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Australia's foreign investment review board and the regulation of Chinese investment

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Foreign investment has played an important role in the Australian economy since the country's foundation. Part of the latest wave of foreign direct investment (FDI) in Australia has been by Chinese firms, and largely by state-owned enterprises with connections to the Chinese state. Despite the value it has generated for the Australian economy, Chinese FDI has been controversial and has exposed some of the shortcomings in Australia's foreign investment review process. This article evaluates Australia's foreign investment regime, and pays particular attention to the Foreign Investment Review Board (FIRB). Questions are asked about how closely the FIRB's role and processes resemble regulatory best practice. The article also considers whether greater fidelity by the FIRB to principles of good governance could better serve Australia's broad policy interests and reduce Chinese perceptions of an opaque and discriminatory foreign investment regime.

Keywords: China; Australia; foreign direct investment; regulation; good governance

JEL code: K2

1. Introduction

Foreign investment is crucial to the Australian economy. This was acknowledged by the *Australia in the Asian Century White Paper* (White Paper) commissioned by the former Federal Labor government,[1] which enumerated some of the benefits that foreign investment brings to Australia:

> Foreign investment supplements domestic savings and provides additional capital for economic growth, supports existing jobs, and creates new opportunities. It helps boost productivity by introducing new technology, providing capital for infrastructure, supporting global value chains and markets, and enhancing Australia's skill base through greater knowledge transfer and exposure to more innovative work practices. (Australia in the Asian Century Implementation Task Force 2012, 199)

Foreign investment is behind more than one third of all capital formation in Australian industry since 2000 and a much higher share in mining and resources (Drysdale and Findlay 2009, 353). Foreign investment has been critical to mining and resources, where it has been instrumental 'not only in delivering resource supplies to international markets,

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but in discovering and proving resource reserves and assets' (Drysdale and Findlay 2009, 353).

Successive Australian governments have largely recognized that foreign investment is important to national economic prosperity, and as a consequence, the country has for the most part adopted a relatively open stance towards foreign investment. Foreign investment is nonetheless subject to the constraints imposed by Australia's foreign investment regime. The Foreign Investment Review Board (FIRB) is an important part of that regime, as it exists to help the Australian government decide whether foreign investment proposals should be blocked on the basis that they are contrary to the national interest.

This article examines the function and operation of the FIRB in the light of recent concerns about the administration of Australia's foreign investment review process. These concerns have coincided with a surge in foreign direct investment (FDI) in Australia by Chinese enterprises, and have centered on the perception that Australia's foreign investment regime has at times become politicized. This unease can itself be traced to some of the difficulties entailed in having a foreign investment review process that is ultimately administered by a political figure (the Treasurer).

1.1 The aim and structure of the article

1.1.1. The FIRB as the subject

This article is primarily an analysis of the FIRB and its role in reviewing foreign investment proposals. The FIRB has been chosen as the subject of this article for a couple of reasons. First, the FIRB's role in assessing foreign investment proposals is arguably why some indicia[2] suggest that Australia is a relatively closed destination for FDI.[3] Secondly, the FIRB is the 'face' of foreign investment review that Australia presents to the world. These reasons warrant a detailed analysis of the FIRB's role in Australia's foreign investment review process.

1.1.2. Facilitating a considered discussion

This article aims to facilitate a considered discussion on the merits of the FIRB's operation and whether improvements might be possible. This is an important conversation from the perspective of economic efficiency, prosperity, and good governance. The question is whether Australia's approach to foreign investment represents sound policy. In other words, does it utilize scarce government resources well, and is it consistent with national goals and best practice standards for regulators?

The conversation is also important in the face of Chinese criticisms about the FIRB and Australia's foreign investment review process more generally. Foreign investment is fundamental to the Australian economy, and the share of Chinese FDI in Australia as a proportion of total FDI is increasing. Once negligible, in the last five to six years Chinese inward FDI has grown to be the ninth most important source of FDI in Australia, surpassing France, Germany, New Zealand, and Hong Kong (Mahoney 2013). With increasing evidence that the Chinese economy is slowing, Australia must carefully consider complaints about the fairness of its foreign investment review process. It cannot be assumed that Chinese FDI will continue to flow into Australia regardless of the regulatory approach that Australia adopts.

1.1.3. Article structure

The article is organized into five parts. The remainder of this part describes the FIRB's historical role in maintaining openness to foreign investment, and details the emergence of a fragile political consensus in Australia on foreign investment. Part 2 describes the salient features of Australia's legal and policy framework for regulating foreign investment. Part 3 sets out accepted principles for good regulatory practice. Part 4 goes on to discuss a series of contentious proposals by Chinese companies in Australia. We then comment on the implication of these cases for the FIRB's current operation and practice in the light of the standards set out in Part 3. Part 5 concludes by discussing whether changes ought to be made to how the FIRB operates, and considers the nature of potential changes by reference to the literature and our own analysis.

1.2. The FIRB and its historical role in maintaining openness to foreign investment

The FIRB was established in 1976, and advises the Treasurer on whether foreign investment proposals are in the Australian national interest. The FIRB was created in the aftermath of the 1970s boom in the Australian resources sector, which was largely driven by growth in FDI from the US and saw a rise in economic nationalism and sentiment opposed to foreign investment (Drysdale 2011, 56). Subject to a few notable exceptions, the operation of the FIRB and Australia's foreign investment review process has been mostly uncontroversial until recently.[4] This is arguably because Australia's policy on foreign investment has historically been relatively open and welcoming, aside from brief periods of retreat from the commitment to openness (Drysdale and Findlay 2009, 350).

While some measures identify Australia's treatment of FDI as relatively restrictive, it has been observed that in fact 'Australia … has a long record, and a strong policy regime, characterised by openness towards foreign investment in its resource industries…' (references omitted) (Drysdale and Findlay 2009, 350). Drysdale (2011) argues that the FIRB's very existence and function have been important symbolically: they have helped maintain Australia's openness towards foreign investment by reassuring Australians that proposed transactions are examined for consistency with the national interest (56). Drysdale (2011) also argues that the FIRB has helped maintain openness by shielding the review process from wholesale politicization:

> Although the FIRB has been perceived by some observers and foreign governments (especially that of the USA) as restrictive of access by foreign investors to the Australian market … it can be persuasively argued that over the years it has served precisely the opposite role, keeping Australia open to direct investment from abroad in the face of political pressure to be more restrictive.… (references omitted) (56)

Armstrong (2011) recently conducted an econometric analysis that confirms Australia is more open to foreign investment than recent Chinese complaints and international indicia suggest.[5] Armstrong assesses how actual levels of FDI received by a country compare to potential levels (which are calculated based on determinants of FDI), thereby allowing him to comment on the conversion of potential to actual investment. Armstrong finds that there is a relatively high conversion of potential Chinese investment in Australia to actual investment (31). He concludes that 'Chinese ODI [outward direct investment] to Australia faces relatively less resistance than does Chinese ODI to many other destinations' (31).

Armstrong notes that '[t]he important inference from these results is that … Chinese investment has more open access to Australia than to any other country in the world…' (31, 33).

1.3. Recent controversy surrounding foreign investment in Australia, and the emergence of a fragile political consensus

The largely uncontroversial nature of the FIRB and Australia's foreign investment review process has been tested in the last five years or so, with a marked increase in Chinese investments in so-called strategic industries like mineral resources and agriculture.[6] The spike in proposed investments by Chinese enterprises (that are often state-owned) proved challenging for the FIRB and Australia's regulation of foreign investment. Sensitivity around foreign investment in agriculture, however, has extended beyond investment from China, as the failed proposed takeover of GrainCorp by US firm Archer Daniels Midland illustrates.[7]

Chinese FDI has attracted political controversy and has generated concern among parts of Australian society. Australia's foreign investment review process and the FIRB have similarly been sources of contention: Chinese business and government officials have leveled accusations of discrimination against the Australian government and its review agency.

The controversy surrounding Chinese investment has subsided somewhat in recent times. A fragile political consensus has increasingly emerged between the two major parties at the Federal level, with both generally in favor of foreign investment and an open approach to Chinese FDI. This consensus began in August 2012, when – while still in opposition – Liberal Party leader Tony Abbott sought to constrain the National Party (the Liberal Party's junior partner) from expressing anti-foreign investment sentiment. Then Nationals' Senator Barnaby Joyce[8] had been vocal in his campaign against the acquisition of Australia's largest cotton farm, Cubbie Station, by a Chinese-led consortium. Despite contrary noises within the National Party, Abbott insisted that the Coalition supports foreign investment (including in the agricultural sector) that is in the national interest.[9]

There are a number of indications that the consensus between the Liberal and Labor Parties on this issue is precarious. The Coalition was elected to government in September 2013, and Prime Minister Tony Abbott now has the unenviable task of managing latent tensions between the Liberal and National Parties on the issue of foreign investment. For its part, the National Party has historically expressed strong reservations about foreign investment in Australia.[10] The maintenance of political agreement between the major parties will depend on the Prime Minister's continued assertion of Liberal Party policy priorities over those of the Nationals. Managing these competing policy priorities will not be an easy task, particularly given that the new Minister for Agriculture, the Nationals' Barnaby Joyce, has been the country's most prominent critic of foreign investment in agriculture and resources more generally.[11]

While we may be witnessing a period of relative political agreement about the benefits of foreign investment, there is a pressing need to evaluate Australia's foreign investment review process. An evaluation is needed because of the polarizing potential of Chinese FDI in Australia and the contested nature of Australia's foreign investment review process.

