commercial confidentiality, may render it impossible to verify the circumstances of proposed individual deals and thereby ascertain whether skewed and unfair evaluation processes are at work. This ambiguity helps to create the regulatory space in which

78 AFIP, supra n 2, 1. Bath also notes that “the relative rarity of rejections [of investment proposals] suggests that Treasurers have not been easily swayed by popular opinion on major investment projects or on policy.”: ibid 18.
79 KPMG and the University of Sydney 2013, supra n 64.
80 Clayton Utz, supra n 66.
prejudice, resentment and other negative variables may flourish. We contend that this state of affairs impacts negatively upon Australia’s national self-interest.

Transparency could further be enhanced by providing more granular information about each of the criteria used. Moreover, the use of reviewable decisions and involvement of specialist independent agencies would further enhance the accountability of the Treasurer and FIRB. In this way, public (as well as investor) confidence in the fair and consistent application of the national interest test in investment decision-making can also be vouchsafed. Indeed, there are transparent but confidential regulatory review processes already in place in Australia. To this end the ACCC Merger Guidelines on competition policy provide a valuable role-model. The Merger Guidelines outline the informal process that the ACCC undertakes. Not only is the process only publicised when there are issues to be resolved, but there is ample public consultation and community involvement. The application of strict protocol processes increase transparency, certainty and accountability. The Merger Guidelines also manage to maintain confidentiality in that an investor can request the ACCC to provide a non-disclosed view as to whether the acquisition runs a risk of substantially lessening competition. When the ACCC’s decision is announced, despite the process being secret, the means of obtaining that decision are clear and reviewable. Similar mechanisms could be adopted by FIRB, requiring it to establish a set of guidelines, which clearly outline the method (as opposed to general principles) by which foreign direct investment proposals are assessed to fulfil the ‘national interest’ requirement.

One final way to increase public awareness and confidence about foreign investment is by collating and disseminating empirical data on investment trends and levels, as Gilligan and Bowman have previously argued. This is crucial in order to counter media sensationalism and ill-informed populism that can shape and inform investment policy. Accordingly, we support the Committee’s recommendations to establish a national agricultural land register and suggest that this proposal be extended to all foreign investments and ownership. Specifically, such a register ought to document:

(a) foreign ownership of Australian assets, corporations, agricultural land, agribusiness and water entitlements in terms of volume and value;

(b) the type of investor, whether state-controlled or private; and

(c) divestment activity, which is just as crucial as investment activity when tracking real supply and demand patterns.

3. Non-discrimination

What seem to be the possible stress points in the operating environment of the AFIP and the FIRB and what might they indicate more broadly about the calibration of inward foreign investment to Australia? First, some issues reflect the political dimension more starkly than others, for example, thresholds. Privately-owned foreign investors should notify the Government before acquiring an interest of 15% or more in a business valued at $244 million or above. However, for privately-owned US investors that threshold is $1,062 million (except in

84 Gilligan and Bowman, supra n 19.
85 Senate Standing Committees on Rural and Regional Affairs and Transport, supra n 70.
prescribed sensitive sectors where the $244 million limit still applies). Is this discrepancy fair given Australia’s overall trade portfolio and trading patterns? Is this why the US still remains the largest inward investor into Australia? Is it a reflection of the Australia: US strategic alliance, in particular the presumed military shield that the US offers to Australia under the ANZUS Alliance? The answers to these questions (in order) are probably: yes; possibly; and almost definitely. Will these settings change as we progress through the coming Century? Particularly, will they be affected significantly by the ongoing global tension between the US and China and how will the repercussions of that tension impact upon Australia’s strategic priorities?

This is particularly problematic in relation to adjudicating violation of non-discrimination principles set out by the OECD. China is not a member of the OECD and not a signatory to the OECD Code of Liberalisation of Capital Movements (1961). China has barriers to inward investment that Australia does not. China is by western standards an authoritarian one party state, that some in the Australian Parliament and elsewhere (from all sides of politics), view as having a shameful human rights record, but which nevertheless is the most dynamic economy in the world. Within ten years if current trends are maintained China will assume the mantle of the world’s largest contributor to global GDP through its amalgam of central economic planning and its embryonic China Model of Capitalism.

In the lead-up to the most recent federal election, the then-Opposition Leader, Mr. Tony Abbott, publicly stated that there should be no “colour bar” on foreign investors in Australia. This was an implicit reference to concerns over Chinese FDI in Australia. The OECD Council on Recipient Country Investment Policies relating to National Security has recommended that, while nations may impose restrictions on foreign investment for national security reasons, those measures ought to be applied in a way that ensures the regime is predictable, transparent, proportionate and accountable. This commitment was affirmed by G20 Leaders at the 2012 Los Cabos Summit, and again in the 2013 Reports on G20 Trade and Investment Measures. Now that Mr Abbott is Australian Prime Minister he is in an excellent position to ensure this benchmark is upheld.

