CELIS Country Report

on

Australia, 2023

by

Tania Voon, University of Melbourne

20 December 2023

Abstract

Australia was one of the first countries to introduce a mechanism for the 'screening' or approval of inward foreign investment, in the 1970s. The mechanism has evolved over time, most recently since the COVID-19 pandemic began in 2020. It purports to reflect Australia's welcoming of inward foreign investment — consistent with a longstanding commitment to an open economy — while retaining controls to restrict investment. Australia has in recent years expanded foreign investment screening to encompass a broader range of security-related matters as well as the potential for 'retrospective' review of existing investments on national security grounds. These security-specific developments build on the general 'national interest' test that continues to apply in most cases, which incorporates national security as only one of a range of factors considered. Although Australia's regime is elaborated in detail in legislation and regulations, some important aspects, including the meaning of national security and the national interest, are explained only in policy documents rather than in law. This aspect of the Australian system increases the discretion of the Treasurer in making relevant decisions, as does the limited transparency of decision-making, regarding not only public notices but also non-disclosure of certain information to the investor applicant.

Author

Tania is Professor and former Associate Dean (Research) at Melbourne Law School, The University of Melbourne. She was previously a Legal Officer in the WTO Appellate Body Secretariat. She has practised law with King & Wood Mallesons and the Australian Government Solicitor and taught law at the National University of Singapore, Chinese University of Hong Kong, Georgetown University, the University of Western Ontario, the University of British Columbia, and several Australian universities. She currently teaches students in the fields of international economic law, legal method and reasoning, and torts.

Contact the author: tania.voon@unimelb.edu.au

To cite this report: Tania Voon, CELIS Country Report on Australia, 2023, 20 December 2023.

Table of Contents

CELIS Country Report on Australia, 2023

Tania Voon

1. Introduction

Australia's screening of inward foreign investment began in the 1970s with the introduction of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (FATA), which entered into force on 1 January 1976. FATA continues as the primary legislation governing foreign investment screening in Australia today, following many amendments. Although both of Australia's main political parties, and the Australian government, have ostensibly welcomed foreign investment for decades, in comparison to other OECD countries the country's restrictions on foreign investment, including through screening, are high.[1]

This report begins by setting out the economic and political background of Australia's screening regime in section 2 and then explains in section 3 the international framework in which the regime is situated, including trade and investment obligations and Australian critiques of international investment agreements. Section 4 outlines Australia's domestic framework for inward foreign investment screening, including Australian critiques of the screening process.

Originally, Australia's screening of inward foreign investment focused on a broad test of "national interest", which included national security considerations. National security has become increasingly emphasised, today providing the basis for separate reviews in some circumstances, as explained in section 4.1. The absence of legislated definitions of the concepts of national interest and national security (with legislation and regulations instead supplemented by policy statements and other informal guidance, as explained in section 4.1.4.) aggravates the low levels of transparency and high levels of discretion in Australia's screening process.[2] The limited availability of judicial review (section 4.5.1) and merits-based

[1] Hundt D (2020) The Changing Role of the FIRB and the Politics of Foreign Investment in Australia. Australian Journal of Political Science 55(3): 328–343, p. 329; McCalman P, Puzzello L, Voon T, Walter A (2023) Inward Foreign Investment Screening in Australia: Development and Implications. In: Pohl JH, Papadopoulos T, Wiesenthal J (eds) Nationalised Security Review of Investments: Trends in the Law and Policy of Investment Screening. Springer Studies in Law & Geoeconomics, Vol 1. Springer, 2023.

[2] Hundt D (2020) The Changing Role of the FIRB and the Politics of Foreign Investment in Australia. Australian Journal of Political Science 55(3): 328–343, pp. 331–332; McCalman P, Puzzello L, Voon T,

review (section 4.5.2) further diminishes transparency and enhances discretion. These are areas for improvement, as identified in section 5.

2. Economic and Political Background

2.1. Australian Government Approach and Statistics

Australia's Commonwealth Department of Foreign Affairs and Trade (DFAT) proclaims on its website:

> Australia welcomes foreign investment. It has helped build Australia's economy and will continue to enhance the wellbeing of Australians by supporting economic growth and innovation into the future. Foreign investment supplements domestic savings; without foreign investment, production, employment and income would all be lower.[3]

In mid-2023, the website for the Foreign Investment Review Board (FIRB) was removed and replaced with a more general website, within the Treasury portfolio, on foreign investment in Australia. Like the DFAT statements, the new foreign investment home page states prominently:

> Australia welcomes foreign investment
>
> Foreign investment benefits Australia and Australians.
>
> Australia's foreign investment laws ensure that foreign investments are in our national interest.[4]

A separate page elaborates on these statements and states that "Australia is attractive to investors" because it offers:

- consistent economic growth
- A highly skilled workforce
- proximity to dynamic and fast-growing markets
- strong governance and legal system

Walter A (2023) Inward Foreign Investment Screening in Australia: Development and Implications. In: Pohl JH, Papadopoulos T, Wiesenthal J (eds) Nationalised Security Review of Investments: Trends in the Law and Policy of Investment Screening. Springer Studies in Law & Geoeconomics, Vol 1. Springer, 2023.

[3] See Australian Government, DFAT https://www.dfat.gov.au/trade/investment/about-foreign-investment (accessed 2 October 2023)

[4] See Australian Government, The Treasury, Foreign Investment in Australia https://foreigninvestment.gov.au (accessed 2 October 2023).

- good infrastructure and resources[5]

The new website makes clearer that FIRB forms just one component of Australia's foreign investment framework, which is administered by the Treasurer with support from FIRB as well as Treasury and the Australian Taxation Office. At the same time, DFAT "leads whole-of-government efforts in international trade and investment negotiations' and Austrade 'promotes Australian trade, investment, tourism, and education to the world".[6]

According to DFAT, based on data from the Australian Bureau of Statistics (ABS), the top 10-ranked economies investing in Australia in 2022 were as follows:[7]

1. United States
2. United Kingdom
3. Belgium
4. Japan
5. Singapore
6. Hong Kong (SAR of China)
7. Canada
8. Luxembourg
9. Netherlands
10. China

The top 10-ranked economies in which Australia invests are, according to ABS data for 2022 as reported by DFAT:[8]

1. United States
2. United Kingdom
3. New Zealand
4. Japan
5. Cayman Islands
6. Canada
7. France
8. Hong Kong (SAR of China)
9. Singapore

---

[5] See Australian Government, The Treasury, Foreign Investment in Australia, Australia welcomes foreign investment https://foreigninvestment.gov.au/investing-in-australia/australia-welcomes-foreign-investment (accessed 31 August 2023).

[6] See Australian Government, The Treasury, Foreign Investment in Australia, About Us https://foreigninvestment.gov.au/investing-in-australia/about-us (accessed 31 August 2023).

[7] See Australian Government, DFAT https://www.dfat.gov.au/trade/trade-and-investment-data-information-and-publications/foreign-investment-statistics/statistics-on-who-invests-in-australia (accessed 31 August 2023).

[8] See Australian Government, DFAT https://www.dfat.gov.au/trade/trade-and-investment-data-information-and-publications/foreign-investment-statistics/statistics-on-where-australia-invests (accessed 31 August 2023).

10. Germany

DFAT also reports, again based on ABS data, the top 10-ranked industries attracting foreign direct investment (FDI) in Australia in 2022 as follows:[9]

1. Mining and quarrying
2. Real estate activities
3. Financial and insurance activities
4. Manufacturing
5. Wholesale and retail trade
6. Information and communication
7. Transport and storage
8. Electricity, gas and water
9. Construction
10. Professional, scientific and technical activities

2.2. Further International Statistics, Rankings and Restrictiveness Index

The Organisation for Economic Co-Operation and Development (OECD) reports the services sector as the largest component of outward Australian FDI flows in 2021 (especially financial and insurance activities, followed by professional, scientific and technical activities, and transportation and storage).[10]

According to the United Nations Conference on Trade and Development (UNCTAD), Australia ranked sixth in 2022 as a host economy for FDI inflows (FDI) ("flows tripled to $62 billion as M&A sales almost tripled").[11] In the same year, Australia ranked sixth for FDI outflows ("Outflows from Australia rose from $3.4 billion to $117 billion, mainly due to the acquisition of BHP (United Kingdom) from BHP (Australia)").[12] Focusing on sustainable development, UNCTAD identified Australia as a top destination in the areas of battery storage projects, "almost all critical minerals", and "oil and gas extraction and refining activities".[13]

---

[9] See Australian Government, DFAT https://www.dfat.gov.au/trade/trade-and-investment-data-information-and-publications/foreign-investment-statistics/australian-industries-and-foreign-investment (accessed 31 August 2023).

[10] OECD (2023) *OECD international Direct Investment Statistics 2022* https://read.oecd-ilibrary.org/finance-and-investment/oecd-international-direct-investment-statistics-2022_8d856f89-en#page7 (accessed 31 August 2023); see also https://doi.org/10.1787/8d856f89-en (accessed 31 August 2023).

[11] UNCTAD (2023) *UNCTAD World Investment Report 2023: Investing in Sustainable Energy for All*, 8-9.

[12] UNCTAD (2023) *UNCTAD World Investment Report 2023: Investing in Sustainable Energy for All*, 16-17.

[13] UNCTAD (2023) *UNCTAD World Investment Report 2023: Investing in Sustainable Energy for All*, 40, 42, 47.

According to the OECD's 2020 FDI Regulatory Restrictiveness Index, Australia's overall level of FDI restriction is 0.149 (with zero being open and 1 being closed). Of the 38 OECD Member Countries, only four have a higher index than Australia, namely Canada, Iceland, Mexico, and New Zealand. The OECD average is 0.063.[14]

3. International Framework

3.1. World Trade Organization

Australia is a founding Member of the World Trade Organization (WTO). As such, it has international obligations with respect to national treatment and quantitative restrictions under Article 2 of the *Agreement on Trade-Related Investment Measures* (TRIMS). These obligations might be relevant to trade-related performance requirements imposed as a condition of approval following screening of foreign investment transactions, for example if they require exportation of products, require the use of domestic products, or restrict importation of products. Article 3 provides for exceptions under the *General Agreement on Tariffs and Trade 1994* (GATT) to apply, which would include exceptions for customs unions and free-trade areas (Article XXIV), security exceptions under GATT Article XXI, and general exceptions under GATT Article XX. The latter category includes exceptions for: measures necessary to protect human, animal or plant life or health under Article XX(b); measures necessary to secure compliance with other WTO-consistent laws or regulations under Article XX(d); and measures relating to the conservation of exhaustible natural resources under Article XX(g)).

Australia's obligations under the *General Agreement on Trade in Services* (GATS) may also be relevant to foreign investment screening, particularly with respect to the supply of services via mode 3: "by a service supplier of one Member, through commercial presence in the territory of any other Member" (GATS Article I:2(c)). Potentially relevant GATS obligations include most-favoured-nation (MFN) treatment (Article II), national treatment (Article XVII), market access (Article XVI), and domestic regulation (Article VI). Potentially relevant exceptions include exceptions for economic integration (Article V), security exceptions (Article XIV*bis*), general exceptions (Article XIV), and denial of benefits (Article XXVII).

