Australian regulation of foreign direct investment by sovereign wealth funds and State-owned enterprises: Are our rules right?

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In recent years there has been considerable debate surrounding investment in Australia by entities affiliated with foreign governments. The benefits to Australia of foreign direct investment seem clear, even if sometimes poorly understood by the general public. This article considers the Australian regulatory regime applicable to foreign direct investment and the experience in applying that regime to investment by sovereign wealth funds and State-owned enterprises.

INTRODUCTION

In the first decade of this century there has been a developing global debate as to the appropriateness of the imposition of restrictions on foreign direct investment 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 rapidly developing BRIC nations,[1] national insecurities arising from global terrorism and the challenges of the global financial crisis in the period following 2007.

In recent times, Australia has been somewhat at the epicentre of this global debate.

In the early stages of the global financial crisis (GFC) the role of sovereign wealth funds (SWFs) came under particular 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, deflated and reinflated, interest from Chinese state-owned enterprises (SOEs) in investing in Australia posed particular challenges when considered in the context of the developing Australia-China trade relationship.

The purpose of this article is to assess from a lawyer's perspective the adequacy of the Australian regulatory regime in dealing with the policy challenges posed by SWF and SOE foreign direct investment in Australia.[3]

RATIONALE FOR REGULATING FOREIGN DIRECT INVESTMENT

Australia has a long history of its economic growth being facilitated by foreign direct investment. That was shown in the early 20th century and following the Second World War when foreign investment

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[1] Brazil, Russia, India, China.

[2] Those investments in late 2007 and early 2008 included a US$10 billion investment by Singapore General Investment Corporation in UBS, US$3 billion investment by Temasek in Barclays, US$5 billion investment in Morgan Stanley by China Investment Corporation, US$7.5 billion investment by Abu Dhabi Investment Authority and US$7 billion investment by Singapore General Investment Corporation in Citigroup and US$4.4 billion investment by Temasek, US$2 billion investment by Korean Investment Fund and US$2 billion investment by Kuwait Investment Fund in Merrill Lynch.

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.

[3] The area has also been an area of strong focus outside the law, particularly by economists and through the work of policy think tanks – see eg, Marchick DM and Slaughter MJ, *Global FDI Policy: Correcting a Protectionist Drift*, (The Bernard and Irene Schwartz Series on American Competiveness CSR No 34, Council on Foreign Relations, June 2008) and Kirchner S, *Capital Xenophobia II: Foreign Direct Investment in Australia, Sovereign Wealth Funds and the Rise of State Capitalism*, (Centre for Independent Studies CIS, Policy Monograph 88, 2008).

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 now key mineral resources.[4]

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 slow down 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.[5]

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.[6]

Foreign investment also contributes to the strength of Australia's trade relationships[7] and can help to reduce security risks through the development of strong political and economic relationships with investing nations.[8]

The general benefits of foreign direct investment globally are recognised and advanced through the principles adopted by the Organisation for Economic Co-operation and Development (OECD) where Australia is an important member. 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

[4] For an overview of the historical contribution of foreign direct investment in Australia see the report published by the Committee for Economic Development of Australia (CEDA) *Information Paper 92: The Contribution of Foreign Direct Investment and the Mining Industry to Welfare of Australians* available at http://www.ceda.com.au/research/current-topics/research/2009/11/infopaper-current-topics/ip_92.aspx viewed 30 July 2010.

[5] It has been suggested that during the period between the 1960s to the 1980s in Australia when trade and investment was negatively affected by a restrictive foreign policy and other protectionism features, capital productivity declined by 30%. See Evans T, *Economic Nationalism and Performance in Australia from 1960s to the 1990s* (Paper presented at the Ninth Colin Clark Memorial Lecture 1999, No 258, 3 June 1999) available at http://www.treasury.gov.au/documents/93/HTML/docshell.asp?URL=default.asp viewed 30 July 2010.

[6] Kirchner, n 3, p 2.

[7] 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), on p 20.

[8] Organisation for Economic Co-operation and Development (OECD) *Foreign Government – Controlled Investors and Recipient Country Investment Policies: A Scoping Paper*, (January 2009) available at http://www.oecd.org/dataoecd/1/21/42022469.pdf viewed 30 July 2010.

[9] OECD, *OECD Code of Liberalisation of Capital Movements* (2009) available at http://www.oecd.org/dataoecd/10/62/39664826.pdf viewed 30 July 2010.

In accordance with Article 1 of the Code, member States shall progressively abolish 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.

[10] OECD, *OECD Declaration on International Investment and Multinational Enterprise* (1976) as reviewed 1979, 1984, 1991 and 2000 available at http://www.oecd.org/daf/investment/declaration viewed 30 July 2010.

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.

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 foreign direct investment and do not appear to appreciate the economic benefits that derive from access to such investment. The Lowy Institute Poll 2008 survey of Australians' views on foreign direct investment reported that 90% of those surveyed said that the Australian government has a responsibility to keep Australian companies in majority Australian control.[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.[14] Supplementing this material, in 2009 the Lowy Institute Poll reported that 50% of those surveyed said that the Australian government was then allowing too much investment from China.[15]

This general community attitude could 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.[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 accountability. 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 sixth most restrictive regime out of the more than 43 countries surveyed (which included both member and some non-member States).[17] Only China, India, Russia, Iceland and Mexico have more restrictive regulatory regimes. 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.[18]

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[11] In this context, the OECD Council on Recipient Country Investment Policies relating to National Security.