2. Australia's legal and policy framework for regulating FDI

2.1. The general structure of the foreign investment framework

Australia's foreign investment framework is comprised of: the *Foreign Acquisitions and Takeovers Act* (FATA); two sets of regulations under the FATA[12]; and the Australian government's foreign investment policy (the Policy) (Australian Treasurer 2013). While it is beyond the scope of this article to discuss the intricacies of this framework, some general observations need to be made.

The framework provides for the Treasurer (or his or her delegate) to review large scale transactions involving overseas investors which, if concluded, would give the foreign party significant control over Australian businesses and their assets (Rae and Jacobs 2006). Proposed transactions are scrutinized to determine whether they are contrary to Australia's national interest and should therefore be prevented from proceeding. Not all foreign investment proposals are reviewable. Various thresholds in the FATA and the Policy concerning asset levels and degrees of corporate control determine whether a proposal must be notified for review.

While the FIRB assists the Treasurer in assessing whether foreign investment applications contravene the national interest, the matter is ultimately for the Treasurer to decide (FIRB 2011, 3). If a transaction is perceived as problematic from a national interest perspective, the Treasurer may allow it to proceed subject to conditions designed to safeguard the national interest (FATA s. 25). Where a transaction is deemed irreconcilable with the national interest, the Treasurer can prevent it from proceeding altogether (FATA ss. 18, 19, 20, 21, 21A). The government has reassured investors that it rarely intervenes in investment applications (Australian Treasurer 2013, 5).[13]

2.2. No legislative definition of the national interest, and a broad policy that singles out foreign governments

The legislation is the source of the Treasurer's right of review, but the FATA and the Policy operate in tandem. Indeed, the FATA is relatively skeletal, while the Policy provides most of the guidance on how the Treasurer's right will be exercised. There is no legislative definition of the 'national interest' and therefore the kinds of investments that may infringe on this. The Policy is the only source of guidance on this, and it is from the Policy that we gather that the national interest is an extremely broad concept.

The Policy sets out a matrix of factors, including economic and security considerations, which are relevant to determining whether a proposal is in the national interest. Special additional considerations apply to the acquisition of urban and agricultural land.[14] The approach outlined in the Policy is ostensibly broader than the test applied in a jurisdiction like the United States, where 'national security' is meant to be the only determinant of whether an investment proposal should be blocked.

The Australian government is especially concerned about foreign government investors, which are explicitly singled out for discussion in the Policy.[15] The Policy states that proposals by foreign government investors will be assessed on whether they have political or strategic objectives rather than purely commercial goals (Australian Treasurer 2013, 8). The government will also consider the extent to which an investor is subject to actual or potential control by a foreign government (Australian Treasurer 2013, 8).

2.3. Legislative silence: the role of the FIRB and the Foreign Investment and Trade Policy Division

In addition to being silent on the national interest, the FATA is also quiet on a number of other matters. The most striking silence is on the role that the FIRB and Treasury's Foreign Investment and Trade Policy Division (the Division) play in Australia's foreign investment screening process. The FATA does not mention the FIRB or the Division, and only refers to the Treasurer's authority to delegate his or her decision-making power under the Act. Similarly, the Government's own Policy makes only passing reference to the role of the FIRB and the Division. The primary source of public information about the agency and Treasury branch is therefore material published on the FIRB's website including its annual reports.

2.3.1. The FIRB's role

From this source, we learn that the FIRB exists to advise the government on: foreign investment policy generally; the application of the FATA and the Policy across all foreign investment proposals received by the government; and individual foreign investment proposals that are deemed especially significant (FIRB 2013).

2.3.2. The FIRB is not a statutory body

We also learn that while the FIRB exists to advise the government on matters of foreign investment, it does not have statutory authority (FIRB 2013). In other words, the FIRB was established under the government's executive power rather than by legislation passed by Parliament. It therefore, by design, lacks a statutory basis for independence from government. There are sound reasons, outlined in the concluding section, for why the FIRB may have been set up in this way. But the question now has to be whether the costs of this structure outweigh the benefits.

2.3.3. Personnel overlap between the FIRB and the government: the dual role of the Executive Member

The primary source of the FIRB's lack of independence is the considerable overlap in personnel between it and the government. The FIRB currently has five members. Four are part-time non-executive members, and one is a full-time member (the Executive Member) who is also an employee of Treasury. As a consequence of this structure, there is only a partial separation of personnel between the agency and the government.

The Executive Member in effect has a dual role. As a member of the FIRB, he or she is a theoretically independent government adviser. In many cases, however, the Executive Member is an extension of the government itself. An obvious example of this is that the Executive Member is often the decision-maker in foreign investment applications under a delegated authority from the Treasurer. The FIRB states that in 2011–2012, approximately 7% of foreign investment decisions were made by the Treasurer himself or a Treasury Minister (FIRB 2013). The remaining 93% were made by the Executive Member or a senior Division official (FIRB 2013). It should be pointed out that the vast majority of applications approved in 2011–2012 were real estate investments (FIRB 2012a, 21, Chart 2.1). While these applications are routinely dealt with by Division officials, business cases – which are likely to be more significant – tend to be decided by a Treasury

Minister. There is, however, little public guidance on the process that governs the internal choice of decision-maker in any given foreign investment case.[16]

2.3.4. *Further personnel overlap between the FIRB and the government: shared secretariat services*

A further intersection of personnel between the FIRB and the government arises because the FIRB relies on secretariat services provided by the Division for the day-to-day administration of the foreign investment review process.

The FIRB has only five members, four of whom are part-time. It meets relatively infrequently, with meetings convened monthly and telephone conversations in the interim as required (FIRB 2012a, 5). It also has a fairly minimal budget. Between 2011 and 2012, the Board accrued approximately AUD$177,000 in expenses, of which 90% was members' salaries (FIRB 2013). This compares to a budget of AUD$3.9 million for the Division in the same period (FIRB 2013). Between 2011 and 2012, 11,420 applications were lodged for foreign investment approval (FIRB 2013). Because of its limited resources and the high volume of applications received,[17] the FIRB works closely with the Division in order to discharge its functions. The Division acts as a filter by carrying out an initial review of all foreign investment applications. It then reports to the FIRB on a weekly basis about applications received (FIRB 2012a, 5).

The FIRB reassures the public that while the Division plays an important role in filtering and evaluating foreign investment proposals, the Board is directly involved at an early stage in applications that are deemed to be significant (FIRB 2012a, 6). The implication seems to be that the FIRB does not play any real role in the many ostensibly 'standard' cases. To the extent that the FIRB is involved in these cases, that involvement is presumably limited to receiving a high-level briefing from the Division about current foreign investment applications overall.

2.3.5. *Summary: a circular situation*

A circular situation arises because of the overlap in personnel between the FIRB and the Division. On the one hand, the FIRB advises the Treasurer on foreign investment proposals. On the other hand, the FIRB itself relies upon the advice and support of the Treasury because of the Executive Member's dual role and the secretariat services provided by the Division.

2.4. *A further silence: the process for administering the foreign investment framework*

The FATA and the Policy are also silent on the precise mechanisms for administering Australia's foreign investment framework.[18] They do not enumerate the legitimate functions of the FIRB and the Division, and nor do they comprehensively establish the processes that are to be observed in assessing foreign investment applications. Because the FIRB was not constituted by statute, there is no publicly available and legally binding document on the parameters of its role and processes. While the FIRB publishes annual reports that discuss how the Board operates, they are not statutorily mandated nor are they binding or enforceable at law. One might legitimately ask a range of questions about procedural matters and the boundaries that apply to the FIRB's role. Some obvious examples are:

(1) What factors determine who the decision-maker is for foreign investment applications? That is, when will a decision be made by the Treasurer or a Treasury Minister as opposed to the Executive Member or a senior Division official?
(2) What considerations are relevant to the FIRB's assessment of foreign investment applications? Are these considerations identical to those set out in the government's Policy, and is the FIRB entitled to take into account additional considerations?
(3) What determines whether the FIRB is briefed by the Division about a proposed investment?
(4) When and how frequently does the FIRB brief the Treasurer?
(5) Are third parties permitted to make submissions to the FIRB on proposed investments, and if so, under what circumstances and on how many occasions?[19]
(6) Will parties be notified that the FIRB has made a recommendation on their proposed investment, and will they be given an opportunity to respond prior to a final decision being made?

While the FIRB's annual reports provide us with some insight into how the agency operates, they are only a partial answer to these questions. The reports themselves cannot set legally enforceable limitations on the process to be observed by the FIRB and the relationships between the FIRB, the Division, and the government itself. Only legislation could do that.