[14] See OECD (2020) https://stats.oecd.org/Index.aspx?datasetcode=FDIINDEX (accessed 31 August 2023).

Australia has limited MFN exemptions, only with respect to audiovisual services.[15] Australia has made extensive GATS commitments with respect to national treatment and market access, including in the sectors of: telecommunications services (including the Reference Paper);[16] financial services;[17] professional services such as legal services and accounting; computer and related services; advertising services; construction; distribution; education; health services; transport; and tourism.[18] However, Australia imposes horizontal limitations on national treatment and market access regarding its foreign investment policy with respect to supply of services under mode 3 in all sectors in its GATS schedule. The relevant horizontal limitations state:

Limitations on market access	Limitations on national treatment
3) Notification and examination under Australia's foreign investment policy guidelines and the Foreign Acquisitions and Takeovers Act 1975. … [P]roposals for foreign interests to invest in the services identified in the Schedule are examined under the Government's policy guidelines without the need to demonstrate economic benefits or to provide for Australian equity participation and are approved unless national interest considerations arise.	3) Australia's foreign investment policy guidelines apply to foreign-owned or controlled enterprises after establishment in Australia

[15] WTO, *Australia – Final List of Article II (MFN) Exemptions*, WTO Doc GATS/EL/6 (15 April 1994); WTO, *Australia – Final List of Article II (MFN) Exemptions (Supplement 1)*, WTO Doc GATS/EL/6/Suppl.1 (26 February 1998).
[16] WTO, *Australia – Schedule of Specific Commitments (Supplement 3)*, WTO Doc GATS/SC/6/Suppl.3 (11 April 1997).
[17] WTO, *Australia – Schedule of Specific Commitments (Supplement 4)*, WTO Doc GATS/SC/6/Suppl.4 (26 February 1998).
[18] WTO, *Australia – Schedule of Specific Commitments*, WTO Doc GATS/SC/6 (15 April 1994).

3.2. Bilateral Investment Treaties and Preferential Trade Agreements

Australia has in force 15 bilateral investment treaties (BITs) (signed between 1988 and 2019) and 18 preferential trade agreements (PTAs) (signed between 1982 and 2022). Most of the PTAs have an investment chapter, while some have an associated investment agreement.

Australia signed the *Energy Charter Treaty* in 1994 but never ratified it and did not accept to apply it provisionally.[19] On 28 September 2021, Australia gave notice of its withdrawal from the treaty,[20] noting in its explanatory statement the financial costs of participation including through annual contributions, as well as the frequent use of ISDS in this treaty and the ongoing challenges with its reform.[21]

Australia's BITs and PTAs contain various obligations that may affect its foreign investment screening. Most obviously these are investment obligations such as MFN treatment, national treatment, expropriation, and fair and equitable treatment. As I have investigated with a co-author elsewhere, these obligations and qualifications and exceptions to them vary between the agreements. Typically, Australia's BITs do not extend to the pre-establishment phase of an investment but may still apply to the post-establishment phase, particularly in relation to existing investors wishing to make a new investment transaction, or retrospective screening such as in the case of changes in market circumstances or failure to disclose information. In contrast, Australia's PTAs typically do extend to both pre- and post-establishment but often contain specific exemptions with respect to foreign investment policy.[22] The potential for breach of an investment obligation must therefore be determined on a case-by-case basis according to the relevant treaty terms.

Australia's PTAs may also affect foreign investment screening with respect to services-related obligations concerning commercial presence of service suppliers, mirroring or building on Australia's GATS obligations as discussed above.

---

[19] Declaration by Gareth Evans, Minister for Foreign Affairs of Australia (6 December 1994) https://www.energychartertreaty.org/treaty/contracting-parties-and-signatories/australia/ (accessed 31 August 2023).

[20] See Australian Government, Department of Foreign Affairs and Trade https://www.info.dfat.gov.au/Info/Treaties/treaties.nsf/AllDocIDs/B5C43BB22EE8D60ACA256C8B0010A881#:~:text=Australia%20deposited%20its%20declaration%20not,45(3)(a) (accessed 31 August 2023).

[21] See Parliament of Australia, Joint Standing Committee on Treaties, *Report 198: European Union Tariff-Rate Quotas Following Withdrawal of the United Kingdom* (November 2021) [3.5] - [3.16].

[22] See generally Voon T, Merriman D (2022) Is Australia's Foreign Investment Screening Policy Consistent with International Investment Law? Melbourne Journal of International Law 23(1): 62–113.

3.3. Australian Critiques of International Investment Agreements

3.3.1. Political Challenges to Investor-State Dispute Settlement

Many of the concerns expressed in Australia about inward foreign investment take the form of objections to investor-state dispute settlement (ISDS) in international investment agreements, a mechanism allowing foreign investors to bring claims against the Australian government before international tribunals. These concerns became heightened after Australia faced its first ISDS claim in July 2011 (against its standardised tobacco packaging laws), which it won on jurisdictional grounds in 2015.[23]

Traditionally, Australia agreed to ISDS in its international investment agreements (taking the form of BITs and PTAs, as discussed above) on an ad hoc basis, depending on the relevant circumstances and negotiating partner. All of Australia's BITs have included some form of ISDS, as have most of Australia's PTAs. The exceptions, which lack ISDS, are Australia's PTAs with (chronologically by date of signature) New Zealand, the United States, Malaysia, Japan, the United Kingdom, and India, as well as the *Regional Comprehensive Economic Partnership* (RCEP) and the *Pacific Agreement on Closer Economic Relations Plus* (PACER Plus). Side letters exclude ISDS as between Australia and New Zealand under the *Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area* (AANZFTA) and between Australia and New Zealand and Australia and the United Kingdom under the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (CPTPP). However, Australia does now have ISDS mechanisms with Malaysia and Japan under the CPTPP, despite the exclusion of ISDS from Australia's PTAs with those countries.

To some extent these ISDS patterns can be traced to the parties in government at the time of concluding these agreements.[24] In April 2011, during the Prime Ministership of Julia Gillard of the Australian Labor Party (ALP) (2010–2013), the Gillard Government released a "Trade Policy Statement" including the following statements with respect to ISDS:

> [T]he Government does not support provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses. Nor will the Government support provisions that would constrain the ability of Australian governments to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign

[23] *Philip Morris Asia Limited v Australia*, PCA Case No 2012-12, *Award on Jurisdiction and Admissibility* (17 December 2015).
[24] See further Mitchell D, Sheargold E and Voon T (2017) Regulatory Autonomy in International Economic Law: The Evolution of Australian Policy on Trade and Investment. Edward Elgar, Cheltenham, pp 13–39.

businesses. The Government has not and will not accept provisions that limit its capacity to put health warnings or plain packaging requirements on tobacco products or its ability to continue the Pharmaceutical Benefits Scheme.

In the past, Australian Governments have sought the inclusion of investor-state dispute resolution procedures in trade agreements with developing countries at the behest of Australian businesses. The Gillard Government will discontinue this practice.[25]

This change in approach was consistent with a 2010 recommendation by the Productivity Commission ("the Australian Government's independent research and advisory body")[26] that the government "seek to avoid the inclusion of investor-state dispute settlement provisions in [bilateral and regional trade agreements] that grant foreign investors in Australia substantive or procedural rights greater than those enjoyed by Australian investors".[27]

With the election of a new government led by the Coalition of the Liberal Party and the National Party (LNP) in September 2013, Australia reverted to its previous ad hoc approach to ISDS.[28] Nevertheless, in a July 2014 speech, Chief Justice Robert French of the High Court of Australia (Australia's highest court) expressed concerns about ISDS.[29]

It was not until May 2022 when the current Prime Minister Anthony Albanese was elected that the ALP returned to power. Consistently with the ALP's election platform, in November 2022 the Australian Minister for Trade and Tourism announced in a speech the Albanese Government Trade and Investment Agenda, including the following statements with respect to foreign investment and ISDS:

Foreign investment will … play a crucial role in lifting us up, bringing in new capital, capability and resources. …

Ensuring the benefits of trade flow to the Australian community … means we maintain Australia's right to regulate key social policy areas like health, the environment and issues affecting First Nations Australians in all our trade agreements. …

And it means preserving the Government's ability to govern in the national interest.

To that end, we will not include investor-state dispute settlement in any new trade agreements.

---

[25] Australian Government, DFAT, *Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity* (April 2011).
[26] Australian Government, Productivity Commission, about https://www.pc.gov.au/about (accessed 31 August 2023).
[27] Australian Government, Productivity Commission Research Report, *Bilateral and Regional Trade Agreements* (November 2010) Recommendation 4.
[28] Parliament of Australia, Senate Foreign Affairs, Defence and Trade Legislation Committee, *Trade and Foreign Investment (Protecting the Public Interest) Bill 2014* (August 2014) [2.7].
[29] Chief Justice RS French AC, Supreme and Federal Courts Judges' Conference, 'Investor-State Dispute Settlement — A Cut Above the Courts?' https://www.hcourt.gov.au/publications/speeches/current/speeches-by-chief-justice-french-ac (9 July 2014, accessed 31 August 2023).

And when opportunities arise, we will actively engage in processes to reform existing ISDS mechanisms to enhance transparency, consistency and ensure adequate scope to allow the Government to regulate in the public interest.[30]

The Australian Greens also oppose ISDS.[31]

3.3.2. Review of Australia's Bilateral Investment Treaties (2020 -)

In July 2020, DFAT commenced a four-year Australian government review of Australia's BITs,[32] noting that:

> [T]hese Australian BITs contain relatively broadly drafted provisions and do not contain the explicit safeguards generally included in more modern treaties, such as Australia's modern Free Trade Agreements (FTA) investment chapters. More broadly drafted provisions in BITs have been seen to be open to an inconsistent and overly broad range of interpretation by tribunals. … Review and reform of Australia's BITs can aim to influence the interpretation of key obligations and introduce modern safeguards.[33]

DFAT noted that Australia had terminated its BIT with Uruguay (which entered into force in 2002) and replaced it with a more modern treaty (which was signed in 2019 and entered into force in 2022).[34] DFAT also noted that Australia had "in recent years" (2018-2020) terminated BITs with Mexico, Viet Nam, Hong Kong, Peru, and Indonesia and "replaced them with modern investment chapters in FTAs".[35]

India unilaterally terminated its BIT with Australia on 23 March 2017, and although Australia has since entered a PTA with India, most of the investment aspects are still being negotiated

---

[30] Minister for Trade and Tourism, Senator the Hon Don Farrell, *Trading our way to greater prosperity and security* https://www.trademinister.gov.au/minister/don-farrell/speech/trading-our-way-greater-prosperity-and-security (14 November 2022, accessed 31 August 2023).