[12] OECD, *OECD Guidelines for Recipient Country Investment Policies Relating to National Security* adopted by the OECD Council on 25 May 2009 available at http://www.oecd.org/dataoecd/11/35/43384486.pdf viewed 30 July 2010.

[13] Hanson F, *The Lowy Institute Poll 2008: Australia and the World: Public Opinion and Foreign Policy* (Lowy Institute for International Policy, 2008) available at http://www.lowyinstitute.org/Publication.asp?pid=895 viewed 30 July 2010.

[14] Hanson, n 13, pp 6-7.

[15] Hanson F, *The Lowy Institute Poll 2009: Australia and the World: Public Opinion and Foreign Policy* (The Lowy Institute for International Policy, 2009) p 8, available at http://www.lowyinstitute.org/Publication.asp?pid=1193 viewed 30 July 2010.

[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 viewed 30 July 2010.

[17] See OECD, *International Investment Perspectives: Freedom of Investment in a Changing World* (2007) available at http://www.oecd.org/document/51/0,3343,en_2649_33763_39398368_1_1_1_1,00&&en-USS_01DBC.html viewed 30 July 2010.

[18] See Davidson S, Novak J and Wilson T, *Submission to the Senate Inquiry into Investment by State Owned Enterprises* (Institute of Public Affairs, April 2009) (available at the Senate Economics website referenced above).

GOVERNMENT-CONTROLLED ENTITIES – SWFS AND SOES

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.[19] SWFs are currently estimated to hold assets of approximately US$3.8 trillion[20] 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.[21]

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;[22]
- Future generation savings funds;[23]
- Holding funds;[24] and
- General SWFs.[25]

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.[26] The working group drafted a set of generally accepted principles reflecting agreed investment practices and objectives.[27] These principles, known as the "Santiago Principles" were adopted in October 2008[28] 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.[29]

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[19] The Future Fund and Queensland Investment Corporation are Australian examples of SWFs.

[20] International Financial Services London, *Sovereign Wealth Funds 2010* (March 2010) available at http://www.ifsl.org.uk viewed 30 July 2010. This report states that there is an additional US$6.5 trillion held in other sovereign investment vehicles such as pension reserve funds and development funds.

[21] This definition is taken from the Santiago Principles, International Working Group of Sovereign Wealth Funds, *Sovereign Wealth Funds: Generally Accepted Principles & Practices: Santiago Principles* (October 2008) p 3 and Appendix 1.

[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.

[24] Management of government direct investments in companies. Generally support government development strategies. Examples are Temasek, China Investment Corporation, Saudi Arabia Public Investment 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.

[27] The drafting committee was led by Mr David Murray, Chairman of Australia's Future Fund

[28] International Working Group of Sovereign Wealth Funds, n 21.

[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).

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 get 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.[30]

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[31] and clear and publicly disclosed policies, rules, procedures or arrangements to its general approach to funding and spending operations.[32]
- SWFs should have sound governance arrangements and clear and effective division of roles and responsibilities[33] with independent operational management.[34]
- Activities of SWFs should be conducted in compliance with applicable regulatory and disclosure requirements in countries in which they operate.[35]
- Investment decisions of SWFs should be aimed to maximise risk adjusted financial returns[36] without seeking or taking advantage of privileged information or inappropriate influence by the broader government.[37]
- Exercise of ownership rights by SWFs in investments should be consistent with investment policies.[38]

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.[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.

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[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, n 3, p 27.

[31] Principle GAPP2.

[32] Principle GAPP4.

[33] Principle GAPP6.

[34] Principle GAPP9.

[35] Principle GAPP15.

[36] Principle GAPP19.

[37] Principle GAPP20.

[38] Principle GAPP21.

[39] Preamble, *OECD Guidelines on the Corporate Governance of State Owned Enterprises* available at http://www.oecd.org/daf/corporateaffairs/soe/guidelines viewed 30 July 2010.

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.

The 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.[40]

Chinese SOEs are typically classified as enterprises "owned by the State, and thus, by the whole people"[41] of China. Ownership rights are exercised by the highest executive organ of the Chinese state, the State Council,[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.[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".[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.[45] Once 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

[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 viewed 30 July 2010.

[41] Article 3, *Law of the People's Republic of China on the State-Owned Assets of Enterprises*, promulgated on 28 October 2008 and effective from 1 May 2009, available at http://www.sasac.gov.cn/n1180/n1566/n11183/n11244/5751091.html viewed 30 July 2010 (in Chinese).

[42] *Interim Measures for the Supervision and Administration of State-owned Assets of Enterprises, People's Republic of China*, promulgated in 2003 available at http://www.sasac.gov.cn/n1180/n1566/n11183/n11244/1727751.html viewed 30 July 2010 (in Chinese).

[43] *Law of the People's Republic of China on the State-Owned Assets of Enterprises*, n 41.

[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.

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

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 2008-2009 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 sixth on the table of source of proposed foreign investment in Australia for 2007-2008 to third for 2008-2009.[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] 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 gave 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.[49]

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.

OVERVIEW OF AUSTRALIA'S FOREIGN INVESTMENT REGULATORY REGIME

Foreign investment in Australia is regulated by the *Foreign Acquisitions and Takeovers Act 1975* (Act)[50] and by the Australian government's *Foreign Investment Policy* (Policy).[51]

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.