2.5. Legislative tension: freedom of information and the absence of administrative review

A final matter worth mentioning is that a party whose interests are adversely affected by a foreign investment decision has no capacity to seek administrative review.[20] For a government decision to be reviewable by the Administrative Appeals Tribunal, it must have been made under an Act, regulation, or legislative instrument that expressly provides a review right. No such right is provided by the FATA or its regulations. This shielding of foreign investment decisions from administrative review arguably runs contrary to the existing entitlement to make a Freedom of Information (FOI) request of the FIRB. The entitlement to make an FOI application illustrates there has been a partial attempt to subject the foreign investment review process to a measure of administrative accountability. The right was successfully exercised in 2011 by Bloomberg News, which sought further details on the Treasurer's decision to block a majority acquisition of the Australian rare earth miner, Lynas Corp., by China Non-Ferrous Metal Mining (Group) Co. (Bloomberg News 2011).

3. Principles of good regulation

There is a large body of literature on what constitutes good governance or sound regulatory practice. A report commissioned by the Victorian government explained the concept of governance in the context of regulatory activities:

> governance refers to the ways in which a body is controlled and managed. In the case of a regulator, it includes the relationships between the regulator, its Minister, its governing body, senior management and stakeholders, and the administrative arrangements that support these relationships. Governance includes the processes by which organisations are directed, controlled and held to account. It refers to the authority, accountability, stewardship, leadership, direction and control exercised in the organisation… (State Services Authority 2009, 31)

The same report went on to observe that good governance can assist regulatory bodies in achieving their stated goals and accountability, thereby facilitating high level performance and engendering community confidence (State Services Authority 2009, 31). Appropriate governance frameworks may also help maintain and enhance the reputation of regulatory bodies (State Services Authority 2009, 31). It must be accepted that the good governance of regulatory bodies is important. But how can we judge what constitutes good governance? A number of indicia of good governance appear in the literature, including the extent to which a regulator is transparent, accountable and independent. Also relevant is whether a regulator has a clearly defined role, is subject to oversight (for example, by Parliament), and makes decisions that are capable of administrative and judicial review. These indicia are each worthy of extensive discussion, but a brief attempt is made here to summarize their key features.

3.1. *Transparency*

Hinton suggests that transparency is an important part of creating an environment that is conducive to the receipt of foreign investment (Hinton 2009). Transparency is closely linked to the idea of openness. It is about communicating 'full, accurate and clear information' so that a regulator's actual performance can be assessed against its stated objectives (State Services Authority 2009, 40). The concept of transparency is said to have a number of facets, including political, policy, procedural, and operational transparency (State Services Authority 2009, 40).[21] The Organization for Economic Cooperation and Development (OECD) strongly advocates the notion of regulatory transparency (OECD 2012b, Recommendation 2).

3.2. *Accountability*

Accountability is about ensuring that a regulator can be held responsible to the government, the subjects of regulation, and the public for its performance relative to the government's stated objectives for the regulator (State Services Authority 2009, 38). It is also about creating lines of responsibility within a regulator for the making and implementation of decisions (State Services Authority 2009, 38). Accountability requires a regulator to have systems in place that ensure the ethical integrity of its decision-making and practices more generally (State Services Authority 2009, 38). Accountability is linked to transparency, in that the latter is required before the former can be achieved.

3.3. *Clear roles*

The OECD emphasizes the importance of role clarity for regulators (OECD 2012b, Recommendation 7; OECD 2013, 7). Clear role definition is desirable, but is not always apparent among regulators. Regulators traditionally have the function of implementing, administering, and enforcing government policy (State Services Authority 2009, 35). In some cases, they are also charged with roles usually performed by government departments such as policy advice and development (State Services Authority 2009, 35). Careful consideration needs to be given as to whether a regulator should be responsible for multiple roles. Good governance suggests that regulatory functions ought not to be 'inherently conflicting' (State Services Authority 2009, 35).[22] It is particularly important that 'a requirement to perform one function should not limit a regulator's capacity to undertake another of its functions' (State Services Authority 2009, 35). There are dangers

in regulators playing a major role in policy development. There is a real risk that they may be 'drawn into the political process' thereby 'compromising … [their] perceived and actual independence, and … [their] capacity to make impartial decisions' (State Services Authority 2009, 35).

3.4. *Independence from government and the subjects of regulation*

Regulatory independence has to do with the nature and closeness of the relationships between the regulator, the subjects of regulation, and the government. There is no such thing as unqualified regulatory independence from government, since 'regulators' powers are always delegated by ministers and Parliament when prescribed in legislation' (State Services Authority 2009, 45). But some regulators have a greater measure of independence from government than others. The degree of independence depends on a number of factors. A critical consideration is whether a regulator sits within a government department, in which case the responsible minister may exert considerable de facto influence over the regulator and its decisions (State Services Authority 2009, 45). In theory, where a regulator is subsumed within a government department, legislation can be used to explicitly delimit the powers that may be exercised by the departmental secretary and the responsible minister over the regulator (State Services Authority 2009, 47). In reality, though, adequate delimitation may be hard to achieve (State Services Authority 2009, 47).

An alternative arrangement is to establish the regulator as a statutory body that sits outside government (State Services Authority 2009, 47). In this case, the constituting Act that establishes the regulator can clearly define its role and set limits on departmental and ministerial influence (State Services Authority 2009, 46). There is a choice to be made as to how independent a regulator should be from government. If for no other reason, independence may be desirable because 'the trust of regulated entities and the wider public is best engendered by demonstrating that key decisions are shielded from the influence of short term political considerations…' (State Services Authority 2009, 45).[23]

The independence of a regulator from the subjects that it regulates is closely correlated with the notion of transparency. The greater the degree of transparency adopted by the regulator, the less space there is for the exertion of improper influence by regulated subjects.

3.5. *Oversight, review prospects, and whole of government coherence*

Non-partisan oversight of regulatory activities is seen as an important part of accountability and good governance more generally (OECD 2012b, Recommendation 3; OECD 2013, 50 [163]). A requirement for regulators to report to Parliament at set intervals on their activities and decision-making is an example of this kind of oversight. The availability of a right to judicial and administrative review of decisions by regulators is also a core part of good regulatory practice (OECD 2012b, Recommendation 8; OECD 2013, 52 [Review of Decisions]). Finally, the literature suggests that good governance requires the adoption of a coherent and consistent approach to regulation at the national and sub-national levels (OECD 2012b, Recommendation 10; Hinton 2009).

4. Contentious Chinese proposals in Australia and what they tell us about the FIRB

In 2009, a series of proposed investments by Chinese state-owned enterprises (SOEs) in the Australian mining sector triggered an intense debate about the merits of accepting FDI from foreign government investors in strategic industries like mining. Discussion about Chinese investment has more recently expanded to focus on agriculture as well.

4.1. Rio and Chinalco

An early contentious Chinese investment application in Australia was Chinalco's 2009 proposed acquisition of a substantial interest in multinational miner Rio Tinto (Rio). Rio announced its agreement with Chinalco, a Chinese SOE and leading global producer and manufacturer of metal and fabricated metal products, in February of that year. The agreement was to give Chinalco a significant stake in a number of Rio's Australian-based mining assets in return for US$19.5 billion in cash. It was understood that the agreement was a way for Rio to reduce its then considerable debt. The 2009 agreement followed Chinalco's share acquisition in Rio the previous year, which was also subject to review by the FIRB (Drysdale and Findlay 2009, 361).

The 2009 proposal proved extremely controversial, and generated extensive (and often unfavorable) commentary in the media, certain political circles, and among parts of Australian society. The primary source of contention was Chinalco's status as a Chinese SOE and the perceived ramifications of its relationship with the Chinese government. The issue was explored at length during a Senate inquiry into foreign investment by SOEs that was triggered by the agreement between Rio and Chinalco.[24]

Rio's board ultimately withdrew from its arrangement with Chinalco on 5 June 2009, just short of four months after the agreement was announced. It had been unpopular with Rio shareholders, and the company instead announced alternative plans to address its debt problems. (It proposed to embark on a rights issue to existing shareholders and a joint venture with rival miner BHP in the Pilbara Region. Ultimately, this joint venture also failed to proceed.)

Rio withdrew from the agreement with Chinalco just 10 days before the Treasurer was to announce his decision on the proposal. The proposal had been subject to an extended review process. The Government had exercised its right to take a further 90 days, in addition to its initial 30 day review, to examine the proposal and make a decision. The then Treasurer Wayne Swan emphasized that the decision on whether to allow the proposal to proceed was 'tough' (Swan 2009a) and 'very significant' (Swan 2009b). The Government would therefore 'take its time to evaluate … [the agreement] in great depth and detail' (Swan 2009b).

When the agreement ultimately collapsed, there were reports of deep disappointment by Chinalco executives and Chinese officials. Recriminations in the Chinese state media implied that Rio's withdrawal had been influenced by the Australian government's position on the proposal, which was said to have been shaped by prejudice against Chinese investment (Feiliena 2009). Chinese officials and the Chinese press attributed part of the breakdown to delays in the review process. It was thought that the review process had been extended to allow time for a rival bidder (BHP) to approach Rio with a less controversial solution to its debt problem (Crowe 2009). Mr Swan was forced to defend the Government's treatment of the proposal – he insisted that it had collapsed for purely commercial reasons and denied there had been any dithering in the review process (Swan 2009c).