[31] See, eg, Trade and Foreign Investment (Protecting the Public Interest) Bill 2014 (Cth); Explanatory Memorandum Trade and Foreign Investment (Protecting the Public Interest) Bill 2014 (Cth).

[32] Australian Government, DFAT, Australia's bilateral investment treaties https://www.dfat.gov.au/trade/investment/australias-bilateral-investment-treaties (accessed 31 August 2023).

[33] Australian Government, DFAT, *Review of Australia's Bilateral Investment Treaties* (August 2020) https://www.dfat.gov.au/trade-and-investment/discussion-paper-review-australias-bilateral-investment-treaties (accessed 31 August 2023).

[34] For discussion, see Parliament of Australia, Joint Standing Committee on Treaties, *Report 188: Investments Uruguay, ISDS UN Convention and Convention SKAO* (December 2019).

[35] Australian Government, DFAT, *Review of Australia's Bilateral Investment Treaties* https://www.dfat.gov.au/trade-and-investment/discussion-paper-review-australias-bilateral-investment-treaties (August 2020, accessed 31 August 2023).

at the time of writing.[36] ISDS claims may still be brought under the terminated BIT for an additional 15 years, with respect to investments made before termination.[37]

Specified policy options to achieve reform in other treaties include:

- full negotiation of a BIT;
- amendment of a BIT;
- negotiation and adoption of a Joint Interpretative Note;
- adoption of a Unilateral Interpretive Note;
- termination of a BIT;
- continuation of a BIT;
- replacement of a BIT with an FTA chapter that may or may not include ISDS.[38]

These various reform options could affect the international framework in which Australia's foreign investment screening mechanism operates, as discussed further below. Submissions were initially requested by 30 September 2020, and several appear on the DFAT website. DFAT states that it "continues to welcome submissions on the review".[39]

3.3.3. Australia's Negotiation of Trade and Investment Agreements (2023-)

On 10 August 2023, the Parliament of Australia issued a media release advising that the Joint Standing Committee on Trade and Investment Growth had launched an inquiry into Australia's negotiation of trade and investment agreements.[40] The terms of reference of the inquiry are to:

> inquire into and report on the approach adopted by the Australian government when negotiating trade and investment agreements with trading partners, including: …

---

[36] *Australia–India Economic Cooperation and Trade Agreement*, signed 2 April 2022, [2022] ATNIF 6 (entered into force 29 December 2022).
[37] *Agreement between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments*, signed 26 February 1999, 2116 UNTS 145 (entered into force 4 May 2000, terminated 23 March 2017) art 17(3).
[38] Australian Government, DFAT, *Review of Australia's Bilateral Investment Treaties* https://www.dfat.gov.au/trade-and-investment/discussion-paper-review-australias-bilateral-investment-treaties (August 2020, accessed 31 August 2023).
[39] Australian Government, DFAT, Australia's bilateral investment treaties https://www.dfat.gov.au/trade/investment/australias-bilateral-investment-treaties (accessed 31 August 2023).
[40] See Parliament of Australia, Media Releases, Trade and Investment Growth Committee to inquire into Australia's Approach to trade negotiations https://www.aph.gov.au/About_Parliament/House_of_Representatives/About_the_House_News/Media_Releases/Trade_and_Investment_Growth_Committee_to_inquire_into_trade_negotiations (10 August 2023, accessed 31 August 2023).

(c) The consultation process undertaken with interested parties, including representatives of industry and workers throughout the process;

(d) The steps taken to ensure transparency and parliamentary oversight;

(e) How the economic, social and environmental impacts of an agreement are considered and acted upon;

(f) The steps taken to ensure agreements protect and advance Australia's national interests, including the ability to regulate in the public interest; …

(i) How the Australian approach compares with other, similar countries; and

(j) How the process could be appropriately legislated to enshrine this approach in law.[41]

This inquiry may have an impact on negotiation of Australia's future treaties as well as its existing treaties, for example in relation to their amendment, replacement, or termination. Accordingly, it may affect the way in which and extent to which Australia's international obligations constrain its foreign investment screening mechanism, as discussed in the next section.

This inquiry raises issues previously discussed by parliamentary committees in 2015[42] and 2021.[43] The LNP government in 2016 responded to the first of these reports by essentially rejecting all of the recommendations, which were designed to increase transparency, predictability, and impartiality in treaty negotiations, for example by giving greater access to draft treaty texts, preparing a model trade agreement, and providing for an independent cost-benefit analysis of proposed treaties before negotiation commences.[44] The LNP government in 2022 responded to the second report by noting two recommendations designed to enhance transparency and independence and accepting the following three recommendations (the first one being accepted "in principle"):

Recommendation 1: To improve transparency and ensure the public is aware of proposed changes, the Committee recommends that the documents relating to minor treaty actions be uploaded to the Joint Standing Committee on Treaties website and so be publicly available.

---

[41] See Parliament of Australia, Joint Standing Committee on Trade and Investment Growth, The Australian Government's approach to negotiating trade and investment agreements https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Joint_Standing_Committee_on_Trade_and_Investment_Growth/Approachtotrade (accessed 31 August 2023).

[42] The Senate, Foreign Affairs, Defence and Trade References Committee, *Blind agreement: reforming Australia's treaty-making process* (June 2015).

[43] Parliament of Australia, Joint Standing Committee on Treaties, *Report 193: Strengthening the Trade Agreement and Treaty-Making Process in Australia* (August 2021).

[44] Australian Government response to the Senate Foreign Affairs, Defence and Trade References Committee Report https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process/Additional_Documents?docType=Government%20Response (2 February 2016, accessed 31 August 2023).

Recommendation 2: The Committee recommends that the Government publish negotiation aims and objectives for all future trade treaty negotiations.

Recommendation 3: The Committee recommends that the Government brief the Joint Standing Committee on Treaties biannually on the status of upcoming and current free trade agreement negotiations, potentially as part of the same briefing to the Trade Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade.[45]

Although much of the discussion may be similar to these two previous reports in the present inquiry, the outcomes and government response may be different while the ALP government remains in power.

4. Domestic Framework

4.1. National interest reviews since 1976; national security reviews since 2021

The Australian screening legislation (FATA) was introduced in the 1970s, around the same time as the corresponding legislative frameworks in Canada and the United States.[46] This legislation has grown in complexity and is today supported by a range of other legislation and regulations, including the *Foreign Acquisitions and Takeovers Regulation 2015* (Cth).

4.1.1. National interest reviews and national security reviews, including call-in and last resort powers

For decades, the only type of review conducted in Australia's screening regime involved the Treasurer considering whether to make an order that taking a proposed action "would be contrary to the national interest".[47] These kinds of reviews, which continue today, are seen as involving a *negative* test, in the sense that the Treasurer assesses whether the action would be *against* the national interest rather than whether it would *promote* the national interest. The same approach applies today in national security reviews, introduced in 2021, as a result of which a Treasurer may make an order that taking a particular action "would be contrary to national security".[48] In either case, the Treasurer may make an order prohibiting certain actions, such as a proposed acquisition (in whole or in part), a proposed agreement, the commencement of an Australian business, or an increase in proportion of voting power or

[45] Australian Government response to the Joint Standing Committee on Treaties Report https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Treaty-makingProcess/Government_Response (28 March 2022, accessed 31 August 2023).
[46] Knight L, Voon T (2020) The Evolution of National Security at the Interface Between Domestic and International Investment Law and Policy: The Role of China. Journal of World Investment & Trade 21: 104–139, pp. 111–114.
[47] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 67(1)(b).
[48] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 67(1A)(b).

interests in issued securities.[49] The Treasurer may also order the disposal of an interest or that specified persons do or refrain from doing "specified acts or acts of a specified kind" within a specified period.[50]

The 2021 reforms also allow the Treasurer to exercise "call-in" powers to review on national security grounds certain types of actions that have not previously been notified, up to 10 years after the action occurs, "if the Treasurer considers that the action may pose a national security concern".[51] In addition, the Treasurer now has powers of "last resort" to review on national security grounds certain actions that have been previously reviewed, where for example a false or misleading statement has been made, the business has materially changed, or the circumstances or market have materially changed.[52] These call-in and last resort powers generally apply only to actions made since 1 January 2021, but they are retrospective in the sense that they can entail review of investments that have already been established in Australia, from that date.

4.1.2. Thresholds for review of land and businesses, including definition of national security land and national security business

Different thresholds apply above which screening is required, depending on factors such as whether the proposed action relates to investment in land, the nature of the foreign investor (e.g., a foreign government investor or a private investor), the type of business, and the nationality of the investor (including, in particular, whether the investor comes from a favoured partner country of Australia under a PTA).[53] For all foreign government investors, the threshold value for screening is zero. The threshold is also zero for all investors in "national security businesses", "national security land", "Australian media businesses", "vacant commercial land", and "residential land". In several areas, the highest thresholds apply to private investors from Chile, New Zealand, and the United States. Higher thresholds also apply in several areas to private investors from China, Hong Kong, Japan, Peru, Singapore, the Republic of Korea, Canada, Mexico, Malaysia, and Viet Nam. India and Thailand also now receive some

[49] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 67(2).
[50] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 69.
[51] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 66A; *Foreign Acquisitions and Takeovers Regulation 2015* (Cth) s 60A.
[52] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 79A.
[53] See summary of thresholds (based on the legislation and regulations) at Australian Government, The Treasury, Foreign Investment in Australia, Monetary thresholds https://foreigninvestment.gov.au/guidance/general/monetary-thresholds (updated 31 May 2023, accessed 2 October 2023).

preferential treatment. These differences are generally explained by obligations in Australia's preferential trade agreements.[54]

"[N]ational security land" is defined in the regulations as "defence premises" (as further defined in the *Defence Act 1903* (Cth)) or "land in which the Commonwealth, as represented by an agency in the national intelligence community, has an interest that: (i) is publicly known; or (ii) could be known upon the making of reasonable inquiries".[55] The regulations essentially define "national security business" to include (among other things) a business that:

- "is an entity that is a direct interest holder in relation to a critical infrastructure asset" (as further defined in the *Security of Critical Infrastructure Act 2018* (Cth));
- "is a carrier or nominated carriage service provider to which the *Telecommunications Act 1997* [Cth] applies";
- "develops, manufactures or supplies critical goods" or "critical technology" that are intended for a military or intelligence use by "defence and intelligence personnel", "the defence force of another country", or "a foreign intelligence agency";
- "provides, or intends to provide, critical services" to such personnel, force or agency;
- "stores or has access to information that has a security classification"; or
- "stores, maintains or has access to personal information" of defence or intelligence personnel that, "if disclosed, could compromise Australia's national security".[56]

The definition of "critical infrastructure asset", as mentioned above, generally includes (among other things) an asset that is a critical hospital or port or a critical asset in telecommunications, broadcasting, data storage or processing, banking, insurance, water, electricity, gas, education, freight services, public transport, aviation, or the defence industry.[57]

4.1.3. Notifications: mandatory and voluntary

In general, foreign persons or foreign government investors:

- must notify the Treasurer when taking a "notifiable action";
- must submit an application when taking a "notifiable national security action" ("which will likely be assessed under the national security test"); and

[54] Voon T, Merriman D (2022) Is Australia's Foreign Investment Screening Policy Consistent with International Investment Law? Melbourne Journal of International Law 23(1): 62–113.
[55] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 4; *Foreign Acquisitions and Takeovers Regulation 2015* (Cth) s 5.
[56] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 4; *Foreign Acquisitions and Takeovers Regulation 2015* (Cth) ss 5, 8AA.
[57] *Security of Critical Infrastructure Act 2018* (Cth) ss 5, 9.