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[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.

[47] FIRB Annual Report 2007/2008, p 39. Economic References Committee, Commonwealth Senate Hansard, *Foreign Investment by State-owned Entities* (22 June 2009) p E2. The 2008-2009 figures for Chinese investment are likely to be inflated as a result of the inclusion of Chinalco's initial A$15 billion investment in Rio Tinto.

[48] Senate Economic References Committee, Commonwealth Senate Hansard (22 June 2009) p 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.

[49] On p E6 it was stated that: Chinese SOEs "are not considered as all one related entity".

[50] The *Foreign Acquisitions and Takeovers Act 1975* (Cth). Prior to the adoption of the Act, foreign investment had largely been regulated through foreign exchange control mechanisms. Treasury, *Foreign Investment Policy in Australia – A Brief History and Recent Developments*, p 64, available at http://www.treasury.gov.au/documents/195/PDF/round5.pdf viewed 30 July 2010.

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

[51] *Australia's Foreign Investment Policy* (June 2010) available at http://www.firb.gov.au viewed 30 July 2010.

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.[52]

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.[53]

In the mid-1980s, a more liberal interpretation of the national interest criteria was adopted.[54] 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.[55] 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.[56]

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.[57]

That being said, the number of rejections of investment applications are very small. Approximately 5,000 to 8,000 investment applications are received by FIRB each year.[58] Typically less than 100 of these applications are rejected, but almost all of those relate to real estate. Only one explicit rejection of a significant corporate transaction has been made in the last decade – the rejection of Shell's proposal to acquire 100% of Woodside Petroleum Ltd in 2001.[59]

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.

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[52] 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.

[53] Second Reading Speech, *Foreign Takeovers Bill 1975* (Cth), House of Representatives, Hansard (22 May 1975) pp 2678-9.

[54] Treasury, *Foreign Investment Policy in Australia – A Brief History and Recent Developments*, n 50, p 64.

[55] Section 25(1A) of the *Foreign Acquisitions and Takeover Act 1975* (Cth).

[56] Section 25(1C) and s 25(1D) of the *Foreign Acquisitions and Takeover Act 1975* (Cth)

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

[58] Foreign Investment Review Board (FIRB), Annual Report 2007-2008, pp 9 and 20.

[59] 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.

Compulsory approval under the Act

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$231 million or more.[60] 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.[61]

It will be noted that the interests of foreign persons and their associates are aggregated. The associate definition is notoriously difficult.[62]

For purposes of these provisions the prohibition applies only to an investment in an Australian corporation, being a corporation incorporated in Australia.[63]

The Treasurer announced on 12 February 2009 that the government would amend the Act to "ensure that any investment, including through instruments such as convertible notes, will also be treated as equity for the purposes of the Act."[64] The amendments were expressed to be effective from the date of that announcement.[65] Prior to that time, the generally held view was that arrangements that gave a right to acquire a share that was not then issued did not result in voting rights or a right to an issued share.[66]

On 12 February 2010, the *Foreign Acquisitions and Takeovers Amendment Act 2010* received royal assent. The amending act amends the Act to extend the circumstances where prior approval is required to include circumstances where a person acquires *potential* voting power or the right to be issued shares.[67] It also clarifies the existing provisions to expressly include circumstances where a

[60] Section 26 of the *Foreign Acquisitions and Takeover Act 1975* (Cth) sets out the requirement to give prior notification. Section 13A(4)(b)(ii) of the *Foreign Acquisitions and Takeover Act 1975* (Cth) and reg 5(2) of the *Foreign Acquisitions and Takeovers Regulations 1989* provide an exemption where the corporation has gross assets of less than A$231 million (calendar year 2010) For investors in the United States, a $1,004 million threshold applies (calender year 2010) except for prescribed sectors or an entity controlled by a United States Government – see s 17E of the *Foreign Acquisitions and Takeover Act 1975* (Cth) and reg 9 of the *Foreign Acquisitions and Takeovers Regulations 1989*.

Separately, the *Foreign Acquisitions and Takeover Act 1975* (Cth) provides for a notification regime that is compulsory in respect to acquisitions of interests in Australian urban land for which there is generally no monetary threshold – s 26A. However, this article is focused on the regulation of investment in corporations.

[61] For purposes of s 26, see s 26(1) of the *Foreign Acquisitions and Takeover Act 1975* (Cth). For other provisions of the *Foreign Acquisitions and Takeover Act 1975* (Cth), see s 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 *Foreign Acquisitions and Takeover Act 1975* (Cth). 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)).

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.

Note the comments attributed to FIRB at n 49 in relation to Chinese SOEs.

[63] Sections 5 and 13(I)(a), 13(I)(b) and 13(I)(c) of the *Foreign Acquisitions and Takeover Act 1975* (Cth).

[64] Treasurer, *Amendments to Foreign Acquisitions and Takeovers Act* (Media Release 017, 12 February 2009).

[65] That announcement preceded the second transaction described in s 5.1 below that was announced later on the same day.

[66] See eg, the facts described in *Canwest Global Communications Corporation v The Treasurer of the Commonwealth of Australia* [1997] FCA 730 (Hill J).

