BERLE V

CAPITAL MARKETS, THE CORPORATION & THE ASIAN CENTURY:
GOVERNANCE, ACCOUNTABILITY & THE FUTURE OF CORPORATE LAW

AUSTRALIA’S EXPERIENCE WITH FOREIGN DIRECT INVESTMENT BY STATE OWNED ENTERPRISES:
A MOVE TOWARDS XENOPHOBIA OR OPENNESS

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Over the last few years there has been considerable debate in Australia as to the appropriate regulation of foreign direct investment by entities affiliated with foreign governments. Over that time Australia has been a significant beneficiary of investment by sovereign wealth funds from many jurisdictions and by Chinese state owned enterprises, in particular. The Australian government, in common with the government’s of many developed western countries, has struggled to properly calibrate its policy settings for the regulation of this type of investment activity. This article considers the Australian regulatory regime and assesses Australia’s success in regulating those investment flows over that time.

1 Introduction

In the first decade of the twenty first century there has been a global debate as to the appropriateness of the imposition of restrictions on foreign direct investment (“FDI”) by entities controlled in some way by foreign governments. It is no surprise that this debate has coincided with the rise in economic power of the BRIC nations,¹ national insecurities arising from global terrorism and the challenges of the global financial crisis in the period following 2007.

Australia has been somewhat at the epicentre of this global debate.

In the early stages of the global financial crisis the role of sovereign wealth funds (“SWF’s”) came under scrutiny as SWFs invested heavily outside their home jurisdictions in struggling financial institutions.² Further, as a once in a generation resources boom developed in Australia, interest from Chinese state-owned enterprises (“SOE’s”) in investing in Australia posed particular challenges when considered in the context of the developing Australia-China trade relationship.


As the GFC developed the role of SWFs as investors was replaced by direct investment by governments to stabilise the international financial system, leading to partial or full nationalisation of a number of financial institutions.

¹ Brazil, Russia, India, China.
The purpose of this paper is to assess the effectiveness of adequacy of the Australian regulatory regime in dealing with the policy challenges posed by SWF and SOE FDI in Australia.

2  Rationale for regulating foreign direct investment

Australia has a long history of its economic growth being facilitated by FDI. That was shown in the early 20th century and following the Second World War when foreign investment helped fund the expansion of the infrastructure required to support Australia’s rapidly growing population and extended through the 1970s when foreign investment was used to help develop some of Australia’s new key mineral resources.3

The significance of the benefits of foreign investment to Australia arise as a result of the historically low level of savings in the Australian economy. Competition for limited capital within Australia to fund growth and development projects would increase the cost of capital by driving up interest rates and lead to a slowdown in the rate of investment and economic growth. Access to foreign investment, particularly in capital intensive areas such as the resources sector, has enabled Australia to achieve a higher rate of economic growth than would otherwise be the case.4

Foreign investment has also had spill over benefits for Australian businesses such as through technology transfer and improved management expertise. These forms of “intangible capital” are difficult to quantify but are argued to have positive implications for domestic economic welfare and yield productivity gains.5

Foreign investment also contributes to the strength of Australia’s trade relationships6 and can help to reduce security risks through the development of strong political and economic relationships with investing nations.7

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6 Rio Tinto, as a recipient of significant foreign direct investment into assets it owns, has commented that Japan’s investment in its Robe River operations helped to underpin rapid growth in its Robe River production and its sales to Japan. See Rio Tinto, “Foreign Investment: a Foundation for Australia’s Prosperity,” (Submission to the Senate Standing Committee on Economics) at page 20.
The general benefits of FDI globally are recognised and advanced through the principles adopted by the Organisation for Economic Co-operation and Development ("OECD")\(^7\). The OECD advances the general principle that foreign investment should be treated in the same way as domestic investment. This principle is recognised by the OECD Code of Liberalisation of Capital Movements of 1961\(^9\) and the OECD Declaration on International Investment and Multinational Enterprises of 1976.\(^10\)

In recognising and advancing this principle the OECD also recognises that international law accepts that governments are entitled to protect their national security. National security may be threatened by foreign investment for non-commercial purposes in sensitive areas. As such, it is accepted that foreign investment regulation may be appropriate where national security might be at risk.

The relevant OECD Council\(^11\) has recommended that where a recipient country imposes restrictions on foreign investment for national security reasons such measures should be formulated narrowly so that the regulatory regime is predictable, transparent, proportionate and accountable.\(^12\)

It is an unfortunate political fact in Australia that many members of the general population have a negative attitude to FDI and do not appear to appreciate the economic benefits that derive from access to such investment. A Lowy Institute Poll of Australians’ views on foreign direct investment reported that 90% of those surveyed said that the Australian


\(^8\) Australia is one of the 34 member countries of the OECD.


In accordance with Article 1 of the Code, member States shall progressively abolish between one another restrictions on movements of capital to the extent necessary for effective economic co-operation, including treating all non-resident owned assets in the same way irrespective of the date of formation. Members shall endeavour to extend those principles to all members of the International Monetary Fund.


The guidelines are guidelines of good practice addressed by adhering governments to multinational enterprises. Item II of the declaration requires that adhering governments should, among other things “consistent with the need … to protect their interests” accord to enterprises operating in their Territories and owned by foreign nationals treatment under their laws that are no less favourable that are accorded in like situations to domestic enterprises.

\(^11\) In this context, the OECD Council on Recipient Country Investment Policies relating to National Security.

government has a responsibility to keep Australian companies in majority Australian control.\textsuperscript{13} Further 85\% of those surveyed said that investments by companies controlled by foreign governments should be more strictly regulated than investment by foreign private investors.\textsuperscript{14} Supplementing this material, in 2012 the Lowy Institute Poll reported that 56\% of those surveyed said that the Australian government is allowing too much investment from China.\textsuperscript{15}

This general community attitude can also be seen in the general tenor of the submissions received by the Australian Senate Economies Inquiry into Foreign Investment by State Owned Entities in 2009.\textsuperscript{16}

The key criticisms levelled at Australia’s foreign investment regime are a lack of transparency and accountability. The foreign investment review process in Australia is inherently political in its ultimate decision making. The Treasurer is not required to publish reasons for decisions and there is no system of appeal when a decision is made.

The OECD measures the restrictiveness of national regimes for regulating inwards foreign direct investment and currently ranks Australia as the thirteenth most restrictive regime out of the more than 44 countries surveyed (which included both member and some non-member States).\textsuperscript{17} If Australia were to abolish its screening processes it has been suggested that Australia would be ranked towards the middle of OECD countries on these measures.\textsuperscript{18}


\textsuperscript{14} Hanson at 6-7.


\textsuperscript{16} On 18 March 2009, the Senate made a referral to the Senate Standing Committee on Economics to inquire and report on the international experience of SWFs and SOEs, their role in acquisitions of significant shareholdings in corporations and the impact and outcomes of such acquisitions on business growth and competition and the Australian experience in the context of Australia’s foreign investment arrangements.

The Committee reported on 17 September 2009. No material changes to the Australian regime were recommended in the majority final report: available at http://www.aph.gov.au/Senate/Committee/.


3 Government-controlled entities – SWFs and SOEs

3.1 What is a SWF and what special concerns arise?

SWFs as an asset class are not new. The oldest SWF, the Kuwait Investment Authority, was established in 1953. However, in recent years, the number of SWFs have proliferated. There are now SWFs in many parts of the world, including Australia. SWFs are currently estimated to hold assets of approximately US$5.2 trillion and this is expected to grow significantly in coming years.

A SWF is defined as a special purpose investment fund or other arrangement that is owned by a general government.

SWFs cover a broad range of different investment vehicles, investment objectives and governance structures. Some of the different types of SWFs can be described as:

- Revenue stabilisation funds;
- Future generation savings funds;
- Holding funds; and
- General SWFs.

In view of some of the perceived policy issues surrounding foreign direct investment by SWFs, an International Working Group (“IWG”) of SWFs was established by the International Monetary Fund (“IMF”) in 2007. The working group drafted a set of

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19 The Future Fund and Queensland Investment Corporation are Australian examples of SWFs.
20 The City UK, “Sovereign Wealth Funds 2013” (March 2013) available at http://www.thecityuk.com. This report states that there is an additional US$7.7 trillion held in other sovereign investment vehicles such as pension reserve funds and development funds.
22 Designed to cushion the impact of commodity price volatility on fiscal revenues. Examples are Russian Reserve Fund, Kuwait Reserve Fund, Mexico Oil Stabilisation Fund.
23 Investment of national wealth intended to be held over long time frames. Funding sources are typically commodity or fiscal based. Generally earmarked for particular purposes eg, future pension liabilities. Examples are Australia’s Future Fund, Norway Government Pension Fund, Kuwait National Prosperity Fund.
25 Cover one or more of the above. Typically manage government excess wealth. Examples are Abu Dhabi Investment Authority, Singapore Government Investment Corporation.
26 The International Working Group of Sovereign Wealth Funds comprised 26 member States of the International Monetary Fund (IMF) (including Australia) with SWFs.
generally accepted principles reflecting agreed investment practices and objectives. These principles, known as the “Santiago Principles” were adopted in October 2008 as a voluntary set of principles to be adopted by SWFs as best practice objectives.

The policy concerns that arise for recipient countries around foreign direct investment by foreign government surround the impact of SWF’s on financial stability, political motives and national security. The debate on financial stability centres on the fact that the governance arrangements surrounding SWFs and their operations may be unregulated and may lack transparency. Due to their size and financial capacity there are concerns that a lack of transparency may mean that investment decisions could have destabilising effects on financial systems.