4.2. OZ Minerals and Minmetals

Another controversial Chinese investment proposal was the announcement by embattled mining company OZ Minerals that Chinese SOE, Minmetals, would acquire 100% of its shares. OZ Minerals would receive approximately AUD$2.6 billion (OZ Minerals 2009, 1–2), and promoted the deal as a 'complete solution' to its 'current debt issues' (OZ Minerals 2009, 2).

Mr Swan issued an interim order advising that the proposal would not be permitted to proceed in its extant form, which was seen as infringing on national security interests. The structure of the agreement was seen as unacceptable because it included the acquisition of mining operations in Prominent Hill, which were situated within the Woomera Prohibited Area used to test Australia's defense weaponry (Swan 2009d). Mr Swan later approved an amended agreement that excised Prominent Hill from the assets that Minmetals would acquire (Swan 2009e). His approval was conditional, as it required a number of undertakings to be observed that were clearly designed to address concerns arising from Minmetals' status as a Chinese SOE.

Larum claims that Chinese officials and investors saw Mr Swan's interim order as discriminatory – they 'felt that a Western country would not have been rejected on [national] security grounds' (Larum 2011, 16). This misgiving may have been compounded by reports that BHP Billiton, dually listed on the Australian and London stock exchanges, was considering making an offer for OZ Minerals' Prominent Hill mining operations ('OZ Minerals Bid from China Minmetals Blocked' 2009).

4.3. Particular issues surrounding investment by Chinese SOEs

There were a number of other contentious Chinese investment proposals in the Australian mining sector in 2009. Controversy centered on the nature of the proposed transactions, the identity of the prospective investors, and how the Australian government handled the proposals. Proposed investments included a failed bid by China Nonferrous Metal Mining to take a majority stake in Lynas, and Hunan Valin's share acquisition in Fortescue Metals Group.

Drysdale and Findlay (2009) discuss several of the 2009 proposals, and observe that the 'commentary on these projects focused on their effect on competition, their impact on cooperation between Australian companies and their implications for security issues' (360).

Chinalco's proposed acquisition in Rio was a case that raised concerns about anti-competitive behavior that could harm Australian resources companies and their global consumers. These concerns were considered by the Australian Competition and Consumer Commission (ACCC). They were also extensively ventilated by then Nationals' Senator Barnaby Joyce in a Senate inquiry into foreign investment by SOEs (Senate Economics References Committee 2009).

It was thought that the agreement between Rio and Chinalco might create a situation of 'vertical integration' where China was both a major purchaser of Australian resources and also the owner and producer of those resources. It was suggested that vertical integration could drive down the global price of resources. The argument was that as an SOE, Chinalco might seek to over-supply the Chinese market so that Rio's prices were artificially reduced thereby allowing other Chinese steel companies (also SOEs) to purchase Rio products at below-market rates. It was said that other non-Chinese Rio customers might receive insufficient supplies. This argument about vertical integration

supposes that Chinalco had an incentive to depress Rio's prices for the benefit of other SOEs. Ultimately, this argument can be traced to the view that all SOEs have an identical ownership structure since their primary shareholder is the Chinese government.

It was also said that 'transfer pricing' could arise as a consequence of the vertical integration some claimed was intrinsic to the arrangement between Rio and Chinalco. This referred to a hypothetical situation where Chinalco would deliberately charge its Chinese customers artificially reduced prices in order to minimize its own revenue, thereby limiting tax payable to Australian authorities. This argument again assumes that a company like Chinalco has an incentive to operate outside the bounds of ordinary commercial behavior in order to achieve an overall net benefit once the interests of other Chinese SOEs have been accounted for.

After considering the matter, the ACCC found that there was no basis for the fears about vertical integration arising from the agreement between Rio and Chinalco (Senate Economics References Committee 2009, 22 June, E19 per Tim Grimwade). The regulator dismissed the claim that Australian iron ore prices would be adversely affected even assuming there was a strong relationship between Chinalco and Chinese steel mills because of their common shareholder (the Chinese government) (Senate Economics References Committee 2009, 22 June, E19 per Tim Grimwade). The ACCC believed that had Chinalco succeeded in influencing Rio to over-supply Chinese steel mills with a view to lowering prices, other competitor iron ore producers would have responded by reducing or withholding their own supplies so that global prices remained unaffected. Hence there was no incentive for Rio to engage in over-supply at the behest of Chinalco in the first instance (Senate Economics References Committee 2009, 22 June, E19 per Tim Grimwade).

Drysdale and Findlay (2009) suggest that the important thing about the particular concerns raised in 2009 about investment by Chinese SOEs is that:

> In all cases, the matters could have been resolved within the existing regulatory structures and in all cases the strategy of Chinese investors appeared consistent with corporate commercial interests. (360)

4.4. Cubbie Station and the maturation of the political debate on Chinese investment

The political debate on Chinese investment in Australia seems to have matured since 2009, with an increasing recognition of the benefits that foreign investment can bring. An example of this progression is the recent sale of Australia's largest cotton farm, Cubbie Station, to a consortium headed by Chinese textile company Shandong Ruyi. The transaction met with relatively little adverse political comment other than at the margin by people like then Nationals' Senator Barnaby Joyce. Joyce was troubled by the sale of an important Australian agricultural asset together with extensive water-usage rights to foreign interests. The Labor Government, on the other hand, made it clear that the matter could be adequately addressed through the foreign investment regime. It approved the investment on the advice of the FIRB, but subjected it to a number of undertakings. These included that Shandong Ruyi: sell down its interest in Cubbie Station from 80% to a maximum of 51% over three years; maintain employment at the farm; manage and operate Cubbie Station through its Australian partner, Lempriere; and report annually to the FIRB on its compliance with the undertakings stipulated by the Treasurer (Swan 2012).

It is important to observe that while Shandong Ruyi was once a Chinese SOE, it was privatized in 2001. The consortium that it headed also consisted of Australian company,

Lempriere. There is therefore some basis for partially distinguishing the sale of Cubbie Station from the investments in 2009 that were proposed by Chinese SOEs going it alone. There is an argument that Shandong Ruyi's proposal proved less troubling for the Government because it was made by a private investor supported by an Australian business partner. Indeed Chinese businesses and officials seem to have drawn some lessons from the 2009 experience, and Shandong Ruyi may have chosen an Australian partner in large part to avoid contention.

4.5. Some backsliding of the political debate – Chinese interests and foreign investment are still problematic

The former Labor Government steadfastly refused to allow Chinese company, Huawei, to tender to supply hardware to Australia's National Broadband Network (NBN). The new Coalition Government has confirmed this policy. The refusal illustrates the capacity for ongoing sensitivity around commercial dealings with Chinese businesses. The Attorney-General's Department under Labor consistently adhered to its 2011 commitment to block Huawei from participating in the NBN on national security grounds. Huawei is an interesting example because of suspicions that it might be a vehicle for state-sponsored espionage even though the company is not an SOE. Some of these concerns no doubt arise because Huawei's Chief Executive was formerly a member of the People's Liberation Army. They are notable because they demonstrate a partial inclination not to take Chinese businesses at face value irrespective of their actual ownership structure.

The case of Huawei and the NBN should be distinguished from pure instances of foreign investment. Huawei was interested in tendering for government contracts to provide goods and services to the NBN, and was not seeking to make a direct investment. And yet the two are closely related, because common sources of concern seem to arise regardless of whether service provision or FDI by Chinese companies is being considered.

The Labor Government's rebuff reportedly came as a shock to Huawei and its high profile Australian advisers who were appointed to act as the company's advocate (Hewett 2012).[25] In April 2013, it was reported that Huawei had basically given up on the idea of playing a role in the NBN in the short-term (McDuling 2013). As opposition shadow spokesman for telecommunications, Malcolm Turnbull indicated that Labor's decision might be reconsidered by a Coalition government. But the new Attorney-General, George Brandis, has now said that the earlier decision still stands ('NBN Ban on Huawei to Stay' 2013).

While Huawei has been blocked from any significant participation in the US market, it has had more success in the United Kingdom, where it has been supplying hardware for use in the UK telecommunications network since 2005 (Blitz and Thomas 2013; Sandle and Goh 2013). This supply has, however, faced critical scrutiny by the British Parliament in recent times (Blitz and Thomas 2013; Sandle and Goh 2013).

The proposed acquisition of GrainCorp – a near-monopolist Australian grain storage and distribution company – by US firm Archer Daniels Midland (ADM) was recently rejected by the Australian Treasurer, Joe Hockey, on the grounds that it was contrary to the national interest. The proposal caused considerable controversy, with concerns being expressed about the vulnerability and long-term livelihoods of Australian grain farmers if the company was sold to foreign interests.[26] The National Party made no secret of its opposition to the deal, and there has been speculation that Treasurer Hockey's rejection of ADM's bid was largely a capitulation designed to appease the Liberal Party's junior partner, the National Party (see, for example, Kenny 2013). The case demonstrates that

foreign investment in strategic Australian industries like mining and agriculture remains a live issue that is easily politicized and that generates emotive arguments that seem to resonate with large portions of the Australian community. Indeed Treasurer Hockey himself cited hostile public opinion as one of the grounds for rejecting ADM's bid (Hockey 2013b).