[67] Section 9(1) of the *Foreign Acquisitions and Takeover Act 1975* (Cth).

person acquires a right to acquire a share or have a share transferred under an instrument, agreement or arrangement, whether the right is exercisable presently or in the future, and whether on the fulfilment of a condition or not.[68]

These amendments to the Act specifically capture all arrangements that involve a future right to acquire voting shares or issued shares, regardless of the way they are structured, including debt instruments having quasi-equity characteristics, and expressly includes convertible notes.[69]

Structures which do not give rise to potential voting power or rights to issued shares (eg, 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.

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.[70] 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[71] and holding companies of such prescribed corporations.[72] A "prescribed corporation" includes offshore companies with specified categories of Australian assets where the gross Australian assets of the company are valued at A$231 million or more and make up more than 50% of the company's global assets[73] or an offshore company with certain Australian assets where the gross Australian assets of the company are valued at A$231 million or more.

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.[74] A change in foreign control occurs where a corporation is already at least 40% foreign controlled in aggregate and there is

[68] Section 11(2)(c) and s 11(2A) of the *Foreign Acquisitions and Takeover Act 1975* (Cth).

[69] Section 11(2A) of the *Foreign Acquisitions and Takeover Act 1975* (Cth).

[70] Section 25(2) and s 25(3) of the *Foreign Acquisitions and Takeover Act 1975* (Cth).

[71] Section 7(1) of the *Foreign Acquisitions and Takeover Act 1975* (Cth) 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.

[72] Section 18(1) of the *Foreign Acquisitions and Takeover Act 1975* (Cth). The concept of a prescribed corporation is much broader in scope than an "Australian corporation" that is relevant to the prior approval test in s 26.

[73] Section 13(1)(g) of the *Foreign Acquisitions and Takeover Act 1975* (Cth) 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 *Foreign Acquisitions and Takeover Act 1975* (Cth) and reg 5(2) of the *Foreign Acquisitions and Takeovers Regulations 1989* provide an exemption for companies where the total assets does not exceed A$231 million (calendar year 2010).

[74] Section 9(1) and s 9(1A) of the *Foreign Acquisitions and Takeover Act 1975* (Cth).

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.[75]

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$231 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.[76] An Australian business is a business carried on partly or wholly in Australia in anticipation of profit or gain.[77] For these purposes control is being in a position to determine the policy of the Australian business.[78]

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.[79]

In the first circumstance where:[80]

- 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[81]; 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.

In the second circumstance where:[82]

- 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 2010 amending 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*. 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. This change 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.

[75] Section 9(1A) and s 9(2) of the *Foreign Acquisitions and Takeover Act 1975* (Cth).

[76] Section 19(2) of the *Foreign Acquisitions and Takeover Act 1975* (Cth).

[77] Section 7(1) of the *Foreign Acquisitions and Takeover Act 1975* (Cth). The holding of a mineral right is such a business – see s 7(2) of the *Foreign Acquisitions and Takeover Act 1975* (Cth).

[78] Section 19(7) of the *Foreign Acquisitions and Takeover Act 1975* (Cth).

[79] The *Foreign Acquisitions and Takeover Act 1975* (Cth) also applies to acquisition of interests in Australia urban land – s 21A. However, this article is focused on the regulation of investment in corporations.

[80] Section 20(2) of the *Foreign Acquisitions and Takeover Act 1975* (Cth).

[81] See text at n 78.

[82] Section 21(2) of the *Foreign Acquisitions and Takeover Act 1975* (Cth).

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.[83] 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.[84] However, the Treasurer may make an interim order if more time is required to enable due consideration of the application.[85] An interim order prohibits the applicant from proceeding with the proposal 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.[86]

Australia's foreign investment policy

Australian Government Policy imposes additional restrictions on investments by foreign persons in sensitive sectors (such as banking, civil aviation, telecommunication, airports and 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[87] 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.[88] However, many commentators considered that the release of these Guidelines indicated a shift in the government's approach.[89]

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

[83] Sections 24, 25(1B) and 25(2) of the *Foreign Acquisitions and Takeover Act 1975* (Cth).

[84] Section 25(2) of the *Foreign Acquisitions and Takeover Act 1975* (Cth).

[85] Section 22(1) of the *Foreign Acquisitions and Takeover Act 1975* (Cth).

[86] Sections 22 and 24 of the *Foreign Acquisitions and Takeover Act 1975* (Cth).

[87] Treasurer, *Government Improves Transparency of Foreign Investment Screening Process* (Media Release 009, 17 February 2008).

[88] 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.

[89] 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 89. See also Treasurer, *Australia, China and this Asian Century* (Speech delivered at the Australia-China Business Council, Melbourne, Speech 021, 4 July 2008).

determined on a case-by-case basis.[90] 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".

Up until recently there is very little guidance as to what constitutes a "direct" investment.[91]

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.[92] The Guidelines make it clear that foreign government agencies include SWFs and SOEs[93] and indicates that the policy would apply to investors owned or controlled by a foreign government.[94] 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 the 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.

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.[95]

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.[96]

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[90] Now incorporated as general criteria in the Policy

[91] In June 2010 a definition of direct investment was incorporated in the Policy. That definition states a direct investment is an investment that has the objective of establishing a lasting interest in and a strategic relationship with the target. It is noted that common international practice is to consider a 10% or more investment to be a direct investment. However, the Policy states that a less than 10% investment may also be a direct investment, particularly if there are preferential or veto rights, director appointment rights or related contractual arrangements. Investments preparatory to a takeover are specifically included as is the enforcement of a security interest.