Due to the potential influence the State may have over the operations and investment decisions of SWFs, there is a concern that SWFs may exercise their control over recipient companies for political rather than commercial purposes. There is a concern that the closeness between a SWF and the State may give that entity privileges and advantages that are not available to other enterprises. Finally, there is concern that foreign governments may obtain access to information or technology through the investments of SWFs that jeopardises the recipient country’s national security.

There is little, if any, evidence of investments being made by either SWFs for political rather than commercial purposes.

The Santiago Principles have attempted to address these concerns in various ways. While there are 34 principles and sub-principles to the Santiago Principles, some of the key principles are as follows.

- SWFs should have clearly defined policy purposes and clear and publicly disclosed policies, rules, procedures or arrangements to their general approach to funding and spending operations.

- SWFs should have sound governance arrangements and clear and effective division of roles and responsibilities with independent operational management.

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27 The drafting committee was led by Mr David Murray, Chairman of Australia’s Future Fund
28 International Working Group of Sovereign Wealth Funds.
29 On the other hand some commentators suggest that SWFs in fact have a stabilising effect on the financial system by virtue of their long term investment horizon, mainly unleveraged positions and capacity to be able to enhance the depth and breadth of markets. See Monetary and Capital Markets and Policy Development and Review Departments, Sovereign Wealth Funds – A Work Agenda (International Monetary Fund, February 2008).
30 There is no example of a SWF exercising decision making in a way that has compromised national security in any country in five decades – Marchick and Slaughter, page 27.
31 Principle GAPP2.
32 Principle GAPP4.
• Activities of SWFs should be conducted in compliance with applicable regulatory and disclosure requirements in countries in which they operate.\textsuperscript{35}

• Investment decisions of SWFs should be aimed to maximise risk adjusted financial returns\textsuperscript{36} without seeking or taking advantage of privileged information or inappropriate influence by the broader government.\textsuperscript{37}

• Exercise of ownership rights by SWFs in investments should be consistent with investment policies.\textsuperscript{38}

3.2 Distinguishing SWFs and SOEs

SWFs and SOEs are different to each other in function as well as purpose. An SOE can be defined as a commercial enterprise where the State has significant control through full, majority or significant minority ownership.\textsuperscript{39}

While the following is a gross simplification, SWFs tend to make portfolio investments or indirect investments through investment funds whereas SOEs tend to make more commercially strategic investments so as to gain synergies, economies of scale or otherwise supplement or support their commercial operations.

3.3 The particular case of Chinese SOEs

Economic reform in China over the last two decades has been driven by State reliance on the establishment and development of SOEs.\textsuperscript{40}

\textsuperscript{33} Principle GAPP6.
\textsuperscript{34} Principle GAPP9.
\textsuperscript{35} Principle GAPP15.
\textsuperscript{36} Principle GAPP19.
\textsuperscript{37} Principle GAPP20.
\textsuperscript{38} Principle GAPP21.
\textsuperscript{39} Preamble, \textit{OECD \textquotesingle Guidelines on the Corporate Governance of State Owned Enterprises} available at http://www.oecd.org/daf/corporateaffairs/soe/guidelines. The preamble further notes that SOEs are often prevalent in utilities and infrastructure industries whose performance is of great importance to broad segments of the population. The rationale for state ownership varies among countries and has typically composed a mix of social, economic and strategic interests.

\textsuperscript{40} It has been estimated that there are currently approximately 115,000 SOEs in China (as at 2007, according to the State-owned Assets Supervision and Administration Commission of the State Council (SASAC), “General Information on Reform and Development of SOEs over the Past Five Years since the Establishment of SASAC” (Material for the Press Conference of 2008 BIMC, 10 August 2008) available at http://www.sasac.gov.cn/n2963340/n2964712/5349959.html.
Chinese SOEs are typically classified as enterprises “owned by the State, and thus, by the whole people”\textsuperscript{41} of China. Ownership rights are exercised by the highest executive organ of the Chinese state, the State Council,\textsuperscript{42} most of whose powers have been delegated by legislation to the State Assets Supervision and Administration Commission (“SASAC”).

Chinese SOEs are constituted by Chinese law as separate legal enterprises to the Chinese state with separate legal identity. SOEs have their own individual operating assets, financial resources, management teams and workforces. Each SOE has autonomy from the State in operational policies.

Chinese law precludes SASAC from interfering in the daily operation and business activities of SOEs, but this is subject to SASAC’s broad discretion to exercise its “contributor’s functions”. This means that SASAC, on behalf of the government, enjoys the right to “return on assets, participation in major decisions, selection of managers,” and other unspecified rights. In particular, the shareholder representative appointed by SASAC is required by law to present opinions and exercise voting rights according to the instructions of SASAC.\textsuperscript{43}

When any Chinese domestic enterprise (being an SOE, privately owned enterprise (“POE”) or foreign-owned investment enterprise (“FIE”)) proposes to make a particular investment outside China it must obtain approvals from Chinese government bodies prior to making that investment. The approvals from these bodies are sought after the investment decision has been made by the relevant enterprise. Approval must be sought from the National Development and Reform Commission (“NDRC”) and the Ministry of Commerce (“MOFCOM”). The NDRC and MOFCOM each apply the same standards to, and impose the same requirements on, all PRC commercial entities seeking offshore investment approval (regardless of whether they are an SOE, POE or FIE).

Before the investment approval process begins, the NDRC conducts a preliminary review in order to confirm that there is no “material adverse factor”.\textsuperscript{44} The NDRC and MOFCOM consider applications for offshore investment approval in accordance with the provisions of the Guidance Catalogue of Countries and Industries for Overseas Investment and relevant regulations on the examination and approval of overseas investment projects.\textsuperscript{45}


\textsuperscript{43} Law of the People’s Republic of China on the State-Owned Assets of Enterprises.

\textsuperscript{44} “Notice of the National Development and Reform Commission on Issues Concerning the Improvement of the Administration of Overseas Investment Projects”, promulgated on 8 June 2009 by the NDRC.

\textsuperscript{45} See the “Guidance Catalogue of Countries and Industries for Overseas Investment” issued by MOFCOM and the Ministry of Foreign Affairs on 8 July 2004, the “Measures for Overseas Investment Management” issued by MOFCOM on 16 March 2009 and the “Interim Measures on
approvals are received from NDRC and MOFCOM, application must be made to the State Administration of Foreign Exchange (SAFE) for the purpose of foreign exchange registration relating to the offshore investment. In addition for offshore investment by an SOE, approval from relevant local counterparts of SASAC must also be obtained.

The NDRC is primarily concerned with reviewing the size and nature of the proposed offshore investment and the capacity of the SOE to make the investment, with a focus on national economic security and compliance with industry policies of the Chinese state. MOFCOM, on the other hand, will consider a variety of factors when reviewing an application to invest offshore.46

While Chinese investment in Australia for the 2011-2012 financial year still fell short of investment from the United States and the United Kingdom, proposed investment from China has increased significantly in recent years as evidenced by its movement from eleventh on the table of source of proposed foreign investment in Australia for 2006-2007 to third for 2011-2012.47 China is now Australia’s most important trading partner and is still significantly under represented in terms of foreign investment in Australia when compared with its dominant trade relationship.

The Executive Member of the Foreign Investment Review Board (“FIRB”) stated in evidence to the Senate Economics Committee inquiry into foreign investment by SWFs and SOEs in 2009 that commercial behaviour was a feature of Chinese SOE conduct.48

3.4 Other GFC created SOE issues

The global financial crisis saw a succession of government financial bail-outs of some of the largest corporate enterprises in the world. All global companies and financial institutions that have had a more than 15% capital injection from a government or SWF are treated as an SOE under Australia’s regulatory framework.

Administration of Examination and Approval of Overseas Investment Projects’ issued by NDRC on 9 October 2004.

46 Article 9, “Measures for Overseas Investment Management” issued by MOFCOM.

Where the overseas investment of an enterprise falls under any of the following circumstances, the Ministry of Commerce or the provincial commerce department shall disapprove it:

- endangering the state sovereignty, national security and public interests of China or violating a law or regulation of China;
- damaging the relationship between China and a relevant country or region;
- likely violating any international treaty concluded by China with a foreign party; or
- involving any technology or goods prohibited by China from import.


48 Senate Economic References Committee, Commonwealth Senate Hansard (22 June 2009) page E4.

“While there is a much greater formal link between a Chinese company and the Chinese government, what we see, by and large is a fair degree of overt commercial behaviour on the part of the Chinese companies seeking to invest in Australia”.

greg golding - xenophobia
4 Overview of Australia’s foreign investment regulatory regime

Foreign investment in Australia is regulated by the Foreign Acquisitions and Takeovers Act 1975 (Act) and by the Australian government’s Foreign Investment Policy (Policy).

The Federal Treasurer is ultimately responsible for all decisions relating to foreign investment and for administration of the Policy. The Treasurer is advised and assisted by the FIRB, which administers the Act in accordance with the Policy. FIRB is an administrative body with no statutory existence, and the Act makes no reference to it. The Policy confirms FIRB’s role. All decisions by the Treasurer relating to a foreign investment proposal are underpinned by analysis and recommendations made by FIRB.

The purpose of the regime is to empower the Treasurer to make orders in respect of proposals that are considered by the Treasurer to be “contrary to the national interest”. There is no definition of when a proposal is to be considered contrary to the national interest and the criteria is assessed on a case by case basis.

Under the current Policy, “The Government determines what is ‘contrary to the national interest’ by having regard to the widely held community concerns of Australians”. The Australian Government does not publish reasons for decisions it makes under the Act or Policy.