Indeed, doing so is more than just an international expectation: it is also in Australia’s national interest. Certain assets will always be in shortage in China, especially resources and food, and thus present attractive investments. The challenge of land scarcity is also unlikely to ease. The opening of ‘soft resources’ commodities markets in China represents timely new opportunities for Australian (and other Western) meat, dairy and grain producers. Indeed, Australia has a sizeable comparative advantage in the region with minimal logistics costs.

In 2012, the previous Labor government published the Australia in the Asian Century White Paper which received bipartisan support (albeit grudgingly). It stipulated that: “The Australian economy

87 OECD, WTO OMC, UNCTAD, Reports on G20 trade and Investment Measures (Mid-October 2012 to Mid-May 2013), 17 June 2013, http://www.oecd.org/daf/inv/investment-policy/9thG20report.pdf: “We recall that G-20 Leaders, at their last Summit meeting in Los Cabos in June 2012, expressed their firm commitment to open trade and investment, expanding markets and resisting protectionism in all its forms, which were considered as necessary conditions for sustained global economic recovery, jobs and development. They underlined the importance of an open, predictable, rules based, transparent multilateral trading system, and their commitment to ensure the centrality of the WTO. Recognizing the importance of investment for boosting economic growth, they made the commitment to maintaining a supportive business environment for investors. Furthermore, they reaffirmed their standstill commitments until the end of 2014 and their pledge to roll back any new protectionist measures that may have arisen.”
will be more open and integrated with Asia, through efforts to improve our domestic
arrangements”.

This includes “improving regulatory frameworks in support of greater financial
integration”, maintaining consistent and transparent foreign investment decision-making, and
“welcoming foreign investment” as a way of supporting Australian businesses. The current
Coalition government needs to remain on course for regulatory integration and non-
discrimination. Resolution of these issues will help to shape Australia’s future. It is a pressing
matter.

F. Conclusion

A key regulatory question in the midst of the likely shift in Australia’s direct investment fortunes,
given Australia’s undeniable need for continuing inward foreign investment, is how it might
affect the regulation of foreign direct investment in general and investment in Australia by
Chinese SOEs in particular. It seems likely that SOEs will continue to be the main mechanisms
through which China funnels its outward investment, not only to Australia, but also to the more
than one hundred jurisdictions for which China is also the number one trade partner.
Competition for that Chinese investment dollar is likely to intensify. Competition for inward
foreign investment against Australia from African jurisdictions and indeed many other countries
around the world is likely to increase. How much the twin pressures of increased investment
capital competition and Australia’s seemingly reduced attractiveness as a target for that inward
investment capital will impact upon the political manifestation of Australia’s foreign investment
regulatory regime over the coming years is unknown. What is clear, however, is that the trends
are obvious. On occasion bank analyst research reports capture the zeitgeist.

In 1993 Jim O’Neil of Goldman Sachs coined the BRIC acronym to highlight the growing
importance of the mid-tier economies of Brazil, Russia, India and China. Subsequently refined
projections – based on GDP growth, per capita income and currency flows – implied integration
provided the building blocks of a global economic alignment. The acronym has since passed into
the lexicon. In 2011, HSBC, a bank that likes to advertise its acumen in knowing when emerging
markets have emerged, chose an even more arresting metaphor. We are, it was claimed,
witnessing the re-emergence of the Southern Silk Road. This positions China as the pivotal hub
in a global trading operation. As with the BRIC projections a decade earlier, China is forecast to
transform the global economy. The timescale has shortened from the realm of futurology to the
present. The global bank predicts a ten-fold increase in trade and capital flows between emerging
markets over the next forty years. The creation of a ‘new global south,’ it argues, ‘is set to
revolutionize the global economy. As could be expected, HSBC was careful to stress the
benefits. Left unstated were the structural strains this realignment poses to national economies.
Australia is exceptionally well poised to be a key hub in this global network. Unless its policy
settings are revised, however, it could find itself by-passed. The question facing Australia is
whether it has the political will to accept these realities.

It is the Government of the day which decides and expresses the AFIP and which provides
guidance on the national interest in relation to foreign acquisitions through that Policy. Then
Australia Trade Minister Craig Emerson admitted in April 2013 that: ‘…talks on a free-trade deal
with China have stalled because of a dispute over restrictions on investment in Australia by
Chinese state-owned enterprises.’ This admission highlights the direct linkage that there can be

90 National Objective 18a, ibid 195.
91 Ibid 195, 187.
92 S King, The Southern Silk Road: Turbo-Charging South-South Economic Growth (HSBC 2011).
2013, 9.
between foreign direct investment decision-making and broader macro-economic trade connections and policy. Given Australia’s current deteriorating fiscal position, its inherent strategic thirst for capital and its key trade relationships, can Australia maintain its segregation of approval processes of state and non-state sources of inward investment capital, and its seeming distaste for the former as we move through the Asian Century? The use of legal process to deny resource investment pursuant to the FATA has been relatively infrequent. Yet can Australia afford to restrict state capital investment due to negative perceptions caused by peripatetic domestic policy? The answer is clear: it cannot. The policy calibrations advocated in this paper allow for a much more nuanced debate that Australia simply must have.