Foreign Investment Review

Contributing editor
Oliver Borgers

2019

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McCarthy Tétrault LLP

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This article was first published in January 2019
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Published by
Law Business Research Ltd
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London, W11 1QQ, UK
Tel: +44 20 3780 4147
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No photocopying without a CLA licence.
First published 2012
Eighth edition
ISBN 978-1-912377-41-1

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Preface

Foreign Investment Review 2019

Eighth edition

Getting the Deal Through is delighted to publish the eighth edition of *Foreign Investment Review*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new article on the European Union.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Oliver Borgers of McCarthy Tétrault LLP, for his continued assistance with this volume.

London
December 2018

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Australia

Deborah Johns
Gilbert + Tobin

Law and policy

1 What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

Australia generally welcomes foreign investment. The Australian government screens foreign investment proposals on a case-by-case basis to determine whether a particular proposal is contrary to the national interest. The kinds of proposals examined include both business investment proposals (which can capture transactions outside of Australia if there is a sufficient Australian nexus) across all sectors of the economy and investment in land, in each case subject to materiality thresholds described in more detail in questions 3 and 8.

In determining whether a foreign investment proposal is contrary to the national interest, the Australian government is able to examine any factors that it considers appropriate. Typically, these factors include the impact of the foreign investment proposal on: national security, competition (noting that this is a different test to the test applied by the Australian Competition and Consumer Commission in examining merger clearances), the economy and the community (for example, as a result of the investor's plans to restructure the business in Australia after the acquisition) and other government policies such as tax and the environment, as well as the character of the investor.

Some kinds of foreign investment proposals give rise to more specific concerns, which the Australian government takes into consideration (in addition to those described above) when examining those proposals:

- for agricultural investment proposals, the Australian government typically considers the effect of the proposal on the quality and availability of Australia's agricultural resources, including water; land access and use; agricultural production and productivity; Australia's capacity to remain a reliable supplier of agricultural production, both to the Australian community and Australia's trading partners; biodiversity; and employment and prosperity in Australia's local and regional communities;
- for residential real estate investment proposals, the overarching principle is that the proposal should increase Australia's housing stock (by creating at least one new additional dwelling); and
- where a foreign investment proposal involves a foreign government investor (defined in question 5), the Australian government considers whether the proposed investment is commercial in nature or whether the investor may be pursuing broader political or strategic objectives that may be contrary to Australia's national interest.

In general, Australia does not impose currency controls (subject to limited exceptions prohibiting, for example, transfers of funds to certain regimes).

2 What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals and investors on the basis of the national interest?

The main laws that regulate foreign investment in Australia are:

- the Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA) and the Foreign Acquisition and Takeovers Regulation 2015 (FATR). Together these give the Australian Treasurer the power to review foreign investment proposals that meet certain criteria and to block such proposals, or apply conditions to the way such proposals are implemented, to ensure they are not contrary to the national interest; and
- the Foreign Acquisitions and Takeovers Fees Imposition Act 2015 (Cth) and its associated regulations. These set the fees for the various kinds of applications that may be made.

Separate legislation imposes other requirements in respect of foreign ownership in certain industries, for example:

- the Broadcasting Legislation Amendment (Foreign Media Ownership, Community Radio and Other Measures) Act 2018 (Cth) requires each foreign person, as defined in the FATA, that has a company interest of 2.5 per cent or more in an Australian media company to notify the Australian Communications and Media Authority;
- the Security of Critical Infrastructure Act 2018 (Cth) requires owners and operators of certain critical infrastructure to report information about the ownership and operation of the asset, which is maintained on a non-public register, and allows the relevant minister to make orders in relation to matters pertaining to the security of the relevant asset;
- the Register of Foreign Ownership of Agricultural Land Act 2015 (Cth) requires foreign persons to register their ownership of agricultural land;
- the Banking Act 1959 (Cth), the Financial Sector (Shareholdings) Act 1998 (Cth) and banking policy regulate foreign ownership in the banking sector;
- the Air Navigation Act 1920 (Cth) and Qantas Sale Act 1992 (Cth) limit aggregate foreign ownership in an Australian international airline (including Qantas) to 49 per cent;
- the Airports Act 1996 (Cth) limits foreign ownership of some airports to 49 per cent, airline ownership in airports to 5 per cent and cross ownership between Sydney airport (together with the proposed future Sydney West Airport) and any of Brisbane, Melbourne or Perth airports;
- the Shipping Registration Act 1981 (Cth) requires a ship to be majority Australian owned if it is to be registered in Australia, unless it is designated as chartered by an Australian operator; and
- aggregate foreign ownership of Telstra is limited to 35 per cent and individual foreign investors are only allowed to own up to 5 per cent.