When the Act was first introduced into Parliament in 1975 it was suggested that the “national interest” criteria should be assessed by reference to a determination of whether or not the proposed investment would have net economic benefits to Australia to justify the change in foreign control, whether the foreign investor was expected to follow practices consistent with Australian expectations and whether the proposal would be consistent with the government’s policy objectives. In assessing these matters it was suggested that the government would look at factors such as Australian participation in ownership, control and management as well as the interests of employees, shareholders and creditors.


From 1972 interim arrangements had been in place – Companies (Foreign Takeovers) Act 1972 (Cth).


51 In the Second Reading Speech for the Foreign Takeovers Bill 1975 (Cth) in the House of Representatives, it was stated that the criteria for judging applications had not been incorporated into the proposed legislation “because the criteria must be flexible in their interpretation and application and it has been found that it would be impracticable, consistent with the need for such flexibility, to express the criteria with the precision required by legislative form.” House of Representatives, Hansard, 22 May 1975, page 2678.

In the mid-1980s, a more liberal interpretation of the national interest criteria was adopted. The possible application of the “net economic benefit” test was abandoned on the basis that foreign direct investment was then acknowledged to have clear economic benefits for Australia.

In considering whether the national interest test is met, the Treasurer may impose conditions on the approval that the Treasurer considers necessary to protect the national interest. The Treasurer is under no obligation to justify or explain the reasons for imposing conditions. In the event that a condition is not complied with, this would constitute an offence and would reactivate the Treasurer’s powers under the Act.

Applicants have no right of administrative or judicial review of foreign investment decisions made under the Act or Policy. The *Administrative Decisions (Judicial Review) Act 1977* specifically exempts decisions made under the Act from administrative review.

That said, the number of rejections of investment applications are very small. Approximately 10,000 investment applications are received by FIRB each year. Typically less than 100 of these applications are rejected, but almost all of those relate to real estate. Only two explicit rejections of a significant corporate transaction have been made in the last decade – the rejection of Shell’s proposal to acquire 100% of Woodside Petroleum Limited in 2001 and Singapore Exchange’s proposal to acquire 100% of Australian Securities Exchange in 2011.

There are three key areas that constitute Australia’s foreign investment regime. These are transactions that require prior notification and mandatory approval under the Act, transactions that enliven the Treasurer’s powers of divestiture under the Act and transactions that require prior approval under Policy.

### 4.1 Compulsory approval under the Act

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53 Treasury, “*Foreign Investment Policy in Australia - A Brief History and Recent Developments*” at page 64.

54 Section 25(1A) of the Act.

55 Section 25(1C) and s 25(1D) of the Act.

56 Paragraph (h) to Sch 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).


58 Announcement of Peter Costello, Treasurer “*Foreign Investment Proposal – Shell Australia Investment Limited Acquisition of Woodside Petroleum Limited*” (Media Release 25, 23 April 2001). The rejection was based on a view that Shell might not develop the North West Shelf projects of Woodside in Australia as part of Shell’s broader portfolio of assets outside Australia as quickly as it would on a stand alone basis.

59 Announcement of Wayne Swan, Treasurer “*Foreign Investment Decision*” (Media Release 030, 8 April 2011). The rejection was based on a view that it is in the national interest for Australia to maintain the strength and stability of its financial system and to build Australia’s standing as a global financial services centre in Asia to take advantage of its superannuation system and that he had concerns the proposal would be contrary to these objectives.
Under the Act, foreign persons must seek prior approval to acquire (alone or together with their associates) control of 15% or more of voting rights or potential voting rights, or to acquire interests in 15% or more of the issued shares or rights to be issued shares in, an Australian corporation that has gross assets of A$248 million or more. It is an offence to enter into such an acquisition without giving prior notification and obtaining a statement of no objection under the legislation.

For purposes of the Act, a foreign person is a non-resident of Australia, a corporation in which a non-resident holds voting rights or issued shares of 15% or more, a corporation where non-residents in aggregate hold voting rights or issued shares of 40% or more or trustees of trusts with foreign ownership beyond these thresholds.

It will be noted that the interests of foreign persons and their associates are aggregated. The associate definition is notoriously difficult.

For purposes of these provisions the prohibition applies only to an investment in an Australian corporation, being a corporation incorporated in Australia.

For purposes of calculating a 15% interest in an Australian corporation the potential right to acquire voting power or the right to be issued shares is included. These provisions are expressed to capture all arrangements that involve a future right to acquire voting shares or

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60 Section 26 of the Act sets out the requirement to give prior notification. Section 13A(4)(b)(ii) of the Act and Regulation 5(2) of the Foreign Acquisitions and Takeovers Regulations 1989 provide an exemption where the corporation has gross assets of less than A$248 million (calendar year 2013). For investors in the United States and New Zealand, a $1,098 million threshold applies (calendar year 2013) except for prescribed sectors or an entity controlled by a United States or New Zealand Government entity — see section 17E of the Act and Regulation 9 of the Foreign Acquisitions and Takeovers Regulations 1989.

61 For purposes of section 26, see section 26(1) of the Act. For other provisions of the Act, see section 5 definition. Where ownership is dispersed, obvious practical difficulties arise in seeking to identify if the 40% in aggregate trigger is enlivened.

62 Section 6 of the Act. Unlike other provisions of Australian law seeking to track share ownership thresholds, the associate reference is not primarily linked to action in concert (compare Pt 1.2, Div 2 of the Corporations Act 2001 (Cth)).

63 For example, an associate is a company where a person and their associate have a 15% or more investment. Great potential confusion is caused by a provision that any person who is an associate of a person by one application of the definition is also an associate of the person by another application of the definition (s 6(l)) causing a potential infinite regression of applications.

64 The question then arises in the foreign investment context whether Chinese SOEs, by virtue of their common government ownership should be aggregated or assumed to be related or associated. The Executive Member of FIRB has given evidence to the Senate Economics Committee that for the purposes of the Foreign Acquisitions and Takeover Act 1975 (Cth), Chinese SOEs are not considered to be associated.

65 Sections 5 and 13(I)(a), 13(I)(b) and 13(I)(c) of the Act.

66 Section 9(1) of the Act.
issued shares, regardless of the way they are structured, including debt instruments having quasi-equity characteristics, and expressly includes convertible notes.\(^{65}\) Structures which do not give rise to potential voting power or rights to issued shares (e.g., cash settled derivative structures) do not appear to fall within the compulsory notification regime but may nevertheless activate the Treasurer’s powers if such an acquisition gives the person the ability to determine the policy of a corporation in relation to any matter. This is considered further below.

### 4.2 Treasurer’s additional powers under the Act

The Act also gives the Treasurer power in certain circumstances to make an order prohibiting a proposed transaction and, where a transaction has already completed, to direct a foreign person to dispose of shares or terminate arrangements.

The Treasurer’s powers apply to a broader range of acquisitions than is captured by the pre-approval requirement. However, the powers will only be activated where the result of the acquisition is determined by the Treasurer to be contrary to Australia’s national interest.

Where a proposed transaction enlivens the Treasurer’s powers under the Act, a foreign person can make an application under the Act such that if no objection is raised the Treasurer’s powers will be deactivated.\(^{66}\) The practical implication of these provisions is that for significant transactions requiring commercial certainty, the approval of the Treasurer is inevitably sought.

The Treasurer’s powers extend to investments in “prescribed corporations” that carry on an Australian business\(^ {67}\) and holding companies of such prescribed corporations.\(^ {68}\) A “prescribed corporation” includes offshore companies with specified categories of Australian assets where the gross Australian assets of the company are valued at A$248 million or more and make up more than 50% of the company’s global assets\(^ {69}\) or an offshore company with certain Australian assets where the gross Australian assets of the company are valued at A$248 million or more.

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\(^{65}\) Section 11(2A) of the Act.

\(^{66}\) Section 25(2) and s 25(3) of the Act).

\(^{67}\) Section 7(1) of the Act provides that a reference in the Act to an Australian business is a business carried on wholly or partly in Australia in anticipation of profit or gain either alone or together with another person.

\(^{68}\) Section 18(1) of the Act. The concept of a prescribed corporation is much broader in scope than an “Australian corporation” that is relevant to the prior approval test in section 26.

\(^{69}\) Section 13(1)(g) of the Act provides that a foreign corporation whose Australian assets make up not less than one half of its gross assets is a prescribed corporation. Section 13A(4)(b)(ii) of the Act and Regulation 5(2) of the Foreign Acquisitions and Takeovers Regulations 1989 provide an exemption for companies where the total assets does not exceed A$248 million (calendar year 2013).
The Treasurer’s powers are enlivened if a prescribed corporation becomes controlled by foreign persons or there is a change in foreign control. Control by a foreign person is control of 15% of the voting power or potential voting power or 15% of the issued shares or rights to be issued shares by an individual foreign person or control of 40% of the voting power or potential voting power or 40% of the issued shares or rights to be issued shares by foreign persons in aggregate.\footnote{Section 9(1) and s 9(1A) of the Act.} A change in foreign control occurs where a corporation is already at least 40% foreign controlled in aggregate and there is a change to the make-up of those foreign holders, unless the Treasurer is satisfied that, having regard to all the circumstances, those persons are not in a position to determine the policy of the corporation.\footnote{Section 9(1A) and s 9(2) of the Act.} The Treasurer’s powers also extend to the acquisition of assets rather than an interest in shares of a company. Where a person proposes to acquire assets valued at A$248 million or more of an Australian business carried on by a prescribed corporation leading to the business being foreign controlled (or controlled by new foreign persons) and the result would be contrary to the national interest, the Treasurer may prohibit the proposal.\footnote{Section 19(2) of the Act.} An Australian business is a business carried on partly or wholly in Australia in anticipation of profit or gain.\footnote{Section 7(1) of the Act. The holding of a mineral right is such a business - see s 7(2) of the Act.} For these purposes control is being in a position to determine the policy of the Australian business.\footnote{Section 19(7) of the Act.} In addition to outright acquisitions, the Treasurer’s powers extend to two situations where arrangements are entered into with foreign persons that can influence the conduct of an Australian business.\footnote{The Act also applies to acquisition of interests in Australia urban land - s 21A. However, this article is focused on the regulation of investment in corporations.} In the first circumstance where:

- an agreement is to be entered concerning the affairs of a corporation or to alter a constituent document of a corporation; and

- as a result, a director or directors of a corporation will be under an obligation to act in accordance with the directions, instructions or wishes of a foreign person or an associate with control as defined above;\footnote{Section 20(2) of the Act.} and

- as a result, the corporation would be controlled by foreign persons or new foreign persons; and

- the result would be contrary to the national interest.