[92] See the FIRB website at http://www.firb.gov.au/content/direct.asp viewed 30 July 2010.

[93] Investments by SWFs and SOEs are expressed to be assessed on the same basis as private sector proposals.

[94] The Guidelines state "the fact that these investors are owned or controlled by a foreign government raises additional factors that must also be examined".

[95] For an interesting debate about the effect and merits of the Guidelines see the summary of the roundtable conducted by the *Australian Financial Review* and reported as, "China Spree Puts Heat on Foreign Investment", *Australian Financial Review* (17 March 2009) and "Staying open is still in our best interests", *Australian Financial Review* (18 March 2009).

[96] See text at n 53.

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.

Industry-based restrictions

In addition to the review process imposed under the Act and the Policy, Australian legislation which restricts foreign ownership in specific industries including shipping, aviation, airports, banking and gaming.[97] There are also specific restrictions relating to foreign ownership of Qantas and Telstra.[98] Any investment by foreign persons in these circumstances require specific consideration of that legislation.

SIGNIFICANT CHINESE SOE CASE STUDIES IN 2008-2009

In the period 2008-2009 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.

Chinalco and Rio Tinto

On 1 February 2008, Shining Prospect Pte Ltd, a company incorporated in Singapore and a wholly owned subsidiary of Aluminium Corporation of China, known as Chinalco, acquired a 12% interest in Rio Tinto plc through on-market purchases.

Chinalco is a Chinese SOE 100% owned by the Chinese people.

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.

The two listed Rio Tinto entities are separate legal entities with separate assets, share listings and share registers. The dual nature of the Rio Tinto Group is effected through a series of contracts and constitutional provisions which prescribe, among other things, joint voting arrangements, common board appointments and restrictions on control transactions unless the transaction relates to both the United Kingdom and Australian-listed entities.

[97] 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.

[98] *Qantas Sale Act 1992* (Cth); *Telstra Corporation Act 1991* (Cwth).

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.[99]

On 24 August 2008, the Australian Treasurer announced that he had decided not to raise any objections to Chinalco acquiring up to 14.99% of Rio Tinto plc on the basis of undertakings given by Chinalco not to increase its shareholding without an approval from the Treasurer and not to seek to appoint a director to Rio Tinto.[100]

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.

The convertible bonds would be issued in two tranches with an average conversion price of US$52.5 per share and on conversion would give Chinalco a 19% interest in Rio Tinto plc (when combined with its existing 12% stake) and a 14.9% interest in Rio Tinto Ltd. The convertible bonds would not carry voting rights prior to conversion. The proposed asset investment comprised minority stakes in a number of Rio Tinto's iron ore, aluminium and copper assets. Pursuant to the proposed arrangements Chinalco would be entitled to nominate two directors to the Rio Tinto Group board one of whom must be independent.

The proposal attracted extensive public comment and debate. Key features of the debate include what level of control or influence the Chinese state has over the operations of Chinalco, what access to information Chinalco would have from the multi-layer nature of the proposed investment and whether Chinalco would be likely to have access to or potential influence over pricing negotiations in respect of key assets such as iron-ore.

No public comment was made by the Treasurer in relation to the proposed transaction other than to say that it was an important decision that would be evaluated in great detail and depth and assessed according to the national interest criteria.[101]

On 13 March 2009, FIRB issued an Interim Order extending the period of consideration of the proposal by up to 90 days.[102] On 24 June 2009, Rio Tinto announced that it had terminated the Cooperation and Implementation Agreement with Chinalco and instead would pursue a US$15 billion rights issue at £14 per share and joint venture with BHP in relation to its iron ore assets in the Pilbara.

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[99] As reported in "Just One Move in Bigger Game", *The Australian* (25 August 2008):

> Chinalco insisted at the time that the company did not need approval from the Foreign Investment Review Board because the shares it had acquired were those of a London-listed company. Chinalco's chief executive, Xiao Yaqing, told *The Australian* it submitted the proposal to the FIRB as "an expression of goodwill". The Government has never accepted this interpretation of law or politics.

[100] Treasurer, *Chinalco's Acquisition of Shares in Rio Tinto* (Media Release 094, 24 August 2008):

> First, Chinalco has undertaken to me that it would not raise its shareholding above this level without notifying and receiving fresh approval from the Government under Australia's foreign investment review arrangements. Second, Chinalco has also undertaken that it will not seek to appoint a director to Rio Tinto Plc or Rio Tinto Limited for as long as it holds a shareholding of below 15 per cent.

[101] See eg: Treasurer, *Doorstop interview Farrer Place Sydney* (Transcript 033, 2 March 2009).

[102] Commonwealth of Australia, *Special Gazette* (16 March 2009).

Sinosteel and Murchison Metals

On 14 March 2008, Sinosteel launched a hostile takeover bid for Midwest Corporation Ltd (Midwest), a western Australian iron-ore mining company. This came following Sinosteel's acquisition of a strategic stake of 19.89% through on-market purchases beginning on 24 January 2008. Sinosteel obtained FIRB approval to make the takeover bid at the time of seeking clearance for its initial investment in January 2008.[103] Sinosteel is a Chinese SOE 100%-owned by the Chinese people.