3 Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

FATA and FATR regulate 'significant actions'. The Treasurer has the power to block or unwind significant actions, or impose conditions on the way they are implemented, if he or she considers them to be contrary to the national interest. A subset of these transactions, called 'notifiable actions' must be notified to the Treasurer. Failure to notify is an offence under the law.

A significant action that is not a notifiable action does not, strictly speaking, have to be notified to the Treasurer. However, notifying the proposal and obtaining a statement of no objection in relation to it cuts off the Treasurer's power. A foreign person must not proceed with a

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notifiable action, or a significant action (which is not also a notifiable action) that it has elected to notify, until the Treasurer has issued a statement of no objection, or ceases to be empowered to make orders in relation to the proposal under the law.

Notifiable actions include:

- the acquisition by a foreign person of an interest of 20 per cent or more in the shares or units of an Australian company or unit trust valued above the then current monetary thresholds (the monetary threshold is generally A$261 million);
- the acquisition by a foreign person of an interest in Australian land valued above the then current monetary thresholds (for residential land, vacant commercial land, mining and production tenements and any kind of land acquired by foreign government investors, the threshold is generally A$0; for agricultural land, the threshold is generally a cumulative A$15 million threshold taking into account other agricultural land holdings of the acquirer; for developed commercial land, the threshold is generally A$57 million for certain sensitive commercial land and A$261 million for other kinds of commercial land);
- the acquisition by a foreign person of an interest of 10 per cent or more (and in some cases interests below 10 per cent) in an Australian company or unit trust or Australian business that is an agribusiness, where the value of the acquirer's past and current investments in the target exceed the then current monetary thresholds (the monetary threshold is generally A$57 million);
- the acquisition by a foreign person of an interest of 5 per cent or more in a company, unit trust or business that wholly or partly carries on an Australian media business, regardless of value; and
- certain transactions by foreign government investors, described in more detail under question 5.

Aside from the notifiable actions described above, significant actions include change of control transactions in relation to Australian companies, entities and businesses valued above the then current monetary thresholds, which (unlike most notifiable actions) can capture offshore transactions if they have a significant Australian nexus. The monetary threshold is generally A$261 million. (Monetary thresholds in this article relate to calendar year 2018 monetary thresholds, which are subject to review on 1 January 2019.)

The system of monetary thresholds is complex: both the way that the threshold is calculated, and the dollar value of the monetary threshold, differ for different kinds of transactions. Monetary thresholds are also indexed annually for inflation and are affected by Australia's treaty obligations, so different thresholds may apply for investors from countries with which Australia has entered into free trade agreements. Not all free trade agreements contain the same exemptions. See question 8 for further detail.

4 How is a foreign investor or foreign investment defined in the applicable law?

The legislation regulates foreign investment proposals by a 'foreign person'. A foreign person means:

- an individual not ordinarily resident in Australia (and therefore could include in certain circumstances a non-resident Australian citizen);
- a corporation in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds an interest of 20 per cent or more;
- a corporation in which two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, holds an interest of 40 per cent or more;
- the trustee of a trust in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds an interest of 20 per cent or more;
- the trustee of a trust in which two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government hold an interest of 40 per cent or more;
- the general partner of a limited partnership in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds an interest of 20 per cent or more;
- the general partner of a limited partnership in which two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government hold an interest of 40 per cent or more; or
- a foreign government or foreign government investor (defined in question 5).

The kinds of foreign investment proposals that are regulated are described in question 3.

5 Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

Australia scrutinises a broader range of investments by 'foreign government investors' than it does investments by other foreign persons.

A 'foreign government investor' includes:

- a foreign government;
- an individual, corporation or corporation sole that is an agency or instrumentality of a foreign country but is not part of the body politic of that foreign country (referred to below as a 'separate government entity'); and
- a corporation, trustee of a trust or general partner of a limited partnership in which (i) a foreign government, separate government entity or foreign government investor from one country holds a 20 per cent or more interest, or (ii) foreign governments, separate government entities or foreign government investors from more than one country hold a 40 per cent or more interest.