4.6. Lessons about how Australia regulates foreign investment

What do these cases tell us about the way that Australia regulates foreign investment? Chinese perceptions of a flawed and prejudiced foreign investment review process began with the failure of Chinalco's bid for a larger share in Rio. These perceptions were reinforced when a number of subsequent proposals by Chinese companies were subject to restrictions. Some of these proposals were only approved after the imposition of onerous undertakings that were seen to preserve the Australian national interest. The recent sale of Cubbie Station progressed relatively smoothly, and illustrates that the mainstream political debate on Chinese investment in Australia may have moved beyond the uncertainties of 2009. As already mentioned, however, there are distinguishing features of the Cubbie Station sale that may help explain why it generated less anxiety than the tranche of investments by Chinese SOEs in 2009. The Coalition Government's maintenance of its predecessor's decision on Huawei and the NBN demonstrates there are still latent Australian sensitivities about doing business with Chinese companies.

While attitudes towards Chinese investment in Australia may have somewhat progressed, the controversy of 2009 provides a timely opportunity to reassess Australia's foreign investment regime and the role that the FIRB plays. Cases like Huawei's exclusion from the NBN – while conceptually distinct from the foreign investment review process – remind us that Australia has yet to reconcile its concerns about Chinese business. Thus anxieties about Chinese investment may yet resurface.

4.7. A case for reform

Shortcomings in the FIRB's structure and processes combined with recent Chinese perceptions of discrimination suggest that the time has probably now come to reform how the agency operates. The FIRB may have historically safeguarded Australia's openness to foreign investment, but it seems that things have moved on such that modifications to the FIRB's governance are now desirable. At a minimum, greater transparency, role clarity, and independence from government should be part of any reform process.

Beginning with the collapse of Chinalco's agreement with Rio, a Chinese belief emerged that the review process was tainted by adverse politics. There was also growing uncertainty in Australia as to the actual basis for the government's foreign investment decisions. A broad political discretion and a lack of clarity as to how that discretion is and will be exercised can create difficulties. In these circumstances, regulated subjects and the broader public are in effect asked to trust that the discretion is being exercised in a fair, balanced, and accurate way. An example is foreign investment applications that are rejected on national security grounds – in these cases, detailed reasons for the rejection are unlikely to be furnished. Some cases might justify a closed approach like this. In the bulk of cases, however, it is surely unacceptable to ask that people blindly trust politicians and bureaucrats to exercise their discretion appropriately and without external influence. This is particularly so in the absence of mandatory parliamentary oversight and

administrative review. Certainly the idea of blind trust contradicts the principles of good governance.

The situation vis-à-vis Chinese investors could have been improved through genuine candor by the government on the approach it would take to foreign investment from sources affiliated with the Chinese state. The Policy at the time[27] made clear that special national interest considerations would apply to proposals by foreign government investors. But it did not state what was privately acknowledged by then Executive Member of the FIRB, Patrick Colmer – *viz*. the Policy was aimed specifically at Chinese investors. Colmer reportedly advised US officials that the national interest considerations were designed to address growing concern about large-scale investments by Chinese SOEs in the Australian mining industry (Dorling 2011). Colmer's comments illustrate the potentially fraught nature of charging an agency with both policy and administrative responsibilities. At a higher level, the comments also arguably run contrary to Australia's policy interests in that de facto policy making by bureaucrats could conceivably contribute to unwanted perceptions of sovereign risk.

Perceptions may also have been improved by greater procedural transparency in the FIRB's operations. Increased openness about how the FIRB and its secretariat would review and make recommendations on Chinese investment proposals may have helped alleviate anxieties. A relatively opaque review process is susceptible to criticism, as a lack of transparency can give rise to practises that may be regarded as inappropriate and a perception of improper proximity between the FIRB and the subjects of regulation. An example is claims that BHP Billiton engaged in self-interested and heavy lobbying of government against Chinalco's proposed acquisition in Rio (Tasker 2009).

Greater procedural and operational openness could also avoid a practise that is understood to have developed whereby the FIRB discourages proposals from progressing so as to avoid having to make outright rejections. It should be emphasized that limited procedural transparency may have profound economic implications for Australian prosperity in the long-term. Giving bureaucrats a largely unfettered power to provide advice and make decisions can have wide-reaching distributive effects. Where the FIRB recommends against – or, more commonly, discourages the progression of – a foreign investment proposal, a company or its assets will ultimately be available to other domestic or foreign buyers at a discounted price. Careful thought needs to be given as to whether this is actually in the Australian national interest as opposed to being in the interests of particular national or international participants.

There may have been fewer concerns about the politicization of the review process had the FIRB not been responsible for both administering Australia's foreign investment framework and advising the government on policy more generally. Because the FIRB was asked to make recommendations on specific Chinese proposals and provide the government with general policy advice, one can understand the suspicion that politics may have crept into the administration of the foreign investment framework.

Some months after the agreement between Rio and Chinalco broke down we saw an example of the blurred line between policy-making and administration. Then Executive Member of the FIRB, Patrick Colmer, told the Australia China Investment Forum that the government was 'much more comfortable' with investments that represented a less than 50% share in greenfield projects or a less than 15% share in major Australian producers (Kirchner 2010). This was interpreted as de facto policy-making by the FIRB, contributing to uncertainty by Chinese investors as to how their proposals would be treated (Larum

2011, 14, 25 [Footnote 40]). Again, comments like these must be considered in the context of sovereign risk. Questions should be asked as to whether these kinds of comments ultimately serve Australia's broader national goals, many of which depend on remaining attractive to foreign trading partners and investors.

Concern over politics creeping into the administration of the foreign investment regime may have been lessened if the FIRB had been endowed with greater structural independence from Treasury. Chinese officials and investors may have been reassured by a statutory body sitting outside Treasury, with clear procedures defining the acceptable limits of interaction between the regulator, the department, and the Treasurer. Some level of parliamentary oversight of the FIRB may also have helped persuade foreign investors that the review process was not capricious and dictated by the political preferences of the government of the day.

The FIRB currently produces publicly available annual reports, but they are largely general in terms and the FIRB itself points out that the reports are discretionary as they are not mandated by statute (FIRB 2012a, 3). Much more could be done to increase lines of communication and accountability between the FIRB and Parliament. A capacity (even if partial) to seek administrative review of the foreign investment process may similarly have allayed Chinese concerns.[28] Administrative law is concerned to demarcate considerations that are relevant to a decision from those that are irrelevant. It also provides the capacity to seek reasons for a particular decision. The demarcation of relevant from irrelevant considerations and the right to reasons could result in better processes when it comes to the making of foreign investment decisions. The prospect of administrative review may serve to sharpen the focus of the decision-maker solely on factors that are relevant to the decision rather than also taking into account irrelevant considerations. The possibility of having to provide reasons for a decision may make the decision-making process more regular and rigorous.

5. Policy options

This article began by acknowledging the great benefit that foreign investment brings to Australia. The clarity of this benefit raises the question of whether pre-screening of foreign investment is necessary at all. We are inclined to accept that some form of pre-investment screening is needed and desirable. At a minimum, a screening process is important because it helps maintain public confidence in foreign investment and therefore helps keep Australia open to the overseas capital that the country needs (Shearer and Thirlwell 2008, 9). Having a screening process means the government can assure the public that a system is in place to ensure that incoming investment is consistent with Australia's interests (Shearer and Thirlwell 2008, 9).

We also tend to agree that 'no government, no matter how supportive of foreign investment, is going to give up its discretion to review potentially sensitive foreign investment proposals' (Shearer and Thirlwell 2008, 9). In other words, some kind of pre-screening is inevitable in Australia. This position contrasts with Kirchner's ideal scenario (Kirchner 2008, 16–17). He argues that Australia's foreign investment regime is one of the most restrictive in the world, and that 'capital xenophobia' (official mistrust of foreign investment) has become a major barrier to Australia's receipt of overseas investment. Kirchner's ideal is full national treatment for foreign investors in Australia with the complete abolition of pre-screening, although he too concedes that this is an unlikely political reality (Kirchner 2008, 16–17).

5.1. Arguments for and against reform

5.1.1. The system is basically sound

The next question is what a pre-screening process should look like. One view is that the current approach is basically sound. Shearer and Thirlwell (2008) argue that it is 'legitimate and appropriate for the elected government of the day to be charged with defining the national interest' (9). They suggest that in practice, the Australian foreign investment regime does function to protect the national interest, and is well equipped to deal with the challenges posed by investment from Chinese SOEs and sovereign wealth funds (SWF**s**). The trouble with this view is that it ignores the potential economic ramifications of maintaining an approach to foreign investment that is widely perceived as opaque and at times perceived as discriminatory.

5.1.2. Calls to reform the foreign investment framework

Others have argued for changes to the foreign investment framework so that Australia remains an attractive destination for overseas capital. Some have focused on legislative and policy reform. For example, there is a suggestion that the scope of transactions that must be notified for review should be narrowed by raising review thresholds to the higher levels that currently apply to US investors under the Australia–US Free Trade Agreement (Kirchner 2008; Shearer and Thirlwell 2008; Novak 2008; ITS Global 2008, 3). This would not require the conclusion of further Free Trade Agreements. It could be accomplished unilaterally by amending the FATA and the Policy, or by developing a Most Favored Nation protocol for investment thresholds.