On 26 May 2008, Midwest announced that it had received a merger proposal from Murchison Metals Ltd (a 9.2% shareholder in Midwest) (Murchison) to combine the two companies with Midwest being retained as the listed entity. Under the merger proposal Midwest shareholders would own 47.8% of the merged entity such that if Sinosteel was successful in gaining 100% of Midwest it would own less than 50% of the merged entity. Sinosteel expressed concerns with the merger proposal.[104] However, as the transaction was to be structured as a reverse merger with Midwest retaining its ASX listing, only a 50.1% approval by Midwest shareholders was required to implement the proposal.

A few days later Sinosteel increased its offer for Midwest and waived the defeating conditions[105] and by 12 June 2008 Sinosteel's shareholding in Midwest had increased to 44%. On 7 July, Murchison and Midwest announced that they were unable to obtain the support of Sinosteel to their merger proposal and consequently the proposal was terminated.[106] The Sinosteel offer successfully closed on 15 September and it moved to compulsorily acquire the remaining shares.[107]

Sinosteel had lodged an application with FIRB to acquire a substantial shareholding in Murchison Metals. An interim order was issued on 25 June 2008[108] prohibiting that transaction for 90 days while the government considered the application further. This occurred at the same time as speculation was growing that the government was considering imposing a 49.9% limit on investments by SWFs and SOEs.[109]

Shortly after the close of Sinosteel's takeover of Midwest, the Australian Treasurer approved Sinosteel's application to acquire up to 49.9% of Murchison Metals.[110] The Treasurer's comments indicated that an application for more than 49.9% was originally submitted but would not have been approved and that in determining the effect on Australia's national interest the government was concerned to ensure "diversity of ownership" of iron ore in the Midwest region.[111]

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[103] Sinosteel's Bidder's Statement (14 March 2008): "The Australian Treasurer has already confirmed through FIRB that there is no objection to the Offer and accordingly the Offer is not conditional on FIRB approval."

[104] Sinosteel announcement, *Sinosteel says Offer Price for Midwest now Final Murchison Proposal Unlikely to Succeed* (28 May 2008).

[105] Sinosteel announcement, *Sinosteel Increases Offer/Freed from Defeating Conditions* (30 May 2008).

[106] Murchison announcement, *Termination of Merger with Midwest* (7 July 2008).

[107] Sinosteel announcement, *Close of Sinosteel's Takeover Offer for Midwest Corporation Limited* (17 September 2008). Murchison had announced on 11 September that it had accepted its 9.2% holding into the Sinosteel bid.

[108] 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.

[109] "Mid West Ore Merger Hangs on Canberra", *The Australian* (27 June 2008) and "Swan and Co Tread a Fine Line in the China Shop of Progress", *The Sydney Morning Herald* (27 June 2008).

[110] 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.

[111] Treasurer, *Foreign Investment Approval: Sinosteel's Interests in Murchison Metals*, n 110.

> 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.

Minmetals and OZ Minerals

On 16 February 2009, OZ Minerals Ltd (OZ Minerals), an Australian-listed company announced that it had entered into a Scheme Implementation Agreement with China Minmetals Non-ferrous Metals Company Ltd (Minmetals) for the proposed acquisition of all outstanding shares in OZ Minerals by Minmetals at a cash price of $0.825 per share.[112]

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.

The Minmetals proposal provided for the full repayment of OZ Minerals' outstanding debt upon successful completion. The all-cash offer was unanimously recommended by the OZ Minerals Board. Implementation of the scheme was subject to a number of conditions including Oz Minerals' financiers agreeing to extend the repayment of OZ Minerals' debt facilities and the approval of Australian and Chinese regulatory authorities, including FIRB.

On 23 March 2009, FIRB issued an interim order extending the period for evaluation of Minmetal's application by 90 days.[113] Given the precarious financial position of Oz Minerals and the looming 31 March repayment deadline, the decision by FIRB to extend the consideration period was seen as a highly risky move.[114]

On 27 March 2009, the Treasurer released a statement advising that the government had determined that, on national security grounds, the scheme could not be approved if it included the acquisition of OZ Minerals' Prominent Hill mining operations, but that the government was willing to consider alternative proposals in relation to OZ Minerals' other assets and businesses.[115]

The decision came as a surprise to the market and left commentators wondering whether the national security issue was merely a convenient façade.[116]

OZ Minerals announced on 1 April 2009 that it had renegotiated the transaction with Minmetals so as to exclude Prominent Hill. The revised proposal involved the sale to Minmetals of most of its other exploration and development assets for US$1,206 million. This would mean that OZ Minerals would continue as a listed entity, retaining Prominent Hill and certain other minor assets.[117]

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[112] OZ Minerals announcement, *Recommended 82.5 Cents per Share All-Cash Offer For OZ Minerals By Minmetals* (16 February 2009). Minmetals is a Chinese SOE controlled by China Minmetals Corporation as a 90% shareholder (which is wholly owned by the Chinese government).

[113] Commonwealth of Australia, *Special Gazette* (24 March 2009).

[114] Analysts predicted that without the Minmetals deal, Oz Minerals would be forced into administration: "without the Chinese deal, OZ's only alternative was administration, the likely loss of 6,000 jobs, and operating mines being placed on care and maintenance as the administrators conduced a fire sale". "FIRB dawdles on OZ rescue", *The Australian*, (24 March 2009).

[115] 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 Government is willing to consider alternative proposals relating to those other assets and businesses.