The definition of foreign government investor captures not only SOEs and SWFs, but also things like public sector pension funds, the investment funds into which SOEs, SWFs and public sector pension funds invest and, owing to tracing rules, portfolio companies for such investment funds.

The following transactions by foreign government investors are notifiable actions (see question 3):

- the acquisition of an interest of 10 per cent or more (and in some cases interests below 10 per cent) in any Australian company, unit trust or business (including offshore businesses that have an Australian nexus);
- the acquisition of an interest in Australian land, regardless of value;
- the starting of an Australian business; and
- acquiring a legal or equitable interest in a tenement or an interest of at least 10 per cent in securities in a mining, production or exploration entity (ie, an entity where the total value of legal or equitable interests in tenements held by the entity, or any subsidiary of the entity, exceeds 50 per cent of the total asset value for the entity).

These are subject to very limited exemptions.

6 Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

The Treasurer has the ultimate power to decide whether a transaction is contrary to the national interest.

When making foreign investment decisions, the Treasurer is advised by the Foreign Investment Review Board (FIRB), which examines foreign investment proposals and advises on the national interest implications. FIRB is a non-statutory advisory body.

FIRB is supported by a secretariat located in the Treasury and by the Australian Taxation Office (ATO). The Treasury is responsible for the day to-day administration of the framework in relation to business transactions and some land transactions. The ATO administers foreign investment into residential real estate.

7 Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

The Australian government has wide discretion to approve or reject foreign investment proposals on national interest grounds. As noted in question 1, the test is whether a foreign investment proposal is contrary to the national interest, and the term 'national interest' is not defined. Typically, the factors the Treasurer takes into account in determining what the national interest is and what is contrary to it are as described in question 1, although the Treasurer is not obligated to consider these factors and is not limited to considering only these factors.

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Procedure

8 What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

See question 3. The system of monetary thresholds is complex: both the way that the threshold is calculated, and the dollar value of the monetary threshold, differ for different kinds of foreign investment proposals.

In terms of the way that the threshold is calculated:

- for acquisitions of interests in shares of Australian corporations or units in Australian trusts, the threshold is the higher of the value of the gross assets of the target entity and the value implied by the consideration paid for the shares or units;
- for acquisitions of interests in Australian agricultural land, the threshold is the consideration for the land being acquired plus the value of all other Australian agricultural land held by the acquirer;
- for acquisitions of interests in Australian agribusinesses, the threshold is the consideration paid for the investment plus the value of all other investments in that agribusiness held by the acquirer;
- for asset acquisitions, the threshold is the consideration for the acquisition; and
- for other control type transactions, the threshold is the gross assets of the target entity.

Question 3 sets out the most common dollar thresholds. These vary depending on the kind of transaction and the nature of the investor and can be affected by Australia's treaty obligations.

9 What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees?

The procedure for securing approval for a foreign investment proposal that is a notifiable action or a significant action is that the applicant must lodge an application with FIRB online. The online application requires basic information about the transaction: names and addresses of the parties, the kind of transaction and information relevant to calculating the monetary threshold for the transaction and the application fee. The applicant is expected to attach a cover letter that explains the transaction in detail, including reasons for the transaction and the acquirer's intentions for the target.

Each application attracts filing fees. They vary depending on the kind of application and the consideration for the transaction. For business applications, transactions with consideration of A$10 million or less attract a A$2,000 filing fee; greater than A$10 million but below A$1 billion attract a filing fee of A$25,700, and above A$1 billion attract a filing fee of A$103,400. Other transactions like internal reorganisations attract a filing fee of A$10,200. The application is not considered to be lodged until payment is made.

Once the application is lodged, the case officer assigned to the application may contact the applicant to ask questions. In addition, all FIRB applications are submitted to other government agencies for input. Consult agencies will always include the ATO and the Australian Competition and Consumer Commission (ACCC) (even if ACCC clearance is not being sought by the parties). It may also include other government agencies such as the Critical Infrastructure Centre, which coordinates the national security review of applications involving critical infrastructure and industries, and state governments.

More complex transactions may result in an ongoing dialogue between the Treasury and FIRB and the applicant regarding the imposition of conditions.

10 Which party is responsible for securing approval?

In most cases, the acquirer is responsible for securing approval.