\footnote{See text at n 79.}
In the second circumstance where:  

- an arrangement is to be entered or terminated in relation to an Australian business carried on solely by prescribed corporations. For these purposes an arrangement means leasing, hiring or the grant of rights to use or (much more importantly) participation in profits or management; and

- as a result the business would be controlled by foreign persons or new foreign persons; and

- the result would be contrary to the national interest.

It can be seen that the first circumstance is narrower than the second circumstance in that it is premised on a foreign person being in control of a corporation and it is premised on directors being under an obligation to that foreign person.

In both instances the result must be that the corporation or business be “controlled” by foreign persons. The Act expands the concept of control to include circumstances where a person and its associates are able to determine the policy of the corporation in relation to any matter. This provision is potentially broad enough to capture interests including structures using converting instruments, economic only interests, derivative or swap positions in Australian entities or offshore entities with Australian assets if that interest leads to a foreign person or persons having the ability to determine the policy of a corporation in relation to any matter.

4.3 Applications under the Act

If a foreign person is required to obtain prior approval under the Act or if they wish to make an application under the Act so that the Treasurer’s powers are de-activated, then the applicant must provide FIRB with specified information about the company, the target and the transaction.

Once notification of the proposed transaction has been lodged, the Treasurer has 30 days to make a decision and then 10 days to notify the applicant of that decision. If the applicant has not proceeded with the transaction and no notification by the Treasurer is given in that time, the Treasurer ceases to have power in respect of that proposal. However, the Treasurer may make an interim order if more time is required to enable due consideration of the application. An interim order prohibits the applicant from proceeding with the proposal.

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78 Section 21(2) of the Act.
79 This provision was inserted in the Act in 2010. Before that time the concept of control was based on the Treasurer being satisfied that the foreign person and its associates be in a position to determine the policy of the corporation or the business, as the case may be.
80 Sections 24, 25(1B) and 25(2) of the Act.
81 Section 25(2) of the Act.
82 Section 22(1) of the Act.
for a period of up to 90 days, after which the Treasurer has a period of 10 days in which to notify the applicant of the decision.\textsuperscript{83}

4.4 Australia’s foreign investment policy

Australian Government Policy imposes additional restrictions on investments by foreign persons in a limited number of sensitive sectors (such as banking, civil aviation, telecommunication, airports, airlines, shipping and media) as well as in relation to investments by foreign governments and their agencies.

The Policy has no legislative force, but adherence to its requirements is achieved in practice by a number of means, including by refusal to grant necessary ministerial or other approvals under other Australian legislation and by the prospect of on-going resistance from the Australian government to the relevant investor, including the likelihood that future applications under the Act might be refused.

It is under this Policy that additional obligations are imposed on SWFs and SOEs. These obligations are additional to those imposed by the Act.

Any “direct investment” by “foreign governments and their agencies” irrespective of size requires “notification for prior approval”. Such applications are intended to be dealt with on a case-by-case basis.

The Australian Treasurer released a set of additional Guidelines for Foreign Government Investment Proposals on 17 February 2008\textsuperscript{84} which purported to “enhance the transparency of Australia’s foreign investment screening regime” in the area of SWFs and SOEs. It was suggested that this did not reflect a new development.\textsuperscript{85} However, many commentators considered that the release of these Guidelines indicated a shift in the government’s approach.\textsuperscript{86}

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\textsuperscript{83} Sections 22 and 24 of the Act.

\textsuperscript{84} Treasurer, Government Improves Transparency of Foreign Investment Screening Process (Media Release 009, 17 February 2008).

\textsuperscript{85} In a speech to the Australia-China Business Council in Melbourne on 4 July 2008, the Treasurer made the following comments in relation to the Guidelines:

“These guidelines were those used by the previous government; they are what we use too. They are not new”

\textsuperscript{86} The Treasurer said at the time:

“You will have heard, as I have, a couple of arguments about our approach to Chinese investment – broadly, that we have changed our policy to a more restrictive stance, and furthermore, are slowing down the processing of Chinese applications.

I don't think either of these stand up when considered against the facts. I have approved a Chinese investment proposal on average once every nine days since coming into office. This is certainly not a slowing pace. ”

Treasurer, Government Improves Transparency of Foreign Investment Screening Process, n 90. See also Treasurer, “Australia, China and this Asian Century” (Speech delivered at the Australia-China Business Council, Melbourne, Speech 021, 4 July 2008).
The Guidelines provide that proposed investments by foreign governments and their agencies are assessed on the same basis as private sector proposals and that national interest implications are determined on a case-by-case basis.\textsuperscript{87} The Guidelines then set out a list of six issues to which the government will have regard when considering whether a proposal by a state-owned entity or SWF is contrary to the national interest.

In understanding the potential reach of the pre-approval requirement for investments by SWFs and SOEs it is necessary to consider what is meant by “direct investment” and what investors would be considered a “foreign government agency”.

For the purposes of the Policy, a “foreign government investor” is considered by FIRB to be an entity that is owned or controlled by a foreign government where the foreign government has an interest of 15% or more.\textsuperscript{88} The Guidelines made it clear that foreign government agencies include SWFs and SOEs\textsuperscript{89} and indicates that the policy would apply to investors owned or controlled by a foreign government.\textsuperscript{90} Recent experience suggests that in the current political environment the Australian government would take a broad view of what constitutes a foreign government agency and would look at decision-making processes and other indicia of control rather than focusing only on the ownership of a particular entity.

The Guidelines set out six issues to which the government will typically have regard when assessing whether a proposal by an SOE or SWF is contrary to the national interest. The six issues are the extent to which:

- an investor’s operations are independent from the relevant foreign government;
- an investor is subject to and adheres to the law and observes common standards of business behaviour;
- an investment may hinder competition or lead to undue concentration or control in the industry or sectors concerned;
- an investment may impact on Australian government revenue or other policies;
- an investment may impact on Australia’s national security; and
- an investment may impact on the operations and directions of an Australian business, as well as its contribution to the Australian economy and broader community.

\textsuperscript{87} Now incorporated as general criteria in the Policy
\textsuperscript{88} See the FIRB website at \url{http://www.firb.gov.au/content/direct.asp}.
\textsuperscript{89} Investments by SWFs and SOEs are expressed to be assessed on the same basis as private sector proposals.
\textsuperscript{90} The Guidelines stated “the fact that these investors are owned or controlled by a foreign government raises additional factors that must also be examined”.

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The key point to note in relation to these Guidelines is that no guidance was given by the government as to how their consideration of the national interest would be impacted by each of these factors and the extent to which each factor is or is not satisfied or to what level the government will need to be satisfied as to each factor.

While the international debate on the policy issues surrounding investments by SWFs tends to focus on economic risks raised by the participation of SWF’s and in particular the lack of transparency in their operations, the issues raised by the Australian government were more focused on non-economic issues. Indeed, the approach harked back to the criteria enunciated in the 1970s which has since been generally disclaimed.

There is also some concern about the discriminatory nature of a number of the six principles in that they sought to impose requirements on foreign government investors that go beyond the laws and regulations that apply to investments by Australian entities in the way suggested by the OECD principles.

For example, one of the six principles related to potential anti-competitive effects of the investment. All proposed transactions whether conducted by an Australian domiciled company or an offshore entity are subject to review by the Australian Competition and Consumer Commission (ACCC) which as an independent statutory body has specific expertise in reviewing the effect of transactions on the competitive landscape and does so according to well established regulatory principles under the *Trade Practices Act 1974* (Cth). It is unclear why FIRB or the Australian Government should impose an additional layer of competition review on investments by SWFs and SOEs.

Similar concerns can be raised in relation to the principle that deals with potential taxation impacts. Australia has a comprehensive taxation regulatory regime that specifically deals with issues such as transfer pricing and tax avoidance. It is therefore unclear what taxation issues this principle was seeking to address that is not already covered by Australia’s taxation regime.

Applications under Policy, such as portfolio investments by SWFs or investments of less than 15% by SOEs, are not governed by the statutory process set out in the Act and therefore no time limits apply in respect of the government’s response to applications that are solely based on Policy. Applications for foreign investment approval by Chinese SOEs in 2008-2009 took many months and that delay proved to be commercially significant in some circumstances.

4.5 **Industry-based restrictions**

In addition to the review process imposed under the Act and the Policy, Australian legislation which restricts foreign ownership in a fairly limited range of sensitive industries including shipping, aviation, airports, banking and gaming. There are also specific

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91 See by way of example: *Shipping Registration Act 1981* (Cth); *Air Navigation Act 1920* (Cth); *Airports Act 1966* (Cth); *Banking Act 1959* (Cth); *Financial Sector (Shareholdings) Act 1998* (Cth); *Casino Control Acts* and analogous legislation of each Australian State.
restrictions relating to foreign ownership of Qantas and Telstra. Any investment by foreign persons in these circumstances require specific consideration of that legislation.