- may voluntarily submit an application (for assessment under the "national security test") when taking a "significant action" or a "reviewable national security action".[58]

A "notifiable action" means, for example, an action to acquire a substantial interest in an Australian entity or an interest in Australian land, above a certain threshold.[59] A "notifiable national security action" means, for example, an action to start a national security business, acquire a direct interest in a national security business, or acquire an interest in "national security land".[60] A "national security business" includes, for example, a business that "develops, manufactures or supplies critical goods that are … for a military use, or an intelligence use, by: (i) defence and intelligence personnel; or (ii) the defence force of another country; or (iii) a foreign intelligence agency".[61] "National security land" means "defence premises" or "land in which the Commonwealth, as represented by an agency in the national intelligence community, has an interest that: (i) is publicly known; or (ii) could be known upon the making of reasonable inquiries".[62]

A "significant action" means, for example, an action "to acquire interests in assets of an Australian business", above a certain threshold, where the action results in a change of control and the person taking the action does not already control the business.[63] With respect to land, a significant action is an action to acquire an interest in Australian land above a certain threshold.[64] A "reviewable national security action" means, for example, an action to acquire an interest of any percentage in an Australian business or to acquire an interest in the assets of an Australian business, where as a result "a foreign person will be in a position, or more of a position, to influence or participate in the central management and control of the Australian business" or "to influence, participate in or determine the policy of the Australian business".[65]

---

[58] See Australian Government, The Treasury, Foreign Investment in Australia, *Guidance Note 1: Overview* v 2 p 3, https://foreigninvestment.gov.au/guidance/general/overview (1 July 2023, accessed 31 August 2023).
[59] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 48.
[60] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 55B(1).
[61] *Foreign Acquisitions and Takeovers Regulation 2015* (Cth) s 8AA(2)(d).
[62] *Foreign Acquisitions and Takeovers Regulation 2015* (Cth) s 5.
[63] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 41.
[64] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 43.
[65] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 55E.

4.1.4. Formal and informal guidance from the Treasurer, FIRB and ATO

The government's foreign investment website provides a general statement of Australia's Foreign Investment Policy[66] that is updated from time to time (and previously appeared on the FIRB website). This document provides policy guidance on the national interest test and the national security test, as follows.

The national interest test assesses whether a proposed investment would be contrary to the national interest and typically includes consideration of: national security; competition; other Australian government policies including tax; the impact on the economy and the community; and the character of the investor (including "the extent to which the investor operates on a transparent commercial basis", its "corporate governance practices", and "whether the investor complies with Australia's laws").[67] Additional considerations apply to investments in the agricultural sector, investments in residential land, and investments by foreign government investors (including "if the investment is commercial in nature or if the investor may be pursuing broader political or strategic objectives that may be contrary to Australia's national interest").[68]

The national security test asks whether a proposed investment would be contrary to national security, based on 'the extent to which the investment will affect Australia's ability to protect its strategic and security interests', and taking account of 'advice from relevant national security agencies',[69] as elaborated further in section 4.3 below.

The government's foreign investment website also publishes more specific guidance notes (previously on the FIRB website), on the following topics:[70]

1. Overview
2. Key concepts

---

[66] Australian Government, The Treasury, Foreign Investment in Australia, Australia's foreign investment framework https://foreigninvestment.gov.au/investing-in-australia/foreign-investment-framework (20 June 2023, accessed 2 October 2023).
[67] Australian Government, The Treasury, Foreign Investment in Australia, Australia's foreign investment framework https://foreigninvestment.gov.au/investing-in-australia/foreign-investment-framework (20 June 2023, accessed 2 October 2023).
[68] Australian Government, The Treasury, Foreign Investment in Australia, Australia's foreign investment framework https://foreigninvestment.gov.au/investing-in-australia/foreign-investment-framework (20 June 2023, accessed 2 October 2023).
[69] Australian Government, The Treasury, Foreign Investment in Australia, Australia's foreign investment framework https://foreigninvestment.gov.au/investing-in-australia/foreign-investment-framework (20 June 2023, accessed 2 October 2023).
[70] Australian Government, The Treasury, Foreign Investment in Australia, Guidance https://foreigninvestment.gov.au/guidance (accessed 2 October 2023).

3. Agricultural land
4. Commercial land
5. Mining
6. Residential land
7. Business investments
8. National security
9. Exemption certificates
10. Fees
11. Principles for developing conditions
12. Tax conditions
13. Residential compliance
14. Register of foreign ownership of Australian assets

Separate pages on the government's foreign investment website also summarise monetary thresholds,[71] and links to agency guidance on the following topics[72] (previously included as fact sheets on the FIRB website):[73]

- Corporate Governance Principles (link to the ASX Corporate Governance Council)
- Compliance with Corporate Law administered by the Australian Securities and Investments Commission (ASIC) (link to ASIC)
- Directors' obligations (link to ASIC)
- Competition and Consumer Protection Laws (link to the Australian Competition and Consumer Commission (ACCC))
- OECD Guidelines for Multinational Enterprises (link to the Australian National Contact Point for Responsible Business Conduct)
- Interacting with the Australian Tax System (link to the Australian Taxation Office (ATO))
- Interests in Australian media assets (link to the Australian Communications and Media Authority)
- National Environmental Law (link to the Department of Agriculture, Fisheries and Forestry).

The Commissioner of Taxation, via the ATO, previously maintained the Register of Foreign Ownership of Agricultural Land and the Register of Foreign Ownership of Water Entitlements.[74]

---

[71] Australian Government, The Treasury, Foreign Investment in Australia, Monetary thresholds https://foreigninvestment.gov.au/guidance/general/monetary-thresholds (updated 31 May 2023, accessed 2 October 2023).
[72] Australian Government, The Treasury, Foreign Investment in Australia, Doing business in Australia https://foreigninvestment.gov.au/guidance/general/doing-business-australia (updated 20 June 2023, accessed 2 October 2023).
[73] Australian Government, Foreign Investment Review Board, Fact sheets https://firb.gov.au/general-guidance/fact-sheets (accessed 4 December 2022).
[74] *Register of Foreign Ownership of Water or Agricultural Land Act 2015* (Cth) ss 13, 30B (now repealed).

The Commissioner reported annually to the Treasurer on these registers, including aggregate statistics,[75] with the reports[76] available on the FIRB website.[77] These two registers have been replaced by the Register of Foreign Ownership of Australian Assets (see section 4.2 below).[78] The ATO provides general guidance on its website.[79]

Informal guidance may also be provided in the form of publication of certain outcomes of review processes. For example, if the Treasurer makes a direction concerning a contravention of FATA that has occurred or will occur, the direction is to be published on a website as soon as practicable, unless the Treasurer decides in writing that doing so would be contrary to the national interest.[80] Similar provisions apply in respect of enforceable undertakings that the Treasurer has accepted under FATA.[81] The Treasurer sometimes but not always issues media releases in respect of decisions under FATA, for example to prohibit a transaction or allow it subject to conditions.[82]

---

[75] Australian Government, Australian Taxation Office, Agricultural Land Register, Statistics and Reporting https://www.ato.gov.au/General/Foreign-investment-in-Australia/Agricultural-Land-Register/ (last modified 8 October 2021, accessed 1 December 2022); Australian Government, Australian Taxation Office, Water Register, Statistics and Reporting https://www.ato.gov.au/General/Foreign-investment-in-Australia/Water-Register/ (last modified 8 April 2021, accessed 1 December 2022).

[76] Australian Government, Australian Taxation Office, *Register of Foreign Ownership of Agricultural Land: Report of Registrations as at 30 June 2021* (2022). Australian Government, Australian Taxation Office, *Register of Foreign Ownership of Water Entitlements: Report of Registrations as at 30 June 2021* (2022).

[77] Australian Government, Foreign Investment Review Board, Publications https://firb.gov.au/about-firb/publications (accessed 1 December 2022).

[78] Australian Government, Australian Taxation Office, Major Reforms to Foreign Investment Framework https://www.ato.gov.au/General/New-legislation/In-detail/Other-topics/International/Major-reforms-to-foreign-investment-framework/ (last modified 31 May 2022, accessed 1 December 2022). See also, eg, Australian Government, Australian Government Response to the Senate Economics References Committee Report: Greenfields, Cash Cows and the Regulation of Foreign Investment in Australia (April 2022) (response to recommendations 2 and 3).

[79] Australian Government, Australian Taxation Office, Foreign Investment in Australia https://www.ato.gov.au/general/foreign-investment-in-australia/ (last modified 26 June 2023, accessed 2 October 2023).

[80] *Foreign Acquisitions and Takeovers Act 1975* (Cth) ss 79R, 79S.

[81] *Foreign Acquisitions and Takeovers Act 1975* (Cth) ss 101C(1), 101D.

[82] See, eg, Australian Government, Treasurer Josh Frydenberg MP, Final Decision on the proposed acquisition of APA https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/final-decision-proposed-acquisition-apa (20 November 2018, accessed 4 December 2022).

4.1.5. Timeframes

In general, the Treasurer needs to make an order or decision on most investment applications within 30 days. However, this time limit does not apply in all circumstances and may be extended by up to an additional 90 days in some circumstances.[83]

According to a Treasury Report, the median processing time for approved commercial investment proposals was 42 days in the quarter 1 January to 31 March 2023, with 70 per cent of cases processed in 60 or fewer days. The median processing time for residential real estate in the same period was six days.[84]

4.2. Register of Foreign Ownership of Australian Assets

The *Register of Foreign Ownership of Water or Agricultural Land Act 2015* (Cth) was repealed and replaced with the Register of Foreign Ownership of Australian Assets on 1 July 2023.[85] The Commissioner of Taxation administers the Register, just as it administered the preceding registers for foreign-owned agricultural land, water, and residential land.[86] Foreign persons must notify the Registrar with respect to most actions involving Australian land, water, entities, businesses, and other assets.[87]

4.3. Relevant agencies

Apart from the Treasurer and the two main bodies involved in Australia's foreign investment screening — FIRB and the ATO — several other Australian agencies have relevant roles.