Another recommendation for legislative reform focusses on removing so-called 'prescribed sensitive sectors' from the FATA and its regulations (FATA s. 17H; *Foreign Acquisitions and Takeovers Regulations 1989* (Cth) r. 12), thereby encouraging investment in previously shielded industries (Novak 2008, 4). Kirchner (2008) has argued that the question of the national interest should be replaced by two narrower legislative tests of 'national security' and 'national economic welfare' (16–17). Consulting firm, ITS Global, has recommended that national security be the only guiding principle when assessing foreign investment proposals (2008, 3). ITS Global (2008) is of the view that the government cannot reliably predict potentially problematic aspects of an investment during the course of a pre-screening process, and should therefore not attempt to do so (3).

A further possibility would be to amend the FATA so that it includes a legislative presumption in favor of foreign investment, followed by a section setting out the rare instances in which the Treasurer may prevent an investment from proceeding. Others have made the argument that the Policy should be amended to remove any suggestion that foreign government investors will be treated differently (Novak 2008, 4).[29]

5.1.3. Calls to engage in bilateral and international negotiation

For some, the foreign investment review process should be bettered through ancillary bilateral and international negotiations. Larum and Qian (2012) emphasize that an improved investment relationship between Australia and China requires greater dialog and collaboration, including the rapid conclusion of a bilateral Free Trade Agreement (21).[30] Nicoll, Brennan, and Josifoski (2012) also favor a bilateral approach, suggesting that there should be an investment agreement with China that specifically addresses how investment by Chinese SOEs and SWFs is to be treated (110–111).

Golding (2010) favors a multilateral approach, and argues that the Australian government needs to reconsider how it handles foreign investment in line with best practice as set out by the International Monetary Fund and the OECD (236). There is certainly merit in the idea of a multilateral approach to foreign investment rather than bilateral arrangements, which can result in a confusing web of potentially contradictory and fragmented regulation.

5.1.4. China's role in reforming its investment relationship with Australia

There is also the view that China needs to do more to better its investment relations with Australia. A common argument is that the Chinese government should work to improve the corporate governance of SOEs, particularly through greater transparency and disclosure (Larum and Qian 2012, 20). Importantly, the very experience of investing in the Australian marketplace may have a transformative effect by exposing Chinese companies to improved corporate governance practices (Huang 2011).[31]

It has been suggested that the Australian government should invest in better understanding the precise nature of the relationship between SOEs and the Chinese government, and that it might consider entering into a multilateral agreement that aims to facilitate the improved corporate governance of these entities (Nicoll, Brennan, and Josifoski 2012, 112).

5.1.5. Calls for reforms to the FIRB

Then there are arguments for reform that focus on the FIRB's role in the review process. Larum and Qian (2012) foresee that changes to how the FIRB operates could improve communication between Australia and China, thereby facilitating a more productive investment relationship (18–19). In particular, they believe it would be desirable for the FIRB to have an expanded presence in China so that it can help explain Australian policy to local investors (Larum and Qian 2012, 18–19).

Kirchner (2008) is more interested in de-politicizing the review process by increasing the FIRB's independence from government (16–17). He wants the FIRB to have greater power than it presently possesses. On Kirchner's conception, the FIRB itself would be charged with making foreign investment decisions and the Treasurer could only overrule those decisions through an Act of Parliament (Kirchner 2008, 16–17). At the same time, Kirchner is also interested in minimizing the discretionary element of the FIRB's powers by requiring it to work closely with other government departments and by subjecting its decisions to administrative and judicial review (16–17). This approach is also favored by ITS Global (2008), which would like to see Parliamentary oversight and a broad right to judicial review of recommendations and decisions by the FIRB and the Treasurer (3).

The merits of each argument for reform require close examination, and a detailed analysis is beyond the scope of this short article. It is clear, however, that particular attention needs to be given to the potential impact of a reform on Australia's capacity to attract foreign investment.

5.1.6. Arguments for the status quo

Despite the importance of the trade and investment relationship with China to Australia's long-term economic welfare, the recent wave of foreign investment by Chinese companies (and especially those connected to the Chinese state) has been a vexed issue. Thus far, we

have done a number of things in this article. First, we have acknowledged Chinese perceptions of a politicized and discriminatory foreign investment review process. Secondly, we have highlighted shortcomings in the way that the FIRB operates, and observed that these may run contrary to Australia's overarching policy interests. Thirdly, we have suggested what greater fidelity by the FIRB to the principles of good governance might look like. And finally, we have made a possible case for changes to the way that Australia's foreign investment framework is communicated and administered.

But we have not yet discussed some of the sound reasons for the way that the FIRB currently operates and is structured. Financial and operational considerations presumably influence the FIRB's institutional structure. Through the FIRB's sharing of Treasury personnel, the government minimizes the budget that needs to be directly allocated to the FIRB. There are likely to be savings that arise from not having to duplicate staff. The sharing of staff probably also streamlines the daily management of the review process.

Domestic political and diplomatic or foreign policy considerations also help explain the current lack of transparency. This is particularly the case when an investor is affiliated with a foreign government – in this situation, some delicacy and opacity in the review process is arguably warranted. It has also been pointed out that the absence of transparency in the review process is partially attributable to the need to keep commercial information confidential (Shearer and Thirlwell 2008, 18). Perhaps the most important argument against greater FIRB independence is the idea that foreign investment often concerns important and strategic Australian assets, and that this is an area that is appropriately managed by the (representative) government of the day.

5.2. The pressing need to consider reform

This article has sought to illustrate how aspects of the FIRB's structure and processes run contrary to principles of good governance. It has also discussed how improved governance could help reduce perceptions that the foreign investment review process has been politicized. While there are defensible reasons for running the FIRB in the current manner, in our view the time has now come for the government to reassess whether the costs of doing so – including potentially adverse effects on Australia's broad policy interests and the possible alienation of Chinese investors – continue to be worth it.

We fall short of endorsing Kirchner's view that there should be a fortified Foreign Investment Review Board that is responsible for making foreign investment decisions. We are inclined to believe that the final decision on whether to block an investment should remain with the Australian peoples' elected representatives. But we do believe that it would be beneficial to find an acceptable way to endow the FIRB with greater independence from government and strengthen its commitment to transparency. Similarly, there may be benefits from introducing a measure of parliamentary oversight and administrative review. A re-evaluation of the FIRB should take place in the context of a broader assessment regarding the merits of the various arguments for reform outlined above. This is not an easy task, but it is a critical and inescapable one if Australia wishes to benefit from foreign investment in a changing global landscape.

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Notes

1. The new Coalition Government's commitment to the *Australia in the Asian Century White Paper* is in doubt. The document was removed from the Government's website in October 2013 (Nicholson 2013).
2. For example, the OECD's *FDI Regulatory Restrictiveness Index*. See OECD (2012a) for a sample year.
3. The OECD ranks Australia as the fifteenth most restrictive destination for foreign investment of 55 countries that it surveyed. It identifies Australia as more restrictive than 40 other countries including the United States, the United Kingdom, Germany, and Finland (OECD 2012a).
4. A notable exception is Peter Costello's 2001 rejection of Shell's plan to acquire a majority shareholding in Woodside Petroleum.
5. See, for example, the OECD's *FDI Regulatory Restrictiveness Index*.
6. This surge coincided with a shift in Chinese government priorities. Encouraging Chinese outward FDI (OFDI) became an official policy priority in 2000, when the Communist Party of China announced its 'Going Out' strategy (Chen 2012). Notwithstanding this official announcement, Chinese OFDI remained largely dormant until a huge spike in 2004 that coincided with the Chinese government's development of laws and policies aimed at facilitating OFDI (Rosen and Hanemann 2011, 17).
7. Prior to the election of the current Coalition government in Australia, the National Party (the junior party in the Coalition alliance) expressed concern over the proposed transaction. Australian Treasurer Joe Hockey subsequently announced an extended timeframe for considering, and making a final decision on, the transaction (Hockey 2013a). Then, on 29 November 2013, Treasurer Hockey announced his decision to prevent the transaction from proceeding on the basis that it was said to be contrary to the Australian national interest (Hockey 2013b).
8. Barnaby Joyce resigned from his Senate seat, and was subsequently elected to the Federal House of Representatives in the Australian election held on 7 September 2013.
9. In August 2012, the Coalition released a policy discussion paper entitled 'Foreign Investment in Australian Agricultural Land and Agribusiness': see http://shared.liberal.org.au/Share/Foreign_investment_discussion_paper.pdf. In the course of commenting on that paper, Mr Abbott said:

> I want to make it absolutely crystal clear that the Coalition unambiguously supports foreign investment in Australia. We need it, we want it. It is essential for our continued national prosperity. What's very important though is that the public have confidence that the foreign investment we need and want is in Australia's national interest and that's what this paper is about. (Lane 2012)

10. For example, at the National Party's Federal Council for 2013 in June, National Party leader Warren Truss delivered the keynote address in which he appeared to question whether foreign investment, particularly in Australian agriculture, is indeed in the national interest (Truss 2013).
11. The leader of the National Party, Warren Truss, has also been critical of foreign investment and is the new Minister for Infrastructure and Regional Development.
12. The *Foreign Acquisitions and Takeovers Regulations 1989* (Cth) and the *Foreign Acquisitions and Takeovers (Notices) Regulations 1975* (Cth).
13. Outright rejections of investment proposals are infrequent, and generally relate to real estate (as opposed to business) proposals. In 2011–2012, the FIRB rejected just 0.1% (approximately) of all proposals that it considered (or 13 proposals in total). All rejections were of proposals concerning the purchase of real estate (FIRB 2012a, 19). In 2010–2011, the FIRB rejected a slightly larger proportion of all proposals considered (but still less than 0.4% with

the rejection of 43 proposals). 42 of the rejected proposals related to real estate (FIRB 2012b, 19). The sole business proposal rejected in 2010–2011 was the proposed takeover of the Australian Stock Exchange by the Singapore Stock Exchange. This constitutes the first outright rejection of a business proposal since Peter Costello's decision in 2001 to prevent the takeover of Woodside Petroleum by Shell.