5 Chinese SOE investment in Australia

In the period following 2008 there were a number of significant investment proposals by Chinese SOEs in the Australian resources sector. The case studies in that period that are described below illustrate the journey the Australian government embarked upon in grappling with the issues thrown up in dealing with SOE and SWF investment in Australia.

5.1 Key areas of focus when assessing investments by SWFs and SOEs

Drawing from the case studies summarised below some key messages coming from the Australian government can be identified in relation to foreign investment by SWFs and SOEs and in particular investments by Chinese SOEs in the resources sector. The broad themes that can be identified are:

- Consideration of the resource in question (or other industry in which the investment is proposed) to ascertain the dynamics of how price and supply is determined so as to ensure that pricing and supply will continue to be market based.

- Sensitivity to national security issues (real or perceived), as that is consistent with the OECD principles.

- Diversity of ownership of Australian assets in the relevant industry sector.

- Assets to be developed according to market-based principles.

- Possible need for majority or substantial minority ownership.

- Commitment to sell down over medium term in appropriate cases to allow market-based ownership.

- Majority or substantial Australian resident independent board members.

- Australian headquarters and management in appropriate cases.

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92 Qantas Sale Act 1992 (Cth); Telstra Corporation Act 1991 (Cwth).
93 See Minmetals, Yanzhou and Cubby conditions.
94 See original Minmetals decision.
95 See Sinosteel decision.
96 See Minmetals condition and Shell rejection.
97 See Chinalco, Sinosteel and Cubby decisions and CNMC result.
98 See Yanzhou and Cubby conditions.
99 See Hunan Valin and Yanzhou conditions.
- Possible need to create information barriers for nominee director access to pricing information.\textsuperscript{101}

### 5.2 Experience in recent years

<table>
<thead>
<tr>
<th>Target</th>
<th>Acquirer</th>
<th>Transaction Description</th>
<th>FIRB Approval</th>
</tr>
</thead>
</table>
| Rio Tinto\textsuperscript{102} | Chinalco\textsuperscript{103} | Acquisition of a 9\% shareholding in Rio Tinto Group for $12 billion by on market purchase on 1 February 2008 | Approved 24 August 2008.\textsuperscript{104} Undertakings:  
1. Not to increase shareholding without further approval.  
2. Not to seek to appoint director while shareholding below 15%. |
| Murchison Metals | Sinosteel\textsuperscript{105} | Possible reverse takeover of Murchison Metals by Sinosteel seeking to acquire 100\% of Midwest Corporation by takeover offer announced 14 March 2008 and Murchison Midwest acquisition approval.\textsuperscript{106} Interim orders made on Murchison transaction.\textsuperscript{107} Approval to acquire up to 49.9\% of the shares in Murchison with no approval for a higher |

\textsuperscript{100} See Minmetals, Yanzhou and Cubby conditions.  
\textsuperscript{101} See Hunan Valin conditions.  
\textsuperscript{102} Rio Tinto plc is a company incorporated in England and listed on the London Stock Exchange as the English arm of the dual-listed Rio Tinto Group. The Australian arm of the Rio Tinto Group is Rio Tinto Ltd, a company incorporated in Australia with its primary listing on the ASX. By virtue of the dual listing arrangements, the two Rio Tinto-listed entities are intended to operate and be managed as a single economic unit. In practice this is primarily effected through the voting arrangements of the two companies. Shareholder decisions that affect both companies are put to a joint decision such that the public shareholders of each of Rio Tinto plc and Rio Tinto Ltd effectively vote in aggregate. Chinalco's 12\% shareholding in Rio Tinto plc equated to an approximate 9\% economic interest in the Rio Tinto Group. It was reported Chinalco had legal advice that it did not require prior approval for an investment in Rio Tinto plc up to 14.9\% because it was acquiring shares in a company incorporated in England and listed on the London Stock Exchange.  
\textsuperscript{103} Chinalco is a Chinese SOE 100\% owned by the Chinese people.  
\textsuperscript{104} Treasurer, “Chinalco’s Acquisition of Shares in Rio Tinto” (Media Release 094, 24 August 2008).  
\textsuperscript{105} Sinosteel is a Chinese SOE 100\%-owned by the Chinese people.  
\textsuperscript{106} Sinosteel obtained unconditional FIRB approval to make the takeover bid at the time of seeking clearance for its initial investment in January 2008.  
\textsuperscript{107} On 25 June 2008, an interim order dated 16 June 2008 was published in the Commonwealth Gazette prohibiting Sinosteel from acquiring a substantial shareholding in or assets of Murchison Metals Limited.
<table>
<thead>
<tr>
<th>Target</th>
<th>Acquirer</th>
<th>Transaction Description</th>
<th>FIRB Approval</th>
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<tbody>
<tr>
<td>Metals seeking to acquire 100% of Midwest Corporation by scrip scheme of arrangement announced 26 May 2008. Sinosteel acquired 100% of Midwest. The Murchison transaction did not proceed.</td>
<td>Metals seeking to acquire 100% of Midwest Corporation by scrip scheme of arrangement announced 26 May 2008. Sinosteel acquired 100% of Midwest. The Murchison transaction did not proceed.</td>
<td>shareholding in the interests of “diversity of ownership” of iron ore in the Midwest region.</td>
<td></td>
</tr>
<tr>
<td>Rio Tinto</td>
<td>Chinalco</td>
<td>On 12 February 2009, Rio Tinto announced that it had entered into a Cooperation and Implementation Agreement with Chinalco for a further proposed US$19.5 billion strategic partnership. The proposed transaction involved the investment by Chinalco of US$7.2 billion through convertible bonds as well as a US$12.3 billion investment in certain Rio Tinto assets. On 24 June 2009, Rio Tinto announced that it had terminated the Cooperation and Implementation Agreement with Chinalco and instead would pursue</td>
<td>Interim order.</td>
</tr>
</tbody>
</table>

108 Treasurer, “Foreign Investment Approval: Sinosteel’s Interests in Murchison Metals.” (Media Release 100, 21 September 2008). The media release noted that Sinosteel’s application to acquire up to 100% of Murchison had been withdrawn and that a revised application for up to 49.9% of Murchison was approved. “In approving Sinosteel’s application, I have determined that a shareholding of up to 49.9 per cent in Murchison will maintain diversity of ownership within the Mid West region. The Government considers the development of such potentially significant new resource areas should occur through arrangements that are open to multiple investors. This approach is consistent with the national interest principles we released in February and with the approach I have outlined previously, including in discussions with my Chinese counterparts.”

109 On 13 March 2009, FIRB issued an Interim Order extending the period of consideration of the proposal by up to 90 days.
<table>
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<th>Target</th>
<th>Acquirer</th>
<th>Transaction Description</th>
<th>FIRB Approval</th>
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</table>
| OZ Minerals         | China Minmetals Non-ferrous Metals Company | Initial proposal on 16 February 2009 to acquire 100% shareholding in OZ Minerals by cash scheme. | Interim order issued.  
Initial proposal would not have been approved if it included the Prominent Hill site on national security grounds.  
Revised proposal approved 29 April 2009 with undertakings:  
• to operate the assets as a separate business unit according to commercial objectives, including the maximisation of product prices and long-term |

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110 Oz Minerals had been struggling financially following the collapse of commodity markets in 2008 and had been unable to complete the sale of various assets which it had hoped would allow it meet a $1.3 billion debt repayment due on 31 March 2009.

111 Minmetals is a Chinese SOE controlled by China Minmetals Corporation as a 90% shareholder (which is wholly owned by the Chinese government).

112 On 23 March 2009, FIRB issued an interim order extending the period for evaluation of Minmetals application by 90 days.

113 Treasurer, “Foreign Investment Decision” (Media Release 029, 27 March 2009): “Under the Foreign Acquisitions and Takeovers Act 1975, all foreign investment applications are examined against Australia’s national interest. An important part of this assessment is whether proposals conform with Australia’s national security interests, in line with the principles that apply to foreign government related investments. OZ Minerals’ Prominent Hill mining operations are situated in the Woomera Prohibited Area in South Australia. The Woomera Prohibited Area weapons testing range makes a unique and sensitive contribution to Australia’s national defence. It is not unusual for governments to restrict access to sensitive areas on national security grounds. The Government has determined that Minmetals’ proposal for OZ Minerals cannot be approved if it includes Prominent Hill … Discussions between the Foreign Investment Review Board and Minmetals are continuing in relation to OZ Minerals’ other businesses and assets, and the “

114 Treasurer, Foreign Investment Decision (Media Release 043, 23 April 2009).
<table>
<thead>
<tr>
<th>Target</th>
<th>Acquirer</th>
<th>Transaction Description</th>
<th>FIRB Approval</th>
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</table>

- profitability and value;
- to own the Australian assets through companies incorporated, headquartered and managed in Australia under a predominantly Australian management team;
- to comply with financial reporting requirements under the *Corporations Act 2001* (Cth);
- to sell products produced on arms length terms by a sales team headquartered in Australia, with pricing being determined by reference to international observable benchmarks and in line with market practice;
- to continue to operate certain assets at current or increased production and employment levels and to pursue the growth of certain projects; and
- to comply with Australian industrial relations laws, to honour employee entitlements and to support Indigenous Australian communities.
<table>
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<th>Target</th>
<th>Acquirer</th>
<th>Transaction Description</th>
<th>FIRB Approval</th>
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</table>
| Fortescue Metals Group | Hunan Valin Iron and Steel Group Company 115 | Acquisition of a 17.4% shareholding in Fortescue, joint venture to develop certain iron ore tenements and off-take arrangement valued at $650 million announced 25 February 2009. | Interim order issued. 116 Approval 31 March 2009 on the basis of undertakings:  
  • that any person nominated by Hunan Valin to Fortescue’s Board will comply with the Director’s Code of Conduct maintained by Fortescue;  
  • any person nominated by Hunan Valin to Fortescue’s Board will submit a standing notice under the Corporations Act of their potential conflict of interest relating to Fortescue’s marketing, sales, customer profiles, price setting and cost structures for pricing and shipping;  
  • Hunan Valin and any person nominated by it to Fortescue’s Board will comply with the information segregation arrangements agreed between Fortescue and Hunan Valin; and  
  • Hunan Valin must report to FIRB on its compliance with the undertakings with

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115 Hunan Valin is a Chinese SOE 100% owned by the Hunan provincial Government.