---

[83] See Australian Government, The Treasury, Foreign Investment in Australia, *Guidance Note 2: Key Concepts* v 2 pp 41-43 https://foreigninvestment.gov.au/guidance/general/key-concepts (1 July 2023, accessed 31 August 2023).
[84] Australian Government, The Treasury, *Quarterly Report on Foreign Investment: 1 January – 31 March 2023* (30 June 2023) pp. 6-7.
[85] *Foreign Investment Reform (Protecting Australia's National Security) Act 2020* (Cth) s 2, sch 3; *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 130S.
[86] *Commonwealth Registers (Appointment of Registrars) Instrument 2021* (Cth) s 8; Australian Government, Australian Taxation Office, Major Reforms to Foreign Investment Framework https://www.ato.gov.au/General/New-legislation/In-detail/Other-topics/International/Major-reforms-to-foreign-investment-framework/ (last modified 31 May 2022, accessed 1 December 2022).
[87] Australian Government, The Treasury, Foreign Investment in Australia, *Guidance Note 15: Register of Foreign Ownership of Australian Assets* v 3 https://foreigninvestment.gov.au/guidance/conditions-and-reporting/register-foreign-ownership-australian-assets (17 August 2023, accessed 2 October 2023).

The Australian Communications and Media Authority (ACMA)[88] administers the Register of Foreign Owners of Media Assets, which is to be made available via the internet.[89]

The Secretary of the Department of Home Affairs, via the Cyber and Infrastructure Security Centre,[90] administers the Register of Critical Infrastructure Assets, which is not to be made public.[91]

When exercising "last resort" powers under section 79A of FATA, the Treasurer "must decide whether a national security risk relating to the action exists", and in doing so the Treasurer "must obtain, and have regard to, advice from an agency in the national intelligence community".[92] The term "national intelligence community" is defined as having the meaning ascribed in the *Office of National Intelligence Act 2018* (Cth),[93] namely:[94]

- Office of National Intelligence;
- Australian Signals Directorate (ASD);
- Australian Security Intelligence Organisation (ASIO);
- Australian Secret Intelligence Service (ASIS);
- Australian Geospatial-Intelligence Organisation (AGO), which is part of the Defence Department;
- Defence Intelligence Organisation (DIO), which is part of the Defence Department;
- Australian Criminal Intelligence Commission; and
- to the extent that the following agencies engage in specified activities such as collecting intelligence that may relate to national intelligence capabilities or maintaining or developing a capability that materially assists in such activities:
    - Australian Transaction Reports and Analysis Centre (AUSTRAC);
    - Australian Federal Police;
    - Department of Home Affairs; and
    - Defence Department (other than as already identified above, and not including the Australian Defence Force).

---

[88] Australian Government, Australian Communications and Media Authority https://www.acma.gov.au/ (accessed 2 October 2023).
[89] *Broadcasting Services Act 1992* (Cth) s 74D. See Australian Government, Australian Communications and Media Authority, Register of Foreign Owners of Media Assets https://www.acma.gov.au/register-foreign-owners-media-assets (accessed 2 October 2023).
[90] Australian Government, Department of Home Affairs, Cyber and Infrastructure Security Centre https://www.cisc.gov.au/ (accessed 2 October 2023).
[91] *Security of Critical Infrastructure Act 2018* (Cth) ss 19, 22.
[92] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 79A(2).
[93] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 4 (definition of 'national intelligence community').
[94] *Office of National Intelligence Act 2018* (Cth) s 4 (definition of 'national intelligence community', 'intelligence agency', and 'agency with an intelligence role or function'); *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 5 (definition of "AUSTRAC").

Other agencies may be involved in foreign investment activities although they are not dedicated to foreign investment. For example, the ACCC[95] investigates mergers (not necessarily involving foreign investors) in connection with the statutory prohibition of acquisitions that "have the effect, or be likely to have the effect, of substantially lessening competition in any market".[96] The ACCC maintains a register of public informal merger reviews under consideration or completed[97] and a merger authorisation register.[98] The ACCC regulates some infrastructure services such as telecommunications and energy and oversees prices in some infrastructure services such as airports and aviation.[99] The Australian Energy Regulator (AER) regulates wholesale and retail energy markets and energy networks.[100] The Takeovers Panel "regulates corporate control transactions in widely held Australian entities, primarily by the efficient, effective and speedy resolution of takeover disputes".[101]

4.4. Additional sectoral mechanisms

Sectoral restrictions or requirements for foreign investment include, as identified in Australia's Foreign Investment Policy:[102]

- In the banking sector: the *Banking Act 1959* (Cth), the *Financial Sector (Shareholdings) Act 1998* (Cth), and banking policy;
- In relation to airlines: the *Air Navigation Act 1920* (Cth) and *Qantas Sale Act 1992* (Cth), limiting foreign ownership in Australian international airlines to 49 percent;
- In relation to airports: the *Airports Act 1996* (Cth), limiting foreign ownership of some airports to 49 percent;
- In relation to shipping: the *Shipping Registration Act 1981* (Cth), requiring most ships to be majority Australian-owned if registered in Australia;

---

[95] *Competition and Consumer Act 2010* (Cth) s 6A.
[96] *Competition and Consumer Act 2010* (Cth) s 50(1), (2).
[97] Australian Competition & Consumer Commission, Public Informal merger reviews https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews (accessed 2 October 2023).
[98] Australian Competition & Consumer Commission, Merger authorisations register https://www.accc.gov.au/public-registers/mergers-registers/merger-authorisations-register (accessed 2 October 2023).
[99] Australian Competition & Consumer Commission, Our role in regulated infrastructure https://www.accc.gov.au/regulated-infrastructure/about-regulated-infrastructure/our-role-in-regulated-infrastructure (accessed 2 October 2023).
[100] *Competition and Consumer Act 2010* (Cth) s 44AE; Australian Government, Australian Energy Regulator, Our role https://www.aer.gov.au/about-us/our-role (accessed 2 October 2023).
[101] Australian Government, Takeovers Panel https://www.takeovers.gov.au/ (accessed 2 October 2023). See also, e.g., *Corporations Act 2001* (Cth) s 657A.
[102] Australian Government, The Treasury, Foreign Investment in Australia, Australia's foreign investment framework https://foreigninvestment.gov.au/investing-in-australia/foreign-investment-framework (20 June 2023, accessed 2 October 2023).

- In relation to Telstra (a telecommunications provider): the *Telstra Corporation Act 1991* (Cth), limiting aggregate foreign ownership to 35 percent and individual foreign investors to 5 percent.

4.5. Adjudicatory and non-adjudicatory recourse

4.5.1. Limited scope of judicial review

Judicial review pursuant to the *Administrative Decisions Judicial Review Act 1977* (Cth) is not available with respect to decisions under FATA.[103] However, this exclusion does not preclude other forms of judicial review.[104] For example, the Federal Court of Australia has jurisdiction to hear applications for judicial review pursuant to section 39B of the *Judiciary Act 1903* (Cth).[105] Pursuant to that provision, the Federal Court's original jurisdiction extends to matters "arising under any laws made by the Parliament"[106] and matters "in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth",[107] which would include the Australian Treasurer.[108]

Leisure & Entertainment Pty Ltd v Willis (Federal Court, 1996)

In *Leisure & Entertainment Pty Ltd v Willis*, the Australian company Leisure & Entertainment Pty Ltd sought to compel the Australian Treasurer Willis to prohibit the acquisition of Dreamworld Theme Park in the Australian State of Queensland by Janola Dale Pty Ltd, a Singaporean subsidiary.[109] A single judge of the Federal Court rejected the application for interlocutory relief under section 39B of the *Judiciary Act 1903* (Cth) on the basis that the claims in the underlying proceedings were bound to fail.[110] A key reason for Justice Spender's conclusion was that although section 39B allows a court "to enforce the performance of a duty owed by an officer of the Commonwealth to the applicant",[111] the Treasurer had no duty under the relevant provisions of FATA.[112] Rather, (then) sections 19(2) and 21A(2) of FATA conferred

[103] *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3(1) (definition of 'decision to which this Act applies), s 5(1), sch 1 para (h) (introduced via the *Administrative Decisions (Judicial Review) Amendment Act 1980* (Cth) ss 3, 10).
[104] Australian Government, Australian Law Reform Commission, Traditional Rights and Freedoms-Encroachments by Commonwealth Laws: Final Report (ALRC Report 129, December 2015) [15.60].
[105] See Administrative Review Council, Federal Judicial Review in Australia (September 2012) [B.54].
[106] *Judiciary Act 1903* (Cth) s 39B(1A).
[107] *Judiciary Act 1903* (Cth) s 39B(1).
[108] *Canwest Global Communications Corporation v Treasurer of the Commonwealth of Australia* (1997) 147 ALR 509, 511.
[109] *Leisure & Entertainment Pty Ltd v Willis* (1996) 64 FCR 205, 206, 209.
[110] *Leisure & Entertainment Pty Ltd v Willis* (1996) 64 FCR 205, 216.
[111] *Leisure & Entertainment Pty Ltd v Willis* (1996) 64 FCR 205, 216.
[112] *Leisure & Entertainment Pty Ltd v Willis* (1996) 64 FCR 205, 216.

"discretionary and not mandatory" power[113] to make an order prohibiting a proposed acquisition by a foreign person on the basis that it would be contrary to the national interest.[114]

CanWest Global Communications Corporation v Treasurer (Federal Court, 1997)

In *CanWest v Treasurer*, three companies sought judicial review of a decision by the Australian Treasurer under FATA before a single judge of the Federal Court pursuant to section 39B of the *Judiciary Act 1903* (Cth). Justice Hill rejected the Treasurer's submission that the Court lacked jurisdiction to undertake judicial review of the Treasurer's decision under (then) section 18(4) of FATA, under which the Treasurer could make an order directing disposal of shares where the acquisition of shares in a corporation resulted in foreign control contrary to the national interest.[115] His Honour stated that, although a "court would be loathe to interfere with a discretion vested in the Treasurer on a matter such as national interest", judicial review would be available where, for example, the Treasurer "ha[d] not fulfilled a condition precedent to making an order under" section 18, took "into account a matter which is clearly irrelevant to the national interest", or "made a decision which no reasonable person acting in accordance with his [sic] authority could have made".[116] In that case, the Court found that the Treasurer made errors of law and also failed to accord procedural fairness to some of the applicants by not giving them an opportunity to be heard.[117]

Wight v Pearce (Federal Court, 2007)

Wight v Pearce was another, more recent case concerning the Treasurer's actions under FATA, also heard before a single judge of the Federal Court.[118] The Court's jurisdiction under section 39B of the *Judiciary Act 1903* (Cth) and other statutory provisions was not contested.[119] In that case, a Swiss citizen, Wight, challenged an order made in 2005 by Pearce, Parliamentary Secretary to the Treasurer (acting for or on behalf of the Treasurer), which required her to divest her interest in certain land in the Australian State of South Australia on