14. There have been calls for the thresholds for agricultural investment to be lowered, which would require the notification of a broader range of transactions for foreign investment review (Lloyd 2013).
15. The Policy defines 'foreign government investors' as including not only foreign governments, but also their affiliates. The precise definition can be found in the Policy (Australian Treasurer 2013, 15).
16. Available guidance is limited to this statement in the FIRB's Annual Report for 2011–2012:

> The Treasurer has provided an authorisation (effectively a delegation) to the Executive Member and other senior Division staff to make decisions on foreign investment proposals that are consistent with the Policy or do not involve issues of special sensitivity.… (FIRB 2012a, 6)

This implies that a minister will become involved in especially sensitive cases or those that appear to contravene the Policy. What is meant by cases of 'special sensitivity' is unclear.

17. The FIRB is unlikely to have been involved in considering the majority of the foreign investment applications for 2011–2012, which mostly involved the proposed acquisition of real estate. But the precise number of applications that the FIRB was involved in cannot be discerned from publicly available sources.
18. This silence was no doubt by design, so as to give the government of the day maximum flexibility in assessing foreign investment applications.
19. This matter is indeed dealt with by the FIRB's Annual Report for 2011–2012, which states that '[w]here major proposals are in the public domain, the Board may … receive submissions from third parties' (FIRB 2012a, 6). But the Annual Report provides no further guidance on this question: whether and how third party submissions are made seem to be discretionary matters for the FIRB to decide.
20. There is a much more limited capacity to seek judicial review in certain circumstances under the *Judiciary Act 1903* (Cth).
21. Political transparency refers to how open the government is about its underlying policy objectives in regulating a particular area. Policy transparency is concerned with how policy decisions by a regulator and its associated department are announced and explained. The antecedent notion of procedural transparency deals with how decisions are made and communicated to the subjects of regulation. The idea of operational transparency looks at how the regulator operates overall, including how it implements policies, processes, and decisions, and the expenses associated with regulation (State Services Authority 2009, 40).
22. See also OECD (2013, 7 [Functions 3]).
23. See also OECD (2013, 32 [89]).
24. The Senate inquiry convened on five separate occasions (Senate Economics References Committee 2009).
25. Australian members of Huawei's advisory board are distinguished former Rear Admiral in the Australian Navy, John Lord AM FAICD, former Federal MP Alexander Downer, and former Premier of Victoria John Brumby.
26. One of the main purported reasons for Treasurer Hockey's rejection of ADM's bid was its potentially adverse effect on: competition in the Australian agricultural sector; the ability of Australian farmers to access grain storage, logistics, and distribution networks (Hockey 2013b).
27. It has subsequently been amended, but the Policy still singles out foreign government investors for special discussion.
28. The OECD (2013) suggests that '[t]he opportunity for independent review of significant regulatory decisions should be available in the absence of strong public policy reasons to the contrary' (50, Review of Decisions [5]). Whether there are always strong public policy reasons to prevent the independent review of foreign investment decisions is debatable.

29. ITS Global is also extremely critical of the differential treatment of foreign government investors, arguing that the approach is delaying or deterring foreign investment and costing the Australian economy (ITS Global 2008, 2). The Policy has been amended since ITS Global articulated this position, but in substance foreign government investors are still treated differently to other investors under the Policy.
30. Prime Minister Tony Abbott has indicated that he wants to see a China-Australia Free Trade Agreement concluded within 12 months of October 2013.
31. An example of the way in which the corporate governance of Chinese firms might be improved is through participation in companies listed on the Australian Stock Exchange. ASX listed companies are required to operate relatively transparently, and this is ensured through mechanisms such as continuous disclosure requirements.

References

Armstrong, S. 2011. "Assessing the Scale and Potential of Chinese Investment Overseas: An Econometric Approach." *China & World Economy* 19 (4): 22–37.

Australia in the Asian Century Implementation Task Force. 2012. *Australia in the Asian Century White Paper*. Canberra: Australian Government, Department of the Prime Minister and Cabinet.

Australian Treasurer. 2013. *Australia's Foreign Investment Policy*. Canberra: Australian Government. http://www.firb.gov.au/content/_downloads/AFIP_2013.pdf

Blitz, J., and D. Thomas. 2013. "UK Security Committee 'Shocked' Over Huawei Contract with BT." *Financial Times*, June 6. www.ft.com/intl/cms/s/0/24bbea6e-ce87-11e2-ae25-00144feab7de.html

Bloomberg News. 2011. "Australia Blocked China Investment on Supply Concerns." *Sydney Morning Herald*, February 15. http://www.smh.com.au/business/world-business/australia-blocked-china-investment-on-supply-concerns-20110215-1au8x.html

Chen, J. 2012. "China's Outward Direct Investment in Context: From 'Open Door' to 'Going Out'." In *Law and Policy for China's Market Socialism*, edited by J. Garrick, 21–38. New York: Routledge.

Crowe, D. 2009. "Not Political Pressure, PM Reassures China." *Australian Financial Review* (Abstracts), June 6.

Dorling, P. 2011. "Laws Aimed to Limit Chinese Investment." *Sydney Morning Herald*, March 3. http://www.smh.com.au/business/laws-aimed-to-limit-chinese-investments-20110302-1bexm.html

Drysdale, P. 2011. "A New Look at Chinese FDI in Australia." *China & World Economy* 19 (4): 54–73.

Drysdale, P., and C. Findlay. 2009. "Chinese Foreign Direct Investment in the Australian Resources Sector." In *China's New Place in a World in Crisis: Economic, Geopolitical and Environmental Dimensions*, edited by R. Garnaut, L. Song, and W. Thye Woo, 349–388. Canberra: ANU E-Press.

Feiliena. 2009. "Commentary: Rio Tinto's Backdown Shows Short-Sightedness, Prejudice." *Xinhua News Agency*, June 10.

Foreign Acquisitions and Takeovers (Notices) Regulations 1975 (Cth).

Foreign Acquisitions and Takeovers Act 1975 (Cth).

Foreign Acquisitions and Takeovers Regulations 1989 (Cth).

FIRB (Foreign Investment Review Board). 2011. *Annual Report 2009–10*. Canberra: Foreign Investment Review Board. http://www.firb.gov.au/content/Publications/AnnualReports/2009-2010/_downloads/2009-10_FIRB_AR.pdf

FIRB (Foreign Investment Review Board). 2012a. *Annual Report 2011–12*. Canberra: Foreign Investment Review Board. http://www.firb.gov.au/content/Publications/AnnualReports/2011-2012/_downloads/FIRB-Annual-Report-2011-12_v4.pdf

FIRB (Foreign Investment Review Board). 2012b. *Annual Report 2010–11*. Canberra: Foreign Investment Review Board. http://www.firb.gov.au/content/Publications/AnnualReports/2010-2011/_downloads/2010-11_FIRB_AR.pdf

FIRB (Foreign Investment Review Board). 2013. "Foreign Investment Review Board Annual Report 2011–12." Foreign Investment Review Board. http://www.firb.gov.au/content/Publications/AnnualReports/2011-2012/04_Chapter_1.asp

Golding, G. 2010. "Australian Regulation of Foreign Direct Investment by Sovereign Wealth Funds and State-Owned Enterprises: Are Our Rules Right?" *Australian Business Law Review* 38 (4): 215–237.

Hewett, J. 2012. "Huawei: It's a Question of Trust." *Australian Financial Review*, March 26. http://www.afr.com/p/national/huawei_it_question_of_trust_rlkJsMUt8WSawogY68V0aJ

Hinton, T. 2009. "Session 3(b): Simplifying and Streamlining Investment Procedures and Regime." In *APEC Seminar for Sharing Experience on Improving Investment Policy*. Singapore, May 18.