116 FIRB issued an interim order on 18 March 2009, extending the FIRB review period of the proposed transaction for up to 30 days.
<table>
<thead>
<tr>
<th>Target</th>
<th>Acquirer</th>
<th>Transaction Description</th>
<th>FIRB Approval</th>
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</thead>
<tbody>
<tr>
<td>Lynas Corporation</td>
<td>China Non-Ferrous Metal Mining Group</td>
<td>On 1 May 2009 Lynas Corp Ltd (Lynas) signed a heads of agreement with China Non-Ferrous Metal Mining Group (CNMC) for CNMC to become a 51.6% shareholder in Lynas at A$0.36 per share and facilitate the arranging of bank debt in a transaction valued at over $500 million. The investment would permit Lynas to complete and commission a rare earths project. On 24 September 2009 Lynas announced that CNMC had terminated the heads of agreement.</td>
<td>Interim orders issued.(^\text{117}) No FIRB approval at time transaction terminated.(^\text{118})</td>
</tr>
<tr>
<td>Felix Resources</td>
<td>Yanzhou Coal Mining Co(^\text{119})</td>
<td>Acquisition of 100% of Felix for a cash amount and shares in a subsidiary of Felix announced 13</td>
<td>Application was relodged.(^\text{120}) Approval given 26 October 2009 on the basis of</td>
</tr>
</tbody>
</table>

\(^\text{117}\) On 8 July 2009 Lynas announced that FIRB had asked CNMC to resubmit its application. On 3 August 2009 Lynas announced that FIRB had yet not made a decision and that the 30-day period for FIRB review would now expire in early September 2009. On 2 September 2009 Lynas announced that FIRB had not yet made a decision and that the 30-day period for FIRB review would now expire in early October 2009. It follows that CNMC withdrew and resubmitted its application 3 times. Five months had by then passed.

\(^\text{118}\) It was disclosed that CNMC had agreed undertakings at ensuring independent director control of rare earths products as part of FIRB discussions. However, additional FIRB undertakings that had been sought that the percentage of ownership held by CNMC be below 50% and that CNMC nominees to the board of Lynas be less than half of the board, led to the termination of the proposal by CNMC.

\(^\text{119}\) Yanzhou is a Chinese company listed on the Hong Kong Stock Exchange, New York Stock Exchange and Shanghai Stock Exchange. Yankuang Group Corporation holds approximately 53% of Yanzhou which is ultimately controlled by the Shandong Provincial Government.

\(^\text{120}\) FIRB consideration of the proposal required the application to be relodged once to re-activate the 30-day review period.
<table>
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<th>Target</th>
<th>Acquirer</th>
<th>Transaction Description</th>
<th>FIRB Approval</th>
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</table>
|        |          | August 2009.             | undertakings:  

- Felix and Yanzhou’s other Australian assets to be owned by an Australian holding company to be headquartered and managed in Australia by a predominately Australian management and sales team with:  
  - the Australian holding company and its operating subsidiaries having at least two Australian resident directors, one to be independent of Yanzhou;  
  - all future Australian operations to be owned by the Australian holding company;  
  - chief executive office and chief financial officer having principal place of residence in Australia;  
  - majority of board meetings in Australia.  
- The Australian holding company to be operated in accordance with commercial objectives,

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121 Assistant Treasurer “Foreign Investment Decision - Felix Resources” (Press release, 26 October 2009).
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<th>Target</th>
<th>Acquirer</th>
<th>Transaction Description</th>
<th>FIRB Approval</th>
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<tbody>
<tr>
<td>Gloucester Coal</td>
<td>Yanzhou Coal Mining Company</td>
<td>Acquisition of 100% of Gloucester by Yancoal Australia by the issue of scrip in Yancoal Australia at cash return announced</td>
<td>Approval given 8 March 2012 subject to undertakings: 122</td>
</tr>
</tbody>
</table>
|                        |                                   | *including maximisation of product prices and long term profitability and value with production sold on an arms length and non-discriminatory basis to all customers at prices determined by reference to international benchmarks in line with market practice.*  
  - The Australian holding company:  
    - to seek to list on ASX by no later than the end of 2010.  
    - Yanzhou’s economic ownership of the Australian holding company to be less than 70% and of Felix’s existing assets to be less than 50% (there are joint venture arrangements in relation to those assets).  
  - The chief executive officer of the Australian holding company must report to FIRB on compliance with the undertakings at least annually. |

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122 Wayne Swan Media Release 9/2012 “Foreign Investment Decision”.

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<th>Transaction Description</th>
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</table>
|        |          | and December 2011. Gloucester shareholders received shares representing 23% of the enlarged bidder. | continue with following amendments;  
  - Yancoal to list on ASX by end 2012 and Yanzhou’s ownership to be less than 70% by end 2013;  
  - Reduce economic ownership in Syntech Resources and Premier Coal to 70% by end 2014 and manage these mines through Yancoal in the interim. |
| Cubbie Group$^{123}$ | Shandong RuYi Scientific & Technological Group Co. Ltd.$^{124}$ | Consortium acquisition with Lempriere Pty Ltd (an Australian Investor) of the assets of Cubbie Group. | Approval given 31 August 2012 subject to undertakings:  
  - RuYi to sell down interest from 80% to 51% to independent parties within 3 years and ensure board representations is proportionate to its shareholding;  
  - Cubbie to be managed by Lempriere and sell cotton on arms length terms;  
  - comply with law and offer to employ existing employees; |

$^{123}$ Cubbie group owns substantial agricultural load in Southern Queensland and is involved in a variety of irrigated agricultural activities including the production of significant amounts of cotton.

$^{124}$ A leading Chinese textile manufacturer owned by Chinese and Japanese investors.

$^{125}$ Wayne Swan Media Release 079/2012 “Foreign Investment Decision”.

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investigate ways to improve water efficiency and sell surplus water allocations.

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<th>Target</th>
<th>Acquirer</th>
<th>Transaction Description</th>
<th>FIRB Approval</th>
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6 Comparative Analysis with other Key Jurisdictions

The fact that Australia has grappled with the issue of FDI in recent years by SWFs and SOEs is not unique to western nations. The extent of regulation of FDI has been a growing issue in many jurisdictions over the last decade for the reasons advanced in the introduction. This section considers comparative analysis and case studies from some other analogous western countries.

In looking at comparable models for regulating FDI the regulatory regimes of many western jurisdictions do not provide helpful comparisons. Many jurisdictions (a number of European countries come within this category) do not have general statutory mechanisms for regulating FDI but instead rely on arrangements: such as the following:126

- sectoral restrictions on foreign control for key industries;
- opaque regulatory approval requirements that apply to any control transaction in key industries, but where foreign control is discouraged as a practical matter;
- golden shares and unequal voting right mechanisms;
- political meddling in mergers and acquisitions transactions that support local bidders.

6.1 United States of America

Foreign investment is regulated in the United States by the Committee on Foreign Investment in the United States (CFIUS).127 The mandate of CFIUS is to review the

127 CFIUS is an interagency committee that works for the President – see J.J Jackson “The Committee on Foreign Investment in the United States”. (29 March 2013, Congressional Research Service at [cite].

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national security implications of foreign investment. In this context “national security” extends to “critical infrastructure” and “critical technologies”. As such, the broad scope of the regime is narrower than the national interest criteria of Australia. Importantly in the context of SWFs and SOEs a review must be undertaken if the transaction is a foreign government controlled by or acting on behalf of a foreign government.


A CFIUS review can be initiated by a voluntary filing, by the President or by CFIUS. The advantage of a voluntary filing is the expectation that once a transaction is approved it will be exempt from further review or action. The legislation applies to any “covered transaction, being a merger, acquisition or takeover that could result in a foreign person controlling a person engaged in interstate commerce in the United States. When a CFIUS review is initiated CFIUS has 30 days to review the transaction to determine its effects on the national security of the United States. If the review results in a determination that the transaction threatens to impair national security and that threat has not yet been mitigated CFIUS must conduct an investigation of the effects of the transaction within 45 days and take any necessary actions in connection with the transaction to protect national security. After conducting that investigation CFIUS must submit a report to

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128 CFIUS consists of nine members – the Secretaries of State, Treasury, Defense, Homeland Security, Commerce and Energy, the Attorney General, the United States Trade Representative, the Office of Science and Technology. The Secretary of Labor and Director of National Intelligence are ex officio member. See Jackson at page 8 footnote 31.

129 Systems and assets, physical or virtual, so vital that its incapacity or destruction would have a debilitating impact on national security – section 721 (a).

130 Critical technology, critical components or critical technology essential to national security – section 721 (a).

131 Executive Order 11858(b) 7 May 1975 (President Ford) 40 FR 20263. See Jackson at pages 2-3.

132 P.L. 100-418. See Jackson pages 3-5.

133 P.L. 102-484. See Jackson pages 3-5.


135 Section 721 (b)(1)(E)

136 The legislation allows CFIUS to reopen a review if the person materially fails to comply with an arrangement entered into in relation to an approval or has provided false or misleading material information – section 721 (b) (1) (D).

137 Section 721 (a). Control is defined in Treasury Department regulations as a majority or dominant minority of voting securities or the power to determine or decide certain specified decisions.