11 How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

From a statutory perspective, the review process consists of a 30-calendar-day examination period and a 10-calendar-day notification period. The examination period can be extended on request by the applicant or by the Treasurer issuing an interim stop order, which gives the Treasurer an additional period of up to 90 calendar days to examine the application. In practice, the length of time is affected by the time of year, the extent to which the application is being reviewed by other government departments, the election cycle and general levels of business, and voluntary extensions by the applicant are routine.

12 Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

For any notifiable action, it is an offence to fail to notify the foreign investment proposal. For a significant action (including a notifiable action) that is notified, it is an offence to proceed with the foreign investment proposal until a statement of no objection is received or the Treasurer's power to make a decision in relation to the proposal expires. Penalties for failing to comply are: for individuals, up to three years' imprisonment or an A$157,500 fine or both; and for companies, a fine of up to A$787,500.

Civil penalties for less serious breaches include: for individuals, a fine of up to A$52,500; and for companies, a fine of up to A$262,500.

Officers of companies commit an offence or may be liable for civil penalties if the corporation is convicted of the offence or is the subject of a civil penalty order and the person authorised or permitted the commission of the offence or the contravention of the civil penalty provision by the corporation.

Third parties who knowingly assist a breach may also be subject to civil and criminal penalties.

13 Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

Most foreign investment proposals are routine and do not require any prior consultation with the Australian government. If an applicant considers that a foreign investment proposal may be controversial, it is possible to engage in dialogue with the Treasury and FIRB before and during the application process. However, guidance will generally not be given as to how an application will be decided.

14 When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

Most foreign investment proposals are routine, and the review process is confidential. However, given the case-by-case nature of the examination process, high-profile transactions have the potential to become politicised. It is sensible for applicants to monitor the Australian media and political process to ensure that information in the public domain that is inconsistent with the application is appropriately addressed.

There is no procedure for expediting approvals. The Treasury and FIRB may take into account requests for early decisions based on commercial imperatives, but they have no obligation to do so and such requests should be used sparingly.

15 What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to pre-merger review?

If a foreign investment proposal is a notifiable action or significant action, then regardless of whether the transaction was actually notified, if the Treasurer is satisfied that the proposal is contrary to the national interest, the Treasurer has the power to order the disposal of any interests in Australian securities, assets or land that were acquired under the proposal.

Substantive assessment

16 What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

See question 1. In order to make an order prohibiting implementation of a foreign investment proposal or an order to dispose of property acquired under a foreign investment proposal, the Treasurer must be satisfied that the proposal is contrary to the national interest. Because of the discretionary nature of the decision, the question of burden of proof does not really arise, although it is prudent for applicants to show why a proposal is not contrary to the national interest in their applications.

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Update and trends

There are two main trends that have been evident in the past year.

The first is an increasing focus on national security concerns in assessing the national interest. This is evidenced by the establishment of the Critical Infrastructure Centre (CIC) and the passage of the Security of Critical Infrastructure Act 2018 (Cth) (SCI Act). The CIC is a government agency that conducts risk assessments and provides advice to reduce the potential for malicious actors to gain access to, and control of, Australia's critical infrastructure through ownership, offshoring, outsourcing and supply chain arrangements. Critical infrastructure includes physical facilities, supply chains, information technologies and communication networks that provide services for everyday life such as energy, communications, water, transport, health, food and grocery, banking and finance, and government, which, if unavailable for extended periods, would significantly impact the social or economic wellbeing of Australia or affect Australia's ability to ensure national security. Risk assessments are undertaken:

- to help owners and operators of critical infrastructure understand risks and take mitigating actions;
- to inform government decisions (eg, foreign investment – the CIC coordinates the national security review on FIRB applications relating to critical infrastructure);
- in the context of administering the SCI Act and the Telecommunications and Other Legislation Amendment Act 2017 (Cth) (telecommunications sector security reforms) – these pieces of legislation deal with certain high-risk critical infrastructure relating to electricity, gas, water, ports and telecommunications.

The purpose of the SCI Act is to manage national security risks relating to high-risk critical infrastructure by gathering information (owners and operators of these high-risk assets are required to report certain ownership and operating information), creating a non-public register of critical infrastructure assets and giving the Minister power to require an owner or operator to do, or refrain from doing, an act or thing, if the Minister is satisfied that there is a risk of an act or omission that would be prejudicial to security.