[116] For example refer to: "Decision Came Out of Left Field", *Australian Financial Review* (28 March 2009) and "Shock as Oz Deal is Shot Down", *The Australian*, (28 March 2009).

[117] The Chairman of OZ Minerals commented that: "While this is a structurally different proposal to the previous cash proposal from Minmetals … it … provides a complete solution to OZ Minerals' refinancing issues." OZ Minerals announcement, *Proposed Transaction with Minmetals* (1 April 2009).

On 23 April 2009, the Treasurer approved the revised proposal on the basis of a number of undertakings from Minmetals which he explained were designed to protect Australian jobs and ensure consistency with Australia's national interest principles.[118] The undertakings given by Minmetals were broadly:

- to operate the acquired assets as a separate business unit according to commercial objectives, including the maximisation of product prices and long-term 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) and to make those reports available on the group's Australian website;
- 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 the certain projects; and
- to comply with Australian industrial relations laws, to honour employee entitlements and to support Indigenous Australian communities, by honouring agreements with Indigenous Australians and maintaining and increasing levels of Indigenous employment in its local operations.

Hunan Valin and Fortescue

On 25 February 2009 Fortescue Metals Group Ltd (Fortescue), an Australian-listed iron ore mining company, announced that it had entered into a Cooperation Agreement and Share Subscription Agreement for a proposed A$558 million investment by Hunan Valin Iron and Steel Group Company Ltd (Hunan Valin), a Chinese state-owned steel manufacturer.[119]

Under the proposed transaction Fortescue and Hunan Valin would establish a joint venture to develop lower grade resources from some of Fortescue's tenements and give Hunan Valin the option to participate in any additional new projects Fortescue undertakes. Key components of the arrangements included the right for Hunan Valin to appoint one director to the Fortescue board, iron ore off-take arrangements, raw ore processing, utilisation of lower grade hematite ore, and the development of future new projects.

In a separate transaction, Hunan Valin entered into a conditional agreement to purchase 275 million existing shares from Harbinger Capital Partners (Harbinger), an American hedge fund and Fortescue shareholder.[120]

On 9 March 2009, Fortescue announced it agreed to a request from Hunan Valin to amend the size of the share issue, taking the size of Hunan Valin's proposed investment in Fortescue to A$644.8 million. When combined with the purchase of 275 million existing shares from Harbinger Hunan Valin's total proposed shareholding in Fortescue would be 17.4%.

FIRB issued an interim order on 18 March 2009, extending the FIRB review period of the proposed transaction for up to 30 days.[121]

On 31 March 2009 the Treasurer approved Hunan Valin's application under the Act on the basis of undertakings given by Hunan Valin and Fortescue.[122] The undertakings were:

- that any person nominated by Hunan Valin to Fortescue's Board will comply with the Director's Code of Conduct maintained by Fortescue;

[118] Treasurer, *Foreign Investment Decision* (Media Release 043, 23 April 2009).

[119] Fortescue announcement, *Fortescue Formalises Co-operation Agreement with Major Chinese Steel Mill* (25 February 2009); and Fortescue announcement, *Fortescue Strikes Share Subscription Agreement with Valin* (25 February 2009). Hunan Valin is a Chinese SOE 100% owned by the Hunan Provincial Government.

[120] Share Purchase Agreement between Valin and Harbinger dated 24 February 2009.

[121] Fortescue announcement, *Update on the FIRB Review of Valin Application* (19 March 2009).

[122] Treasurer, *Foreign Investment Decision* (Media Release 032, 31 March 2009).

The Treasurer explained:

- 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; and
- 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.
- Hunan Valin must report to FIRB on its compliance with the undertakings with penalties payable for non-compliance.

China Non-Ferous Metals and Lynas

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.[123] The investment would permit Lynas to complete and commission a rare earths project.

China currently produces 95% of the world's rare earths which are used in hybrid car batteries, LCD screens and superconductors. Lynas had been attempting to construct the largest new rare earth plant in the world but construction had been suspended since February 2009 as a result of funding problems.

The FIRB consideration of the proposal was extended.[124]

On 24 September 2009 Lynas announced that CNMC had terminated the heads of agreement.[125] 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.

On 29 September 2009 Lynas announced a capital raising of A$450 million at A$0.45 per share that would allow it to complete and commission Phase I of its rare earths project. CNMC was not a participant in that capital raising.

Yanzhou and Felix

On 13 August 2009 Felix Resources Ltd (Felix) announced that its board had recommended a transaction with Yanzhou Coal Mining Co (Yanzhou) for Yanzhou to acquire 100% of Felix for a cash amount of $17.95 per share and shares in a subsidiary of Felix.[126]

FIRB consideration of the proposal required the application to be relodged once to re-activate the 30-day review period.[127]

These undertakings ensure consistency with Australia's national interest principles for investments by foreign government entities, which I set out in February 2008. They ensure the appropriate separation of Fortescue's commercial operations and customer interests, and support the market-based development of Australia's resources.

[123] Lynas announcement, *Introduction of CNMC as a New Majority Shareholder to Lynas* (1 May 2009). CNMC is a Chinese SOE 100% owned by the Chinese people.

[124] 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 withdraw and resubmitted its application 3 times. Five months had by then passed.

[125] Lynas announcement, *CNMC Transaction Update* (24 September 2009).