138 Section 721 (b)(1)(E).

139 Section 721 (b)(2).
Congress on the results of the investigation or submit the matter to the President for decision.\textsuperscript{140} The President has authority to take such action within 15 days for such time as he considers appropriate if he finds there is credible evidence that leads him to believe that a foreign interest exercising control might take action that threatens to impair national security.\textsuperscript{141} The Act lists a variety of factors that the President may take into account when considering national security, including:\textsuperscript{142}

- domestic production needed for projected national defense requirements;
- capacity of domestic industries to meet national defense requirements;
- potential effects on sale of military materials to countries of concern;
- effects on critical infrastructure or critical technologies;
- the transaction is a foreign government controlled transaction.

As a result of the rigidity of the 30, 40,15 day process CFIUS has developed a practice of allowing an informed preliminary stage of unspecified length. This allows additional time to resolve concerns and allows confidentiality particularly if a transaction would otherwise be publicly blocked.\textsuperscript{143}

Some broad statistics concerning the results of CFIUS review in recent years are as follows:

\textbf{Foreign Investment Transactions Reviewed by CFIUS, 2008-2010}

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Notices</th>
<th>Notices Withdrawn During Review</th>
<th>Number of Investigations</th>
<th>Notices Withdrawn During Investigation</th>
<th>Presidential Decisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>155</td>
<td>18</td>
<td>23</td>
<td>5</td>
<td>0</td>
</tr>
<tr>
<td>2009</td>
<td>65</td>
<td>5</td>
<td>25</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>2010</td>
<td>93</td>
<td>6</td>
<td>35</td>
<td>6</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>313</td>
<td>29</td>
<td>93</td>
<td>13</td>
<td>0</td>
</tr>
</tbody>
</table>

\textit{Source}: \textit{Annual Report to Congress}, Committee on Foreign Investment in the United States, December 2011.

\textsuperscript{140} Section 721 (b)(3).
\textsuperscript{141} Section 721 (d).
\textsuperscript{142} Section 721(f)
\textsuperscript{143} See Jackson pages 7-8
The most recent development in the Presidential decision making area is in relation to the Sany investment (see below).

Some of the more contentious of the decisions made in connection with the CFIUS regime in recent years are as follows:

<table>
<thead>
<tr>
<th>Date</th>
<th>Transaction</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
<td>Acquisition by NTT Communications (Japan) of Verio Inc, a firm providing internet services. The transaction was approved by CFIUS. NTT was controlled by the Japanese Government. CFIUS review was instigated by the FBI who was concerned NTT could access information on US government wiretaps.</td>
</tr>
<tr>
<td>2005</td>
<td>US$18.5 billion bid for Unocal withdrawn by CNOOC (Chinese SOE) after House of Representatives approved a provision that would have delayed the transaction and a likely CFIUS investigation.</td>
</tr>
<tr>
<td>2005/06</td>
<td>Proposed acquisition of commercial port operations by Dubai Ports World (Arab entity) from P&amp;O. The transaction was approved by CFIUS without undertaking a 45 day investigation. 145 As a result of vocal criticism from members of Congress and the public DP World disposed of the ports to AIG Global Investment Group (a US asset manager) in 2006.</td>
</tr>
<tr>
<td>2006</td>
<td>Acquisition by Check Point Software Corporation (Israel) of Sourcefire a specialist in security appliances for computer networks. The transaction was terminated following CFIUS concerns.</td>
</tr>
<tr>
<td>2008</td>
<td>Proposed acquisition by Bain Capital and Huawei technologies (China) of 3Com, a network and software provider, for $2.2 billion. The transaction did not proceed after failure to negotiate a mitigation agreement with CFIUS. Certain 3Com software is used to protect the confidentiality of databases used by U.S. defense forces.</td>
</tr>
<tr>
<td>2009</td>
<td>US$16 million proposed investment by Northwest Non-Ferrous International Investment Co Ltd to acquire 50.1% interest in First Gold</td>
</tr>
</tbody>
</table>

144 Jackson at page 9.  
145 Jackson at page 22.  
146 Jackson at page 1.  
147 Jackson at page 9.  
148 Jackson at page 16.
<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>2010</td>
<td>Proposed acquisition by Tangshan Caofedian Investment Corporation (China) of Emcore, a maker of components for fibre optics and solar panels. The transaction was terminated following CFIUS concerns.</td>
</tr>
<tr>
<td>2012</td>
<td>Proposed acquisition by Ralls Corporation (owned by executives of Sany of China) of several wind farms in Oregon. In September 2012 President Barak Obama signed in Executive Order prohibiting the acquisition, requiring the dismantling of Sany turbines on the sites and ordered that no purchaser of the sites be sold Sany turbines. In October 2012 Sany commenced proceedings before the District Court of Columbia challenging the President’s decision on the basis it exceeded his powers under the CFIUS legislation, particularly in requiring the turbines to be dismantled and not sold for use at the sites, and that the action discriminated against Sany. Wind farms in the restricted air space area use turbines made by German and Danish companies and are owned by an Indian conglomerate. On 26 February 2013 Judge Amy Jackson dismissed Sany’s complaint for lack of jurisdiction on the basis that the provisions of the CFIUS legislation provide that the actions of the President shall not be subject to judicial review. A further complaint that due process requires Sany to be provided with a more detailed explanation of the President’s findings was not struck out and that claim continued. Ralls Corporation has appealed the decision.</td>
</tr>
<tr>
<td>2013</td>
<td>Proposed acquisition by Wanxiang Group (China) of A123 Systems, an electrical battery maker. Approved by CFIUS despite criticism by members of Congress on the grounds it could jeopardise energy security and because of the government grants A123 received.</td>
</tr>
</tbody>
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149 First Gold was a junior mining company listed on the Toronto Stock Exchange (incorporated in the United States) that was seeking to develop gold mines adjacent to United States military installations in Nevada. The rejection was based on national security concerns.  
150 Jackson at page 9.  
152 Amended Memorandum Opinion in Ralls Corporation v Committee on Foreign Investment in the United States, District Court for the District of Columbia, Civil Action 12-513, 26 February 2013.  
153 Jackson at page 10.
The recent cases involving China demonstrate that CFIUS is struggling with its review of Chinese investment.\textsuperscript{154} This was taking place at a time where Chinese FDI into the United States has matched Australia for the first time as the primary destination of Chinese investment in 2012.\textsuperscript{155}

There appears to be much greater political hostility to Chinese investment in the United States than in Australia. The vitriolic tone of the House of Representatives Permanent Select Committee on Intelligence into the activities of Huawei and ZTE and the suggestion that their sale of computer equipment to US national security interests illustrate the current level of suspicion in the United States.\textsuperscript{156}

6.2 Canada

Foreign investment is regulated in Canada by the Investment Canada Act 1985.\textsuperscript{157} Reviewable transactions are assessed by the Minister of Industry on the basis that the Minister must be satisfied that the investment but when considered objectively is likely to be of “net benefit” to Canada.\textsuperscript{158} The term net benefit is not defined, but when considered objectively is likely to be a higher hurdle than Australia’s national interest test because of the need for the Minister to positively form that view. Of course, at the end of the day each of these tests involve a very subjective political decision-making process rather than a subjective standard rather than a reviewable objective standard.

Investment Canada review applies to the acquisition of control by a non-Canadian person of a Canadian business or the establishment of a new business.\textsuperscript{159} Control is defined in terms that the acquisition of 50% or more of voting interests is deemed to be control, the acquisition of 33\% or more but less than 50% of voting interests is presumed to be an acquisition of control unless there is evidence to the contrary and the acquisition of less than 33\% of voting interests is deemed not to be control.\textsuperscript{160} A C$ threshold applies to reviewable transaction that is indexed each year. The general C$ threshold increases substantially in 2013 to an enterprise value of C$600 million, rising to C$1 billion over 4

years where the acquisition is made by an entity from a World Trade Organisation member.\(^{161}\)

The filing of an application for review triggers a process under which the minister generally has 45 days to make a decision\(^{162}\), extendable unilaterally by 30 days\(^ {163}\) or longer by agreement. As the case studies below a 30 day extension with a no net benefit opinion has significant implications to implementation of a transaction. The application is generally processed by Industry Canada.\(^ {164}\) In considering “net benefit” certain factors are to be taken into account, where relevant:\(^ {165}\)

- the effect of the investment on the level and nature of economic activity in Canada;
- participation of Canadian’s in the business;
- effect on productivity, industrial efficiency, technological development, product innovation and variety in Canada;
- effect on competition in Canada;
- Compatibility with national industrial, economic and cultural policies;
- impact on Canada’s ability to compete in world markets.

A separate regime applies to investments involving national security concerns. If the Minister has reasonable grounds to believe that an investment by a non-Canadian could be injurious to national security the investment can be prohibited.\(^ {166}\) In this situation there is no monetary threshold. The terms “injurious to national security” is not defined and is much more ambiguous in its scope compared to, for example, the CFIUS regime.

Since 2007 a special regime has applied to SOE investment.\(^ {167}\) An SOE is defined as an enterprise owned, controlled or influenced by a foreign government. The C$ threshold for investment by SOE’s is a book value of assets of C$344 million for 2013. The guidelines specify that in considering net benefit the Minister will consider the corporate governance and reporting structure of the SOE, including whether the SOE adheres to Canadian

\(^{161}\) Budget Implementation Bill C-60 released 29 April 2013. For non-WTO entities the threshold is C$5 million. A different threshold applies to SOE’s – see below.

\(^{162}\) Investment Canada Act section 21(1).

\(^{163}\) Investment Canada Act section 22(1).