---

[113] *Leisure & Entertainment Pty Ltd v Willis* (1996) 64 FCR 205, 216.
[114] *Leisure & Entertainment Pty Ltd v Willis* (1996) 64 FCR 205, 210.
[115] *Canwest Global Communications Corporation v Treasurer of the Commonwealth of Australia* (1997) 147 ALR 509, 521.
[116] *Canwest Global Communications Corporation v Treasurer of the Commonwealth of Australia* (1997) 147 ALR 509, 525.
[117] *Canwest Global Communications Corporation v Treasurer of the Commonwealth of Australia* (1997) 147 ALR 509, 528, 531, 534. See also Cosgrave P (1998) Case Note: CanWest Global Communications Corporation v Australian Broadcasting Authority and CanWest Global Communications Corporation v Commonwealth of Australia. Australian Journal of Administrative Law 6: 56-70.
[118] *Wight v Pearce* (2007) 157 FCR 485.
[119] *Wight v Pearce* (2007) 157 FCR 485, 488.

the basis that her acquisition of such urban land was "contrary to the national interest".[120] Wight was a "foreign person" under FATA by virtue of being "a natural person not ordinarily resident in Australia".[121] Although Wight's (then) husband had purported to give notice to the Treasurer of their joint acquisition of the land in 1995, which acquisition was apparently approved subject to conditions, Justice Besanko found this notice and approval ineffective because Wight's signature was (as she stated herself) forged.[122] Following dissolution of the marriage, Wight had become sole owner of the land in 2004.[123]

The Court rejected Wight's contention that the relevant provisions of FATA were constitutionally invalid, finding that they were a valid exercise of the Federal Parliament's external affairs power under section 51(xxix) of the *Australian Constitution*.[124]

As regards Wight's application for judicial review of the 2005 order,[125] Justice Besanko stated that"'A court will be slow to interfere with a Minister's decision as to what is in the national interest on the ground that a matter not taken into account was relevant to the national interest or a matter taken into account was irrelevant to the national interest".[126] Moreover, his Honour added that a "court will also be slow to interfere with a Minister's decision as to what is in the national interest under the guise of an argument that it should be inferred from the material before the decision-maker that he or she was not in fact satisfied that the acquisition was contrary to the national interest".[127] The Court rejected Wight's argument to this effect.[128]

Nevertheless, the Court quashed the divestiture order of February 2005 on the grounds of failure to accord "procedural fairness".[129] The Secretary to the Treasurer (Pearce) did not dispute the need to comply with procedural fairness in making the relevant decision under FATA.[130] Although the Treasurer wrote to Wight in December 2004 advising of the forthcoming order and the ineffectiveness of the purported notice given in 1995,[131] Wight was not advised

[120] *Wight v Pearce* (2007) 157 FCR 485, 487-488.
[121] *Wight v Pearce* (2007) 157 FCR 485, 494.
[122] *Wight v Pearce* (2007) 157 FCR 485, 494, 504.
[123] *Wight v Pearce* (2007) 157 FCR 485, 488-489.
[124] *Wight v Pearce* (2007) 157 FCR 485, 498, 502.
[125] *Wight v Pearce* (2007) 157 FCR 485, 505.
[126] *Wight v Pearce* (2007) 157 FCR 485, 516.
[127] *Wight v Pearce* (2007) 157 FCR 485, 516.
[128] *Wight v Pearce* (2007) 157 FCR 485, 516.
[129] *Wight v Pearce* (2007) 157 FCR 485, 515, 517.
[130] *Wight v Pearce* (2007) 157 FCR 485, 509.
[131] *Wight v Pearce* (2007) 157 FCR 485, 507-508.

that "her alleged visa violations" might affect the decision to make such an order.[132] The failure to give notice of this "adverse conclusion"[133] and provide Wight an opportunity to respond to it "constituted a breach of the rules of procedural fairness".[134]

4.5.2. Merits review of national security decisions

Merits review in the Administrative Appeals Tribunal (AAT)

Pursuant to the FATA reforms that came into effect in 2021, merits-based review of certain national security decisions is now available. Previously, review by the Administrative Appeals Tribunal (AAT) of decisions made under FATA was unavailable, because FATA did not provide for such review pursuant to section 25(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act). Now, when the Treasurer gives notice to a person[135] of a decision pursuant to the "last resort"' powers[136] that a national security risk exists in relation to an action taken or proposed by that person, an application for AAT review of that decision may be made by or on behalf of that person.[137]

The AAT may affirm, vary or set aside the Treasurer's decision (in the latter case making a decision in place of that decision or remitting the matter to be reconsidered subject to the AAT's directions).[138] In its findings, the AAT may state its "opinion as to the correctness of, or justification for, any opinion, advice or information contained in the decision"[139] and may attach comments regarding the "procedures or practices of the Department of the Treasury".[140] The Treasurer must exercise its powers under FATA in respect of the relevant action in accordance with the AAT's findings "except on the basis: (a) of matters or material changes occurring after the review; or (b) of which evidence was not available at the time of the review".[141] Where in the opinion of the AAT the applicant's application for review was "successful, or substantially successful", the AAT may order that all or any of the applicant's reasonable costs of review be paid by the Commonwealth of Australia.[142] After the AAT has given its findings, an applicant

---

[132] *Wight v Pearce* (2007) 157 FCR 485, 514.
[133] *Wight v Pearce* (2007) 157 FCR 485, 511.
[134] *Wight v Pearce* (2007) 157 FCR 485, 515.
[135] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 79B(1).
[136] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 79A.
[137] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 130A(1), (2).
[138] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 130J; *Administrative Appeals Tribunal Act 1975* (Cth) s 43(1).
[139] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 130K(1).
[140] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 130K(6).
[141] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 130L.
[142] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 130M(1).

may apply for review of those findings "on the ground that the applicant has fresh evidence of material significance that was not available at the time of the previous review".[143]

Review by the AAT is to be conducted in the Security Division,[144] which may prohibit or restrict disclosure of all or any of its findings, or information such as that concerning a party to the proceeding or information comprising or about evidence.[145] In the review, "the agency in the national intelligence community that provided advice to the Treasurer in relation to the decision is entitled to adduce evidence and make submissions",[146] and the Treasurer is under a "duty … to present to the Tribunal all relevant information available".[147] Several of the usual AAT procedures do not apply,[148] such as the general requirement of public hearings,[149] the general right of parties to have "a reasonable opportunity to present his or her case and … inspect any documents to which the [AAT] proposes to have regard in reaching a decision",[150] and the general requirement that AAT findings following a review in the Security Division be given to the applicant.[151]

In an AAT review, the Treasurer may certify in writing that the disclosure of evidence or submissions of the Treasurer or intelligence agency "would be contrary to national security".[152] In that event, the applicant may not be present when the evidence is adduced or submissions are made, and their representative may be present at those times only if the Treasurer consents.[153] If a representative is present by consent, they must not disclose the evidence or submission to anyone, with a potential penalty of two years' imprisonment.[154]

In an AAT review, the Treasurer may also certify in writing that the disclosure of specified information or documents "would be contrary to the public interest".[155] The effect of the

[143] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 130A(3).
[144] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 130E.
[145] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 130F; *Administrative Appeals Tribunal Act 1975* (Cth) s 35AA(2).
[146] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 130G(2).
[147] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 130G(3).
[148] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 130N.
[149] *Administrative Appeals Tribunal Act 1975* (Cth) s 35(1).
[150] *Administrative Appeals Tribunal Act 1975* (Cth) s 39(1).
[151] *Administrative Appeals Tribunal Act 1975* (Cth) s 43AAA(4).
[152] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 130G(8).
[153] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 130G(9).
[154] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 130G(10).
[155] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 130H(2).

certificate depends to some extent on the Treasurer's reasons, which must be one of the following (as specified in section 130H(2)):

a) because it would prejudice Australia's national security;

b) because it would involve the disclosure of deliberations or decisions of the Cabinet or a Committee of the Cabinet or of the Executive Council; or

c) for any other reason stated in the certificate that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the information or the contents of the document should not be disclosed …[156]

Disclosure of information in connection with AAT review

At the time of writing, no publicly reported cases exist pursuant to the FATA provision for AAT review. However, related provisions in the AAT Act are the subject of a 2022 decision by the High Court of Australia (Australia's highest court), as explained further below. In order to explain that decision in the context of FATA, I set out in further detail the relevant FATA provisions regarding the disclosure of information or documents in the course of an AAT review proceeding (particularly to the applicant), where the Treasurer has issued a public interest certificate.

Where the public interest certificate does not specify a reason set out in section 130H(2)(a) or (b) as mentioned above, if the presiding member of the AAT "is satisfied that the interests of justice outweigh the reason stated by the Treasurer, the presiding member may authorize" disclosure of the information or document to the applicant.[157] In making this decision, the presiding member must:

a) … take as the basis of … consideration the principle that it is desirable, in the interest of ensuring that the Tribunal performs its functions effectively, that the parties should be made aware of all relevant matters; but

b) … pay due regard to any reason stated by the Treasurer as a reason why the disclosure … would be contrary to the public interest.[158]

Apart from that exception (and subject to section 46 of the AAT Act as explained below), where a public interest certificate exists, the AAT must "do all things necessary to ensure" that the information or document is not "disclosed to anyone other than a member of the Tribunal as constituted for the purposes of the proceeding".[159] The AAT may nevertheless disclose the information or document to a member of its staff "in the course of the performance of the

[156] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 130H(2).
[157] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 130H(5).
[158] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 130H(6).
[159] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 130H(3).

person's duties" as such.[160] If the reason specified in the public certificate falls in section 130H(2)(a) (national security), the AAT may also disclose the information or document to the Treasurer or the Treasurer's representative.[161]

Even in the absence of a public interest certificate, the AAT is under a "duty … to ensure, so far as it is able to do so, that, in or in connection with a proceeding, information is not communicated or made available to a person contrary to the requirements of security".[162] Moreover, the AAT "may direct that the whole or a particular part of its findings, so far as they relate to a matter that has not already been disclosed to the applicant, is not to be given to the applicant".[163] Subject to any direction by the AAT, the applicant "is entitled to publish, in any manner that the applicant thinks fit", the findings of the AAT provided to the applicant.[164]

Part IVA of the AAT Act relates to appeals and references of questions of law to the Federal Court of Australia. Under section 44, a party to an AAT proceeding may appeal to the Federal Court "on a question of law" from any decision of the AAT in that proceeding.[165] The Federal Court may, for example, affirm or set aside the AAT decision or remit the case to the AAT to be heard and decided again.[166] The AAT itself may also, under section 45, refer "a question of law" arising in an AAT proceeding to the Federal Court for decision.[167]

Within Part IVA, section 46 of the AAT Act relates to the sending of documents to and disclosure of documents by (inter alia) the Federal Court, in connection with an appeal or reference from the AAT under sections 44 or 45. Section 46(1) provides for the AAT to send to the Federal Court all documents that were before the AAT in connection with the relevant proceedings that are relevant to the appeal or reference. Section 46(2) specifies that if a public interest certificate exists in connection with a matter in a review arising under FATA, the Federal Court must in general "do all things necessary to ensure that the matter is not disclosed to any person under person other than a member of the court as constituted for the purposes

[160] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 130H(7).
[161] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 130H(4).
[162] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 130H(10).
[163] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 130K(3).
[164] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 130K(5).
[165] *Administrative Appeals Tribunal Act 1975* (Cth) s 44(1).
[166] *Administrative Appeals Tribunal Act 1975* (Cth) s 44(4), (5).
[167] *Administrative Appeals Tribunal Act 1975* (Cth) s 45(1).