[126] Felix announcement, *Felix Resources Recommends All-Cash Offer from Yanzhou Coal Mining Company* (13 August 2009). 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.

[127] Felix announcement, *Felix Resources Update on Yanzhou Coal Mining Offer* (14 September 2009).

On 26 October 2009 the Assistant Treasurer approved Yanzhou's application on the basis of undertakings given by Yanzhou.[128] The undertakings were:

- 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, 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.

Key areas of focus when assessing investments by SWFs and SOEs

Drawing from the case studies described above 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. There is as much to be learned about politics as policy from these case studies. 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.[129]
- Sensitivity to national security issues (real or perceived), as that is consistent with the OECD principles.[130]
- Diversity of ownership of Australian assets in the relevant industry sector.[131]
- Assets to be developed according to market-based principles.[132]
- Possible need for majority or substantial minority ownership.[133]
- Commitment to sell down over medium term in appropriate cases to allow market-based ownership.[134]
- Majority or substantial Australian resident independent board members.[135]
- Australian headquarters and management in appropriate cases.[136]

[128] Assistant Treasurer *Foreign Investment Decision – Felix Resources* (Press release, 26 October 2009).

[129] See Minmetals and Yanzhou conditions.

[130] See original Minmetals decision.

[131] See Sinosteel decision.

[132] See Minmetals condition and Shell rejection.

[133] See Chinalco and Sinosteel decisions and CNMC result.

[134] See Yanzhou conditions.

[135] See Hunan Valin and Yanzhou conditions.

[136] See Minmetals and Yanzhou conditions.

- Possible need to create information barriers for nominee director access to pricing information.[137]

All of the considerations identified above come from the experience of 2008-2009 in the Australian government dealing with proposed investments by Chinese SOEs in the resources sector. However, there is nothing to suggest that Chinese SOE investment in other sectors of the Australian economy would be treated fundamentally differently by the Australian government.

ASSESSING THE "SUCCESS" OF AUSTRALIA'S REGIME

The fact that Australia has grappled with the issue of direct foreign investment by SWFs and SOEs is not unique. The extent of regulation of foreign direct investment has been a growing issue in many jurisdictions over the last decade for the reasons advanced in the introduction. Notable foreign direct investment transactions blocked outside Australia in recent years have included the following:

Jurisdiction	Date	Transaction
United States	December 2009	US$16 million proposed investment by Northwest Non-Ferrous International Investment Co Ltd to acquire 50.1% interest in First Gold Corp withdrawn when CFIUS advised it would recommend the investment be blocked[138]
Canada	April 2008	US$1.3 billion bid for space technology division of MacDonald Dettwiler and Associates by Alliant Techsystems Inc (US) blocked by Canadian government[139]
Japan	April 2008	Bid to increase stake in J-Power (electricity wholesaler) by Children's Investment Fund (UK) blocked by Japanese government[140]
United States	February 2008	US$2.2 billion joint bid for 3Com Corp by Bain Corp and Huawei withdrawn after objections raised by the United States government[141]
United States	2005	US$18.5 billion bid for Unocal withdrawn by CNOOC after House of Representatives approved a provision that would have delayed the transaction

Ultimately the Australian government was not called upon to decide on the February 2009 transaction proposed by Chinalco and Rio Tinto. The initial feedback to Minmetals of likely rejection by the Australian government ultimately led to a conditional approval in relation to the acquisition of most of OZ Minerals assets. CNMC chose to terminate the Lynas proposal rather than face a possible rejection from the Australian government.

In recent years, it is only the rejection of the Shell bid for Woodside in 2001 that represents the direct blocking of a foreign direct investment proposal in a substantial Australian business.

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.[142] Those claims seem overblown. The reality is that the overwhelming majority of transactions are approved.

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[137] See Hunan Valin conditions.

[138] 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.

[139] First significant rejection of a foreign investment proposal in Canada since the 1980s. There was significant community concern as to the loss of important technology to Canada and a threat to Canada's surveillance of disputed arctic territory.

[140] This company is commonly considered to have a strategic role in supplying energy to Japan. The company operates nuclear power plants. CIT was seeking to increase its shareholding from 10% to 20%.

[141] 3Com provides computer network security equipment to United States government agencies. Huawei had been founded by a former General of the Chinese Peoples Liberation Army.

[142] 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 Iincreasing Cost of Regulation* (9 September 2008) pp 21-22 available at http://www.itsglobal.net viewed 30 July 2010. Also see Kirchner, n 3, pp 8-9.

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 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[143] 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.[144]
- 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.[145] The Act and related legislation should be amended to replace the current national interest test with distinct "national security" and "national economic welfare" tests.[146] 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 foreign direct investment 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 the issues raised in this article and over time move its policy settings to reflect international consensus on these issues. 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.

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,[147] 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

[143] Kirchner, n 3.

[144] That approach reflects the OECD position – see n 10.

[145] Since that time the approval threshold has been increased from A$100 million to A$231 million (calendar year 2010).

[146] 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 (see text at n 53) should be noted.

[147] Clearly that test is more consonant with the analysis discussed in the section, "Rationale for Regulating Foreign Direct Investment" in this article.

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.[148]

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.

[148] The June 2010 restatement of the Policy sought to address this criticism by incorporating a definition of direct investment that focuses on strategic investments and notes an internationally accepted practice of 10% being a relevant threshold – n 91.