\(^{164}\) Except for transactions involving cultural issues that are handled by the Department of Canadian Heritage.

\(^{165}\) Investment Canada Act section 20.

\(^{166}\) Investment Canada Act section 25.

standards of corporate governance, Canadian laws and practices and adherence to free market principles. Further the Minister will assess whether the SOE will operate on a commercial basis including where to export, where to process, participation of Canadian’s in operation, support for innovation and levels of capital expenditure.

The current regime described above has developed against a backdrop of extreme public debate about the appropriate scope of regulation and the role of FDI is shaping the Canadian economy. Canada, in particular has been anxious that its industries being “hollowed out” with its industry champions being acquired by foreign persons with head offices and jobs increasingly going off shore. In the hollowing out debate Canada has had more to fear from the United States than SOE investment in resources.

Some of the major transactions that have shaped this debate in Canada are as follows:

<table>
<thead>
<tr>
<th>Date</th>
<th>Transaction</th>
</tr>
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<tbody>
<tr>
<td>2008</td>
<td>Proposed $1.3 billion acquisition by Alliant Techsystems Inc (US) of space technology division of MacDonald Dettwiler &amp; Associates blocked by the Minister. The basis of the decision was the loss of important technology to Canada and a threat to Canadian surveillance of disputed artic territory. This was the first investment blocked under the Investment Canada Act.</td>
</tr>
<tr>
<td>2010</td>
<td>Proposed C$38 billion acquisition by BHP Billiton of Potash Corporation of Saskatchewan Inc (a significant global producer or of potash). The proposal was withdrawn following a preliminary finding by the Minister that the investment is not likely to be of net benefit and an invitation to make further submissions to the Minister within 30 days. BHP had proposed various capital expenditure commitments, Canadian employment commitments and community programs to satisfy the benefit test.</td>
</tr>
</tbody>
</table>

\[^{168}\text{Se G. Michael and M. Bloom “Hollowing Out – Myth and Reality: Corporate Takeovers in an Age of Transformation” Conference Board of Canada (2008).}\]
\[^{169}\text{Hon Jim Prentice “Minister of Industry confirms initial decision on proposed sale of MacDonald, Dettwiler and Associates Ltd to Alliant Techsystems Inc” 8 May 2008, Industry Canada.}\]
\[^{170}\text{Hon Tony Clement “Industry Minister Clement confirms BHP Billiton’s Withdrawal of its Application for Review Under The Investment Canada Act” 14 November 2010, Investment Canada”.}\]
\[^{171}\text{BHP Billiton “BHP Billiton Withdraws its Offer to acquire Potash Corp and Reactivates its Buy-Back Program” 15 November 2010.}\]
2012  Proposed C$5.2 billion acquisition by Petronas (Malaysian SOE) of Progress Energy Resources Corp (an oil and gas exploration and production company). On 19 October 2012 the Minister advised Petronas that he was not satisfied the investment is likely to be of net benefit and invited further submissions within 30 days. On 7 December 2012 the Minister advised that the investment is likely to be of net benefit. The Minister’s release indicated undertakings had been given in the areas of transparency and disclosure, adherence to Canadian laws and practices and free market principles, employment and capital investments. Petronas had previously advised that it planned to combine its Canadian business with Progress and retain all employees of Progress.

2012  Proposed C$14 billion acquisition by CNOOC Limited (Chinese SOE) of Nexen Ltd (significant oil sands explorer and producer). On 7 December 2012 the Minister advised that he was satisfied that the investment is likely to be of net benefit to Canada. The Minister’s release indicated undertakings has been given in the areas of transparency and disclosure, adherence to Canadian laws and practices, free market principles, employment and capital investments. CNOOC had previously advised that it planned to establish Calgary as its American head office, retain Nexen’s expenditure plans, list on Toronto Stock Exchange and support oil sands research.

The record outline above illustrates a very tumultuous record of FDI regulation in Canada over the last few years. At the same time of announcing the last 2 approvals listed above the Minister announced various changes to the regime as well as the SOE policy. In particular, the Minister advised that the acquisition of control of a Canadian oil sands business by an SOE will only be found to be of net benefit “on an exceptional basis only”. There is a concern in some quarters within Canada that the regulatory regime is calibrated too harshly against foreign investors, particularly Chinese SOE’s, and that Canada is losing

172 Hon Christian Paradis “Minister of Industry Confirms Notice Sent to PETRONAS Carigali Canada Ltd Regarding Proposed Acquisition of Progress Energy Resources Corp” 19 October 2012, Investment Canada.
173 Hon Christian Paradis “Petronas’ Acquisition of Progress” 7 December 2012, Investment Canada.
174 Hon Christian Paradis “CNOOC Limited’s Acquisition of Nexen Inc” 7 December 2012, Investment Canada.
175 Investment Canada “Statement Regarding Investment by Foreign State – Owned Enterprises” 7 December 2012.
foreign direct investment to other countries that have better dealt with Chinese FDI, particularly Australia.\textsuperscript{176} Grant has suggested in Canada changes in the following areas:\textsuperscript{177}

- replace the net benefit test with a contrary to national interests test (i.e. the Australian test);
- include in the SOE standards guidelines undertakings on arm’s length marketing and international price benchmarks;
- explicitly state that Canada has a national interest in companies operating on a commercial basis under the laws of Canada;
- recognise the economic importance of resources mergers and acquisitions; and
- engage with Chinese companies and make them aware of Canadian sensitivities and requirements to develop a model of Chinese investment in Canada.

7 Some Conclusions

The Australian review process is structurally designed to approve most investment applications. Some argue that Australia’s regime imposes a measurable cost through rejection, excessive conditions imposed on transactions and investments deferred by the regime.\textsuperscript{178} Those claims seem overblown. The reality is that the overwhelming majority of transactions are approved.

It can be argued that the structure of the Australian regime does not sit well with Australia’s obligations under the OECD regime (particularly the 2009 Recommendations) described in the section, “Rationale for Regulating Foreign Direct Investment” in the following areas:

- The OECD Council recommends that transparency and predictability requires that there be strict time limits applied to review procedures for foreign investments. The experience with some of the Chinese SOE investment since 2008 does not suggest a high degree of correlation with this recommendation.
- The OECD Council recommends that proportionality requires that investment decisions be narrowly focused on concerns relating to national security. The national

\textsuperscript{176} See M.Grant “Fear the Dragon? Chinese Foreign Direct Investment in Canada” 2012, Conference Board of Canada.
\textsuperscript{177} M.Grant at pages 25-26.
\textsuperscript{178} ITS Global has estimated that Australia’s regulatory regime costs the Australian economy at least $5.5 billion a year through delay or deterrence of foreign investment. Report by ITS Global “Foreign Direct Investment in Australia – the increasing Cost of Regulation” (9 September 2008) pages 21-22 available at http://www.itsglobal.net/. Also see Kirchner, pages 8-9.
interest criteria in Australia are certainly much broader and opaque than that standard.

- The OECD Council recommends that accountability suggests that there be the possibility for foreign investors to seek review of decisions to restrict foreign investment through administrative procedure or before judicial or administrative courts. The Australian regime does not reflect such a feature.

Moving from deficiencies, what should the longer term structural solutions to this policy issue be?

Stephen Kirchner\(^{179}\) has suggested structural reform along one or more of the following options:

- A first preference to abolish the existing process altogether extending full national treatment to foreign direct investments. Instead of regulating foreign direct investment at the border, the focus of policy should be on regulating foreign-owned businesses in Australia in the same manner as domestically owned firms.\(^{180}\)

- Alternatively, thresholds for review of foreign direct investment proposals should be raised to reflect the dollar thresholds used under the United States free trade agreement.\(^{181}\) The Act and related legislation should be amended to replace the current national interest test with distinct “national security” and “national economic welfare” tests.\(^{182}\) Federal cabinet should rule on investment proposals raising specific national security concerns. All other foreign direct investment proposals should be considered by an independent statutory body subject to a national economic welfare test that would be binding on the government of the day and be subject to administrative and judicial review.

A different approach is recommended. It is clear that the issue of regulating FDI is an issue of global concern and represents an ongoing dialogue in globalised markets. Bodies such as the OECD and the IMF have made substantial contributions to this debate in recent years. The Australian government should renew its efforts for international consensus on these issues and over time move its policy settings to reflect international consensus. Rather than removing the byzantine edifice of the existing statutory regime in the short term, the focus of government action should be to embrace OECD and IMF best practice in the practical implementation of its decision making.

\(^{179}\) Kirchner, note 5 above.

\(^{180}\) That approach reflects the OECD position.

\(^{181}\) Since that time the approval threshold has been increased from A$100 million to A$248 million (calendar year 2013).

\(^{182}\) The contrast to the OECD recommendations described in the section, “Rationale for Regulating Foreign Direct Investment” in this article and the historic attitude to the test before the 1980s.
Longer term, if Australia’s embrace of best practice global trends has the effect of removing a national interest test and its replacement by the types of tests suggested by Kirchner,\textsuperscript{183} that would be a good result but should be consistent with greater global consensus around these issues.

At a narrower and more immediate level, the Australian government’s continued application of its existing policy to portfolio investments by SWFs makes no policy sense. Now that the Santiago Principles are in place, Australia’s foreign investment policy should be to permit SWFs that are committed to the Santiago Principles to make investments in Australian companies that are not subject to assessment under the Act without the need for prior notification for approval from the Australian government.

As to the bigger issues surrounding strategic investment to permit SWFs by Chinese SOEs in Australia, the recent developments in the Australia-China relationship generally suggests that this will remain a sensitive and difficult issue for some time.

\textsuperscript{183} Clearly that test is more consonant with the analysis discussed in the section, “Rationale for Regulating Foreign Direct Investment” in this article.