of the proceeding".[168] Some exceptions apply under section 46(3) but are difficult to follow due to an apparent error in the reference to the relevant FATA provision.[169]

SDCV v Director-General of Security (High Court, 2022)

The case of *SDCV v Director-General of Security*[170] concerned section 46(2) of the AAT Act. In that case, the Director-General of Security (Director-General), on behalf of the Australian Security Intelligence Organisation (ASIO), issued an adverse security assessment (ASA) with respect to the appellant, which resulted in the appellant's visa being cancelled on character grounds under section 501(3) of the *Migration Act 1958* (Cth).[171] The appellant received a statement of grounds for the ASA decision, with sections omitted on public interest grounds.[172] On application by the appellant to the AAT for merits review of the ASA decision, the ASIO Minister issued certain public interest certificates for non-disclosure, with the effect that certain documents relating to the ASA decision were not disclosed to the appellant, and also that the AAT held both open and closed hearings and wrote both open and closed reasons (the closed hearings and closed reasons being not open to the appellant or his representatives).[173] The AAT decision affirming the ASA decision was based on "classified evidence" not disclosed to the appellant.[174] In an unsuccessful appeal by the appellant to the Federal Court pursuant to section 44 of the AAT Act, the Federal Court considered the "certificated matter" that was again not disclosed to the appellant, finding the ASA decision "warranted by the evidence available" to the AAT.[175]

The appellant appealed to the High Court on constitutional grounds, alleging that section 46(2) of the AAT is unconstitutional on the basis that it is contrary to procedural fairness.[176] The Court held by a 4:3 majority that section 46(2) is constitutional. In the majority, Kiefel CJ and Keane, Gleeson and Steward JJ all pointed out that in the absence of the non-disclosure

---

[168] *Administrative Appeals Tribunal Act 1975* (Cth) s 46(2).
[169] *Administrative Appeals Tribunal Act 1975* (Cth) s 46(3)(a) refers to whether the certificate specifies a reason referred to in *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 130H(3), but that provision does not refer to any reasons (s 130H(2) refers to reasons as indicated above).
[170] *SDCV v Director-General of Security* (2022) 405 ALR 209.
[171] *SDCV v Director-General of Security* (2022) 405 ALR 209 [1] (Kiefel CJ, Keane and Gleeson JJ).
[172] *SDCV v Director-General of Security* (2022) 405 ALR 209 [2] (Kiefel CJ, Keane and Gleeson JJ).
[173] *SDCV v Director-General of Security* (2022) 405 ALR 209 [4] – [6] (Kiefel CJ, Keane and Gleeson JJ).
[174] *SDCV v Director-General of Security* (2022) 405 ALR 209 [7] (Kiefel CJ, Keane and Gleeson JJ).
[175] *SDCV v Director-General of Security* (2022) 405 ALR 209 [8] – [10] (Kiefel CJ, Keane and Gleeson JJ).
[176] *SDCV v Director-General of Security* (2022) 405 ALR 209 [11] (Kiefel CJ, Keane and Gleeson JJ).

provision in section 46(2), the Federal Court would have been unable to view the relevant material pursuant to section 46(1), because under alternative mechanisms for judicial review such as section 39B of the *Judiciary Act 1903* (Cth) or section 75(v) of the *Constitution* 'public "interest immunity would likely have prevented the use of the certificated matter by the Federal Court";[177] "In unadorned terms, the regime is better than nothing".[178] Kiefel CJ and Keane and Gleeson JJ also emphasised:

> The limited statutory rights of the appellant to enter and remain in Australia … The rights of a visa holder were always qualified by the statutory process of the executive government to deny the visa holder disclosure of security-sensitive grounds for the making of an ASA.[179]

Steward J's reasons for upholding the constitutional validity of section 46 were slightly different. His Honour interpreted section 46 as not necessarily leading to "practical injustice" because the Federal Court could, for example, "order that the gist of certified documents be disclosed by the Director-General to an applicant", "appoint a special advocate who could examine certified material and unredacted reasons and make independent submissions to the Court", or "decline a tender of certified documents or otherwise refuse to consider … certified documents".[180] His Honour stated:

> The provisions of the AAT Act concerning merits review of security assessments reflect choices made by the Parliament to enhance the rights of applicants who have been the subject of adverse security assessments, whilst at the same time preserving the confidentiality of intelligence held by the Director-General in the public interest. It is a legislative scheme that comprises a carefully balanced solution to conflicting rights and interests and that, when originally enacted in the ASIO Act, was a breakthrough in the common law world.[181]

In contrast, in dissent, Gageler J maintained that "[t]he problem with s[ection] 46(2) … lies in its rigidity in compelling a court never to disclose the certified information to a party or to a legal representative of a party … irrespective of the degree of prejudice to security or the defence or international relations of Australia that would result from disclosure";[182] "It can be no answer to an argument that a processed required to be followed in the purported exercise of jurisdiction is unfair to say that something is better than nothing".[183] His Honour reasoned:

> The Commonwealth Parliament is not constitutionally required to confer any federal jurisdiction on any court … But whatever federal jurisdiction it chooses to confer is constitutionally incapable of being

[177] *SDCV v Director-General of Security* (2022) 405 ALR 209 [13] (Kiefel CJ, Keane and Gleeson JJ).
[178] *SDCV v Director-General of Security* (2022) 405 ALR 209 [313] (Steward J).
[179] *SDCV v Director-General of Security* (2022) 405 ALR 209 [12] (Kiefel CJ, Keane and Gleeson JJ).
[180] *SDCV v Director-General of Security* (2022) 405 ALR 209 [290], [291], [295], [306] (Steward J).
[181] *SDCV v Director-General of Security* (2022) 405 ALR 209 [311] (Steward J).
[182] *SDCV v Director-General of Security* (2022) 405 ALR 209 [152] (Gageler J, dissenting).
[183] *SDCV v Director-General of Security* (2022) 405 ALR 209 [128] (Gageler J, dissenting).

exercised by a court other than in accordance with a judicial process. Procedural fairness is a requirement to be observed within a judicial process.[184]

Observance of the constitutional minimum where a court is authorised by statute to engage in a process of adjudication taking account of information which relates to national security does no violence to the allocation of functional responsibilities inherent in the constitutional separate of the judicial power of the Commonwealth … If a court can be trusted to receive national security information into evidence in determining the rights of the parties to a particular case, it is not too glib to say that the court should be trusted to weigh the interests of national security appropriately in considering what fairness to one or more of those parties requires in the circumstances of that case.

Another of the dissenting judges, Edelman J, stated with respect to the appellant's status:

I emphatically agree with Gordon J that the appellant's unchallenged legal status in Australia is irrelevant to this appeal. The threshold at which a court's procedures become instruments of injustice, threatening to compromise substantially the institutional integrity of the court, cannot vary according to the labels assigned to a person by Commonwealth legislation – citizen, permanent resident, or anything else. Those labels cannot be used to create different grades or qualities of justice in the Constitution. Hence, legislation that impairs the institutional integrity of a court by a procedure of gross injustice cannot be saved merely because the injustice is meted out upon a long-term permanent resident of Australia who has not obtained the statutory status of an Australian citizen.[185]

This discussion could apply equally to a foreign investor appealing from an AAT decision in connection with the Treasurer's exercise of last resort powers under FATA. In such a case, the majority judges might remind the foreign investor of the statutory restrictions on its existence and operations in Australia pursuant to FATA, while the minority might maintain that a foreign investor, no less than a domestic investor, deserves procedural fairness in Australian courts established under Chapter III of the *Constitution*. In any event, the majority High Court ruling in *SDCV v Director-General of Security* upholding the constitutional validity of section 46(2) of the AAT Act would prevail, as the law currently stands.

4.6. Recent Australian Critiques of Foreign Investment Screening

4.6.1. Productivity Commission Reports

In 2020, while the LNP government was still in power, and before the 2021 regulatory reforms to Australia's foreign investment screening regime, the Productivity Commission reported on foreign investment Australia. It noted that "[f]oreign investment … stirs strong community reservations, although Australians are generally supportive of globalisation and free trade". The Commission said that "Australia has a broadly open policy towards foreign investment, but is more restrictive than many other advanced economies, by some measures". It also pointed out that "[t]o the extent that foreign investment proposals are blocked or discouraged,

[184] *SDCV v Director-General of Security* (2022) 405 ALR 209 [130] (Gageler J, dissenting).
[185] *SDCV v Director-General of Security* (2022) 405 ALR 209 [222] (Edelman J, dissenting).

this results in lower Australian household incomes – Commission modelling estimates that these economic costs would be material, though not large".[186]

The Commission identified three key points for improvement:

- The national interest test lacks clarity around how it is interpreted from case to case. Tighter policy guidance and excluding risks from the test that can be mitigated through national regulations (such as competition) would lower compliance costs and lift investor certainty.
- Attaching conditions to foreign investment approvals provides only a limited means to mitigate risks. National laws and regulations, together with purpose-built and adequately-resourced regulations (such as the Australian Competition and Consumer Commission, or the Critical Infrastructure Centre), where available, should be preferred.
- Publications of reasons for decisions to block proposals, greater certainty around timelines, and aligning applications fees with the actual cost of administering the screening regime would increase transparency, enhance predictability and lower the costs of the screening regime.[187]

More recently, in July 2023, the Productivity Commission released its annual report reviewing trade and industry assist in Australia for the financial year 2021-2022. The Commission noted that Australia's "foreign investment application requirements have evolved alongside the particular policy concerns of the day, with an explicit national interest test being added to Australia's foreign investment screening regime in 1986 and a standalone national security test added in 2021".[188] It explained that most inbound and outbound foreign investment in Australia takes the form of portfolio investment, with FDI "mak[ing] up a smaller proportion of overall investment in Australia. Despite being smaller in overall scale, it is this ability to control or influence the operations of firms in Australia that makes FDI of more interest to policymakers".[189] The Commission stated in its executive summary:

> As a growing net exporter of equity investment, and a net importer of debt finance, Australia has a particular interest in the free international flow of capital. Despite this, inbound foreign direct investment has been subject to a stricter screening regime since 1 January 2021, and foreign investment application fees have increased notably since that time. These developments risk impacting the quantum and composition of inbound foreign direct investment over coming years, and risk favouring domestic investors over their international counterparts.[190]

With respect to fees associated with foreign investment screening, the Commission noted:

---

[186] Australian Government, Productivity Commission Research Paper, *Foreign Investment in Australia* (June 2020) p. 2.
[187] Australian Government, Productivity Commission Research Paper, *Foreign Investment in Australia* (June 2020) p. 2.
[188] Australian Government, Productivity Commission, *Trade and assistance review 2021-22, Annual report series* (July 2023) p. 62.
[189] Australian Government, Productivity Commission, *Trade and assistance review 2021-22, Annual report series* (July 2023) p. 64.
[190] Australian Government, Productivity Commission, *Trade and assistance review 2021-22, Annual report series* (July 2023) p. 4.