Hockey, J. 2013a. *Foreign Investment Application: Archer Daniels Midland Company's Proposed Acquisition of Graincorp Limited*. October 4. Canberra: Australian Treasury. http://jbh.ministers.treasury.gov.au/media-release/005-2013/

Hockey, J. 2013b. *Foreign Investment Decision: Archer Daniels Midland Company's Proposed Acquisition of GrainCorp Limited*. November 29. Canberra: Australian Treasury. http://jbh.ministers.treasury.gov.au/media-release/026-2013/

Huang, X. 2011. "Corporate Governance and Chinese FDI in Australia." *East Asia Forum*. http://www.eastasiaforum.org/2011/06/05/corporate-governance-and-chinese-fdi-in-australia/

ITS Global. 2008. *Foreign Direct Investment in Australia – The Increasing Cost of Regulation*. ITS Global. http://www.itsglobal.net/sites/default/files/itsglobal/Research%20Report%20on%20Foreign%20Direct%20Investment%20and%20the%20Increasing%20Cost%20of%20Regulation%20in%20Australia%20%282008%29.pdf

Kenny, M. 2013. "GrainCorp Decision: Joe Hockey Caught Between National and Nationals' Interest." *Sydney Morning Herald*, November 29. http://www.smh.com.au/federal-politics/political-opinion/graincorp-decision-joe-hockey-caught-between-national-and-nationals-interest-20131129-2yfw2.html#ixzz2mV1Bmn9s

Kirchner, S. 2008. *Capital Xenophobia II: Foreign Direct Investment in Australia, Sovereign Wealth Funds, and the Rise of State Capitalism*. CIS Policy Monograph No. 88. St Leonards, NSW: The Centre for Independent Studies. http://cis.org.au/images/stories/policy-monographs/pm-88.pdf

Kirchner, S. 2010. "More Inscrutable than the Chinese." *The Australian*, February 19. http://www.theaustralian.com.au/opinion/more-inscrutable-than-the-chinese/story-e6frg6zo-1225831954203

Lane, S. August 3, 2012. "Foreign Ownership Rules are About Public Confidence: Abbott." *The World Today*. http://www.abc.net.au/worldtoday/content/2012/s3559878.htm

Larum, J. 2011. *Chinese Perspectives on Investing in Australia*. Sydney: Lowy Institute for International Policy. http://www.lowyinstitute.org/files/pubfiles/Larum%2C_Chinese_perspectives_web.pdf

Larum, J., and J. Qian. 2012. *A Long March: The Australia-China Investment Relationship*. Australia China Business Council. http://acbc.com.au/deploycontrol/files/upload/news_nat_fdi_report_oct.pdf

Lloyd, H. 2013. "Review of Foreign Investment in Australian Agricultural Assets." Sparke Helmore Lawyers. http://www.sparke.com.au/sparke/news/publications/review_of_foreign_investment_in_australian_agricultural_assets.jsp

Mahoney, P. 2013. Calculations in email to Allan Fels, based on data from the Australian Bureau of Statistics.

McDuling, J. 2013. "Huawei Pulls Plug on NBN Project Teams." *Australian Financial Review*, April 23. http://www.afr.com/p/technology/huawei_pulls_plug_on_nbn_project_hk36T3cyG5A2coaoyvTcgJ

"NBN Ban on Huawei to Stay: George Brandis." 2013. *Sydney Morning Herald*, October 29. http://www.smh.com.au/it-pro/government-it/nbn-ban-on-huawei-to-stay-george-brandis-20131028-hv29r.html

Nicholson, B. 2013. "Asian Century Plans Consigned to History." *The Australian*, October 28. http://www.theaustralian.com.au/national-affairs/policy/asian-century-plans-consigned-to-history/story-e6frg8yo-1226747866681#

Nicoll, G., G. Brennan, and K. Josifoski. 2012. "The New Mercantilism? Direct Investment by State-Owned Enterprises in Australian Public Companies." *Australian Business Law Review* 40 (2): 105–125.

Novak, J. 2008. *Australia as a Destination for Foreign Capital*. Australia's Open Investment Future Paper No. 1. Melbourne, VIC: Institute of Public Affairs. http://www.ipa.org.au/library/publication/1226637929_document_novak_destination_for_foreign_capital.pdf

OECD. 2012a. *FDI Regulatory Restrictiveness Index*. OECD. http://www.oecd.org/industry/internationalinvestment/investmentpolicy/fdiregulatoryrestrictivenessindex.htm
OECD. 2012b. *Recommendation of the Council on Regulatory Policy and Governance*. OECD. http://www.oecd.org/gov/regulatory-policy/49990817.pdf
OECD. 2013. *Principles for the Governance of Regulators: Public Consultation Draft*. OECD. http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CDIQFjAB&url=http%3A%2F%2Fwww.oecd.org%2Fgov%2Fregulatory-policy%2FGovernance%2520of%2520Regulators%2520FN%25202.docx&ei=iYZ0Up24JMK_lQWKkYDADw&usg=AFQjCNE3qa3AiTgqz74P9EmOSFQOvvattw&bvm=bv.55819444,d.dGI
OZ Minerals. 16 February 2009. *Recommended 82.5 Cents Per Share All-Cash Offer for OZ Minerals by Minmetals*. OZ Minerals. http://www.ozminerals.com/Media/docs/ASX_ShareAllCashOffer_160209-8a735283-5e8d-4b71-b5e9-d592db6da72d-0.pdf
"OZ Minerals Bid from China Minmetals Blocked." 2009. *Crikey*, March 30. http://www.crikey.com.au/ 2009/03/30/oz-minerals-bid-from-china-minmetals-blocked/
Rae, W., and D. Jacobs. 2006. "Focus: Mergers & Acquisitions – December 2006: Smoothing the Takeover Path." Allens Arthur Robinson. http://www.aar.com.au/pubs/ma/fomadec06.htm
Rosen, D., and T. H. Hanemann. 2011. *An American Open Door? Maximizing the Benefits of Chinese Foreign Direct Investment*. Asia Society. http://asiasociety.org/policy/center-us-china-relations/american-open-door
Sandle, P., and B. Goh. 2013. "Parliamentarians Say Huawei-BT Deal Exposes Flawed Security Controls." *Reuters*, June 6. http://uk.reuters.com/article/2013/06/06/uk-britain-telecoms-huawei-idUKBRE9550RP20130606
Senate Economics References Committee. 2009. Canberra: 22 June, 23 June, 10 August; Brisbane: 1 July; Perth: 2 July. *Reference: Foreign Investment by State Owned Entities*. Perth: Parliament of Australia.
Shearer, A., and M. Thirlwell. 2008. *Is the Foreign Investment Review Board Acting Fairly?* Australia's Open Investment Future Paper No. 4. Melbourne, VIC: Institute of Public Affairs. http://www.ipa.org.au/library/publication/1229471411_document_thirwell_updated.pdf
State Services Authority. 2009. *Review of the Rationalisation and Governance of Regulators: Final Report*. Melbourne: State Government of Victoria. http://www.ssa.vic.gov.au/images/stories/product_files/933_Review_Regulators_Governance.pdf
Swan, W. 2009a. "Interview with Paul Bongiorno, Meet the Press, Channel Ten, 22 February 2009." Treasury Portfolio Ministers Portal, Australian Government, Treasury. http://www.treasurer.gov.au/DisplayDocs.aspx?doc=transcripts/2009/029.htm&pageID=004&min=wms&Year=2009&DocType=2
Swan, W. 2009b. "Doorstop Interview, Sydney, 2 March 2009." Treasury Portfolio Ministers Portal, Australian Government, Treasury. http://www.treasurer.gov.au/DisplayDocs.aspx?doc=transcripts/2009/033.htm&pageID=004&min=wms&Year=2009&DocType=2
Swan, W. 2009c. "Doorstop Interview, Exodus Foundation, Sydney, 5 June 2009." Treasury Portfolio Ministers Portal, Australian Government, Treasury. http://www.treasurer.gov.au/DisplayDocs.aspx?doc=transcripts/2009/091.htm&pageID=004&min=wms&Year=2009&DocType=2
Swan, W. 2009d. "Foreign Investment, Press Release 029/2009, 27 March." Treasury Portfolio Ministers Portal, Australian Government, Treasury. http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/029.htm&pageID=003&min=wms&Year=2009&DocType=0
Swan, W. 2009e. "Foreign Investment Decision: Press Release 043/2009, 23 April." Treasury Portfolio Ministers Portal, Australian Government, Treasury. http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/043.htm&pageID=003&min=wms&Year=2009&DocType=0
Swan, W. 2012. *Foreign Investment Decision: Shandong RuYi Scientific & Technological Group Co. Ltd and Lempriere Pty Ltd Acquisition of the Assets of Cubbie Group Limited*. Canberra: Australian Treasury. http://www.treasurer.gov.au/wmsDisplayDocs.aspx?doc=pressreleases/2012/079.htm&PageID=003&min=wms&Year=&DocType=0
Tasker, S.-J. 2009. "BHP Lobbies Hard Against Chinalco Upping Rio Stake." *The Australian*, February 13. http://www.theaustralian.com.au/business/breaking-news/bhp-lobbies-to-block-chinalco/story-e6frg90f-1111118836667
Truss, W. 2013. "Keynote Address – Federal Council 2013." In *2013 Federal Council of the National Party*. Canberra, June 1. http://www.nationals.org.au/News/Speeches/tabid/96/articleType/ArticleView/articleId/8369/Keynote-Address–2013-Federal-Council.aspx