The second trend is an increasing willingness by the Treasurer to impose conditions. The government has developed a range of standard conditions relating to tax, privacy and patient data that are routinely imposed in relevant transactions, and may also impose a range of more bespoke conditions in more sensitive transactions (such as around ownership, board composition, headquarters, etc).

FIRB has published a variety of resources in order to provide guidance to prospective applicants, including a document entitled 'Australia's Foreign Investment Policy', detailed guidance notes and fact sheets. These are all located on FIRB's website.

17 To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

Although it is possible that the Australian government could consult or cooperate with officials in other countries (particularly in relation to tax) in reviewing applications for foreign investment proposals, it is more common for the Treasury and FIRB to share information with other governmental departments (see question 9).

18 What other parties may become involved in the review process? What rights and standing do complainants have?

The application process is confidential (including the fact that an application has been made, unless the acquirer chooses to make a public announcement), and there are no formal rights for third parties to intervene in the process. It is possible for third parties to intervene informally, through the media or by lodging a submission to the FIRB if they are aware that an application has been made. FIRB may undertake any enquiries that it wishes, although it does not engage in any formal public consultation processes. As noted in question 17, applications are routinely shared with other government departments.

19 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If a foreign investment proposal is a notifiable action or significant action, then regardless of whether the transaction is actually notified, if the Treasurer is satisfied that the proposal is contrary to the national interest, the Treasurer has the power to issue an order prohibiting completion of the proposal, or if the proposal has completed, an order requiring the acquirer to dispose of any relevant Australian securities, assets or land that were acquired under the proposal.

20 Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings or agreeing to other mitigation arrangements?

Part of the application process involves a dialogue with the Treasury and FIRB, which may result in agreement on conditions that the Treasurer may impose as a condition to allowing a foreign investment proposal to proceed. If a foreign investment proposal is completed without having been notified, it is possible to reach a negotiated solution with the Treasurer but there is no guarantee that a negotiated solution will be reached.

21 Can a negative decision be challenged or appealed?

An order prohibiting a foreign investment proposal, or requiring disposal of assets, could be challenged on the grounds that the transaction was not a notifiable action or significant action or on procedural grounds. Otherwise, an order cannot be challenged as the Treasurer has complete discretion to decide what the national interest is and whether a foreign investment proposal is contrary to it.

22 What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

For its part, the government respects confidentiality, and 'leaks' are extremely rare. There are no remedies if confidentiality is breached, however. The government may be compelled to disclose information under freedom of information laws, but the information contained in FIRB applications is usually commercial in confidence information, which is not subject to such disclosure. Applicants should, however, state in their applications that the information contained in them is commercial in confidence and is not subject to disclosure under freedom of information laws.

Recent cases

23 Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

The vast majority of applications for business proposals were approved without conditions. Counting the number of rejections can be difficult: in some cases, foreign investment proposals were never formally rejected, but the parties terminated the transactions for reasons associated with the foreign investment review process (for example, conditions may have been imposed that the parties did not accept). Taking these 'effective' rejections into account, there are approximately 10 to 15 business transactions that have been rejected, most of them in the past 10 years.

Because of the case-by-case nature of the review process, it is more instructive to look at trends than individual cases. Trends evident in rejections (and effective rejections) include:

- national security concerns (for example, the attempted acquisition of AusGrid, the NSW electricity distribution company, by bidders from China and Hong Kong; development and operation of mines near sensitive Department of Defence-owned land);
- genuine competition concerns (for example, the attempted acquisition of a rare earths miner by an acquirer from China, when Chinese companies already controlled a significant portion of the world's supply of rare earths; or the attempted acquisition of an Australian miner by a Chinese miner where there was insufficient diversity of ownership in a newly emerging resources area);

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- concerns around the ability of the acquirer to move important Australian assets offshore and to be beyond the reach of Australian regulation (for example, the attempted acquisition of the Australian Securities Exchange by the Singapore Stock Exchange);
- concerns as to the motivations of foreign government investors (for example, the attempted acquisition of the Australian Securities Exchange by the Singapore Stock Exchange and the attempted acquisition of Rio Tinto by Chinalco); and
- political issues (for example, the attempted acquisition of S Kidman & Co (which holds approximately 1 per cent of Australian land and approximately 3 per cent of Australia's arable land), and the attempted acquisition of Graincorp by ADM, both of which were thought to have been driven by election-year politics).

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ISBN 978-1-912377-41-1

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