[F]oreign investment fees have increased markedly over recent years and have come to raise more revenue than required to fund the costs of the foreign investment screening process – thereby amounting to a tax on foreign investment intentions and, by extension, foreign investment itself. While the foreign investment screening process has remained largely unchanged over the past year, foreign investment application fees doubled on 29 July 2022.[191]

4.6.2. Senate Committee Reports

Various Senate committees have examined and reported on Australia's foreign investment review framework.[192] Most recently, the Economics References Committee issued a report in August 2021 entitled *Greenfields, cash cows and the regulation of foreign investment in Australia.* The committee stated in its executive summary:

While the committee recognises the importance of foreign investment to the Australian economy, the inquiry raised several areas of concern that lead it to question whether the community can have confidence all investments that are approved, with or without conditions, are not contrary to the national interest. These concerns arise from: the sophistication of the assessment of foreign investment proposals against the national interest; the ability to ensure entities meet the promises they make when proposing an investment; the effectiveness of the Treasury as a regulator; and the secrecy that surrounds the foreign investment process.[193]

The committee's first recommendation was that the government "amen[d] regulations to the effect that undertakings made as part of a foreign investment application can be enforced as conditions on an investment approval and that they consider publishing details relating to these decisions".[194] In its formal response in April 2022, prior to the election of Prime Minister Albanese in May 2022, the (then LNP) government rejected that recommendation, stating:

Generally, after the Treasurer accepts an enforceable undertaking, that undertaking will be published online by the Treasury. The Treasurer can decide that an accepted undertaking should not be published if the release of its contents would be contrary to the national interest.[195]

The committee's second recommendation was that the government "conduc[t] an audit of the expertise required by foreign investment regulators to thoroughly assess applications against

---

[191] Australian Government, Productivity Commission, *Trade and assistance review 2021-22, Annual report series* (July 2023) p. 67.

[192] See, eg, Parliament of Australia, The Senate, Economics References Committee, *Foreign Investment by State-Owned Entities* (September 2009); Parliament of Australia, The Senate, Rural and Regional Affairs and Transport References Committee, *Foreign Investment and the National Interest* (June 2013); Parliament of Australia, The Senate, Economic References Committee, *Foreign Investment Review Framework* (April 2016).

[193] Australian Government, The Senate, Economics References Committee, *Greenfields, cash cows and the regulation of foreign investment in Australia* (August 2021) p. ix.

[194] Australian Government, The Senate, Economics References Committee, *Greenfields, cash cows and the regulation of foreign investment in Australia* (August 2021) [6.21].

[195] Australian Government, Australian Government response to the Senate Economics References Committee report (April 2022) https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Foreigninvestment/Government_Response (accessed 31 August 2023).

the national interest and establis[h] a plan to staff these organisations accordingly".[196] The government stated in its response that it supported this recommendation "in principle", referring to increased funding and staffing levels since 2020.[197] Referring also to recent regulatory reforms (implemented in 2021), the government took note of the committee's third recommendation, which was a reference to an earlier recommendation by the Productivity Commission "that consideration be given to the most suitable institutional design to support decision-making on foreign investment and monitoring and enforcement of compliance, and conducts a review to determine the structure necessary for an effective and efficient foreign investment regulator".[198]

Although these responses came from the pre-Labor government, subsequent developments have not indicated any significant change of direction with respect to the content or management of Australia's system for foreign investment screening.

5. Conclusion: Areas for Improvement

The recommendations and reflections identified above from previous inquiries and reports by parliamentary committees and the Productivity Commission show various areas for improvement in Australia's approach to foreign investment screening.

Non-transparency is repeatedly identified as a problem with Australia's system. Beginning with the international legal framework within which such screening is situated, non-transparency arises in the negotiation or reform of PTAs and BITs. A more transparent approach to treaty negotiation would involve greater meaningful consultation with relevant stakeholders (including not just industry representatives but also academics and NGO officers, among others), as well as providing access to draft treaty text within appropriate parameters. Such increased access is found in other common law countries, including the United States, where designated representatives have more opportunities to see and provide feedback on negotiating developments, including draft treaty text. Another mechanism for increasing transparency

[196] Australian Government, The Senate, Economics References Committee, *Greenfields, cash cows and the regulation of foreign investment in Australia* (August 2021) [6.29].
[197] Australian Government, Australian Government response to the Senate Economics References Committee report (April 2022) https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Foreigninvestment/Government_Response (accessed 31 August 2023).
[198] Australian Government, The Senate, Economics References Committee, *Greenfields, cash cows and the regulation of foreign investment in Australia* (August 2021) [6.54].

during treaty negotiations would be to provide model BIT and PTA texts, again as found in other countries.

Non-transparency continues in the screening process itself, including through vague and unpredictable concepts of 'national interest' and 'national security' leaving significant discretion to the Treasurer. The outcomes of that process are also opaque to interested community members, particularly given the limited information in annual reports of the Foreign Investment Review Board and the inconsistent approach to public announcements of decisions.

Further concerns arise about the *overly restrictive* nature of Australia's approach to foreign investment screening (notwithstanding its avowed openness to foreign investment), particularly given the tightening of the regime from 2021, and in comparison to other countries' welcoming of foreign investment. As noted above, the Productivity has identified this restrictiveness as having potentially negative impacts on inward foreign investment screening as well as the Australian economy and household income, although it has indicated that it is too early to make a meaningful assessment of the 2021 changes.[199]

Also as noted above with respect to the same Productivity Commission report, foreign investment review *fees* in Australia go beyond the amounts needed to cover the cost of screening and are therefore arguably excessive. For example, current fees for a single action are: $4,200 for starting an Australian business; $28,200 for an internal reorganisation; and $14,100 for an acquisition of a business for a consideration of $50 million or less (rising to a maximum of $1,119,100 for acquisitions of more than $2 billion) or of residential land for $1 million or less (rising to a maximum of $1,119,100 for acquisitions of more than $40 million).[200]

Finally, reforms to Australia's foreign investment screening regime must be aligned with its obligations under *international investment agreements*, and vice versa. The tightening of Australia's approach to screening in 2021 increased the potential for conflict between Australian screening and Australia's investment obligations, enhancing the risk of ISDS claims against Australia. The current government's approach to ISDS may somewhat limit this risk, but only in relation to future or amended treaties. For Australia's 15 BITs in force (as well as, to some extent, the terminated BIT with India) and its 10 PTAs in force with ISDS mechanisms,

---

[199] Australian Government, Productivity Commission, *Trade and assistance review 2021-22, Annual report series* (July 2023) p 67-68.
[200] Australian Government, The Treasury, *Guidance Note 10: Fees for Foreign Investment Applications* v 3 https://foreigninvestment.gov.au/guidance/general/fees (10 August 2023, accessed 31 August 2023).

the risk of ISDS claims continues. Due to the complexity of Australia's network of treaties and foreign investment review policy, as well as the variability of reasons and decisions by different arbitral tribunals, the outcome of such a claim is difficult to predict in the abstract.

Annex 1: Relevant laws, ordinances, regulatory guidelines

Laws

Administrative Appeals Tribunal Act 1975 (Cth)

Broadcasting Services Act 1992 (Cth)

Foreign Acquisitions and Takeovers Fees Imposition Act 2015 (Cth)

Foreign Acquisitions and Takeovers Act 1975 (Cth)

Foreign Investment Reform (Protecting Australia's National Security) Act 2020

Security of Critical Infrastructure Act 2018 (Cth)

Regulations

Foreign Acquisitions and Takeovers Fees Imposition Regulation 2020 (Cth)

Foreign Acquisitions and Takeovers Regulation 2015 (Cth)

Security of Critical Infrastructure (Application) Rules 2022 (Cth)

Policy statements

Australian Government, The Treasury, Foreign Investment in Australia, Australia's foreign investment framework https://foreigninvestment.gov.au/investing-in-australia/foreign-investment-framework (20 June 2023, accessed 2 Oct 2023)

Australian Government, The Treasury, Foreign Investment in Australia (2023) Guidance https://foreigninvestment.gov.au/guidance (accessed 2 October 2023)

Annex 2: Relevant administrative and court cases

Canwest Global Communications Corporation v Treasurer of the Commonwealth of Australia (1997) 147 ALR 509 (Federal Court of Australia)

Leisure & Entertainment Pty Ltd v Willis (1996) 64 FCR 205 (Federal Court of Australia)

SDCV v Director-General of Security (2022) 405 ALR 209 (High Court of Australia)

Wight v Honourable Chris Pearce, MP, Parliamentary Secretary to the Treasurer (2007) 157 FCR 485 (Federal Court of Australia)

Annex 3: Relevant literature

Bath V (2018) Australia and the Asia-Pacific: The Regulation of Investment Flows into Australiaand the Role of Free Trade Agreements. In: Morosini F, Ratton Sanchez Badin M (eds) Reconceptualizing International Investment Law from the Global South. Cambridge University Press, Cambridge, pp. 146–187.

Huiqin J, Zhou W (2018) China's Investment in Australia: A Critical Analysis of Australia's Foreign Investment Review Mechanism. Tsinghua China Law Review 10(2): 188–223.

Hundt D (2020) The Changing Role of the FIRB and the Politics of Foreign Investment in Australia. Australian Journal of Political Science 55(3): 328–343.

Knight L, Voon T (2020) The Evolution of National Security at the Interface Between Domestic and International Investment Law and Policy: The Role of China. Journal of World Investment & Trade 21: 104–139.

McCalman P, Puzzello L, Voon T, Walter A (2023) Inward Foreign Investment Screening in Australia: Development and Implications. In: Pohl JH, Papadopoulos T, Wiesenthal J (eds) Nationalised Security Review of Investments: Trends in the Law and Policy of Investment Screening. Springer Studies in Law & Geoeconomics, Vol 1. Springer, Cham, forthcoming.

Voon T, Merriman D (2022) Is Australia's Foreign Investment Screening Policy Consistent with International Investment Law? Melbourne Journal of International Law 23(1): 62–113.

About the CELIS Institute

The CELIS Institute is an independent non-profit, non-partisan research enterprise dedicated to promoting better regulation of foreign investments in the context of security, public order, and competitiveness. It produces expert analysis and fosters a continuous trusting dialogue between policymakers, the investment community, and academics. The CELIS Institute is the leading forum for studying and debating investment screening policy. More about the Institute's activities under www.celis.insitute.

About the CELIS Country Report(er)s Project

CELIS Country Reports (hereafter "Report") are produced by leading experts for any European and select non-European jurisdiction following an elaborate model, allowing for comparison and evaluation across jurisdictions. The project's aim is to identify and suggest best practice and to propose a common European (model) law on investment screening.

Copyright notice

The copyright of this Report shall be vested in the name of the CELIS Institute. The Author has asserted his/her right(s) to be identified as an originator of the contribution in all editions and versions of the Contribution and parts thereof, published in all forms and media.